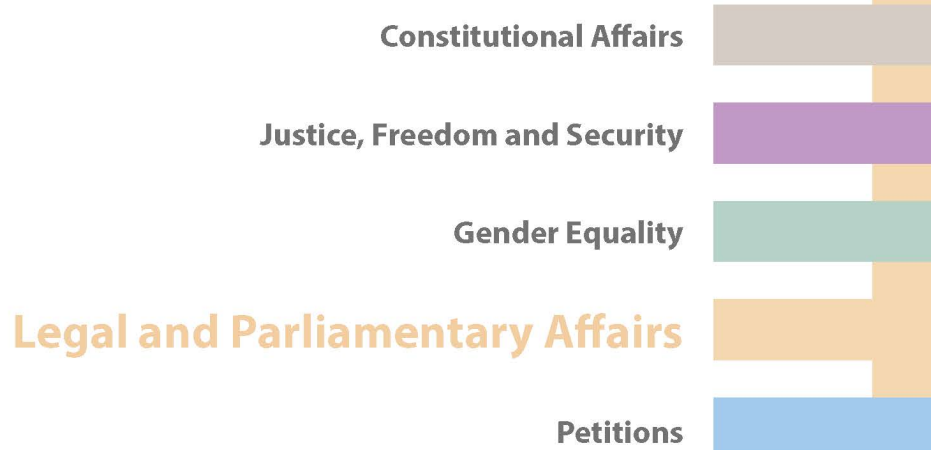


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



**The new proposal  
for harmonised rules for  
certain aspects concerning  
contracts for the supply  
of digital content**

**WORKSHOP FOR THE JURI COMMITTEE**





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**The new proposal for harmonised rules for  
certain aspects concerning contracts for the  
supply of digital content  
(termination, modification of the digital content  
and right to terminate long term contracts)**

**IN-DEPTH ANALYSIS**

**Abstract**

Upon request by the JURI Committee this paper contains a critical evaluation of the European Commission's proposal for a directive of 9 December 2015 concerning contracts for the supply of digital content and harmonising certain civil law contractual rules. More specifically, the rules on termination, modification of the digital content and right to terminate long term contracts (Articles 13, 15, 16) are looked at. These issues are of utmost importance for the consumer. The In-depth-analysis raises a number of questions that would necessitate further consideration during the legislative process to come.

**This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI Committee**

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## INTRODUCTION

This paper contains a critical evaluation of some aspects the European Commission's proposal of 9 December 2015 for a Directive on certain aspects concerning **contracts for the supply of digital content** (COM(2015) 634 final). It does not contain a critical evaluation of the proposal for a Directive on contracts for the online and other distance sales of goods (COM(2015) 635 final), published on the same day. The Directive on contracts for the online and other distance sales of goods is subject to another briefing paper. The third proposal presented by the European Commission on the same day, for a Regulation on ensuring the cross-border portability of online content services in the internal market (COM(2015) 627), is not discussed. The Impact Assessment study of the proposed Directives is not analysed<sup>1</sup>.

The proposed directive should be seen in the wide EU context with regard to the processing of personal data. It is consistent with Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector<sup>16</sup> which are fully applicable to supplies of digital content. This paper does not assess the conformity of the proposed directive with the Proposal for regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, COM(2012)11 final).

**The aim of this paper is to evaluate the rules laid down in the Commission's proposal on termination, modification of the digital content and right to terminate long term contracts.** The classification of digital content contracts as sales, services, rental or *sui generis* contracts and the Directive's choice for full, rather than minimum, harmonization is not part of this analysis, but, comparisons are sometimes made with national laws on contracts and also with specific rules for the supply of digital content ([notably the UK's Consumer Rights Act 2015](#)).

The briefing paper is structured as follows: Part 1 will be about general issues within the scope of the proposed Directive, while the following Parts turn to the proposed Directive's specific rules. Part 2 focuses on article 13, Part 3 on article 15, and Part 4 on article 16.

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<sup>1</sup> Commission Staff Working Document, Impact Assessment Accompanying the document, Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods, SWD(2015) 274 final.

## KEY FINDINGS

- Article 13 is titled "**Termination**" but only envisages termination as a remedy for the lack of conformity with the contract. Article 16 is titled "**Right to terminate long term contracts**" but is only applicable to termination where there is neither a lack of conformity nor a modification which adversely affects the consumer. The scope of articles 13, 15 and 16 should be made clearer in their titles.
- Article 11, titled "**Remedy for the failure to supply**", grants an immediate right for termination while Article 13, "**termination for the lack of conformity**", makes termination a "**second step**" remedy. The supply of digital content, which does not conform at all, should not deprive the consumer from claiming "immediate" termination under Article 11.
- The right to terminate should be subject to a **time limit**: a consumer should give notice within a reasonable time. Provisions on **how to give notice** should be introduced.
- The interaction between Article 13 which does not mention **judicial termination and national rules which limit unilateral termination** or give priority to judicial termination is not clear.
- The scope and practical impact of the supplier's right to alter functionality, interoperability and other main performance features of the digital content **under Article 15** are not easy to ascertain.
- Article 16 deals with the right to terminate at any time for contracts with an indefinite duration. It poses a **12 months period** before termination may operate. This approach does not pay tribute to the wide variety of contracts and diversity of situationsxx.

## 1. GENERAL ISSUES

### 1.1. Wide scope of application

The proposed Directive defines 'digital content' broadly. The new rules will apply to a wide range of contracts on digital products and services.

There are diverse forms of digital content, as set out in Art. 2(1):

- data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,
- a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer : for example cloud storage or online office software
- a service allowing sharing of and any other interaction with data in digital form provided by other users of the service: for example social networks or collaborative tools.

Digital content can either be delivered on a tangible medium—such as a CD or DVD—or through a streaming service. The common feature is that the contracts relate to digitally stored files. As regard termination and modification of the contract, this wide approach generates some difficulties. These are due to the fact that, in actual practice, different situations cannot be equally treated.

A number of important demarcation problems have already been outlined.<sup>2</sup> These are due notably, to the exclusion of the internet of things, to the difficulty to assess precisely what is meant by 'data provided by the consumer', to the interplay between contract law and data protection which pays attention to protection of privacy.

### 1.2. Price paid or data provided

Art. 3(1) of the proposed Directive specifies that the Directive applies to **contracts "where the supplier supplies digital content to the consumer or undertakes to do so, and, in exchange, a price is to be paid" or to contracts where "the consumer actively provides counter-performance other than money in the form of personal data or any other data"**.

Contracts for the supply of digital content whereby consumers give a "counter-performance other than money", such as personal data in return for access to that content, are subject to specific rules. This [differs from the UK's Consumer Rights Act 2015](#) which currently applies only to digital content for which the consumer directly or indirectly pays a monetary price. However, as noted by H. Beale in his Briefing Paper, "the Secretary of State may extend the provisions to other contracts for a trader to supply digital content to a consumer, if the Secretary of State is satisfied that it is appropriate to do so because of significant detriment caused to consumers under contracts of the kind to which the order relates. [ref s 33])".

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<sup>2</sup> Vanessa Mak: 'The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content', PE 536.494 (for this workshop).



As regard **remedies**, this distinction creates some complexity. New specific rules are necessary in order to deal with each situation, particularly with cases where “the consumer actively provides counter-performance other than money in the form of personal data or any other data”.

Contracts whereby payment is made by providing personal or other data to the supplier are very numerous. As regard remedies and modification, they cannot always be treated like contracts where there is a tangible counter performance, such as a sum of money paid in exchange for the supply of the digital content. Where personal or other data are provided to the supplier, the concept of counter-performance is less practical. It may even be doubted whether, in some cases, there is a counter-performance.

Frequently, the terms and conditions of social media platforms provide that users who upload movies or photos transfer copyright in those items to the platform. Transfer of copyright also is a form of counter-performance.<sup>3</sup>

The conformity test (and hence the conditions under which termination may occur) may be influenced by the gratuitous nature of a contract: consumer expectations will be lower for digital content that comes for free than for content for which a market price has been paid. Generally, the proposed directive significantly increases consumer protection, particularly when digital services are provided over a period of time. In many Member States, the obligations of suppliers are governed by the general law of services and these obligations are not as strict for services as they can be for the supply of tangible goods. Besides, under the proposed directive, there is no time limit on notifying claims, other than the national law's limitation (prescription) period.

Opinions differ as to what full harmonization entails and to what extent divergences from fully harmonized EU-rules are still allowed in national laws. As regard remedies, including termination, the nature and effects of full harmonization is uncertain. This will not be dealt with in this paper (on this point, see Smit's and Beale's Briefing papers). Since very few Member States yet have specific provisions on digital contents, full harmonisation should not have too much impact on consumer protection (apart from damages)<sup>4</sup>.

### **1.3. General context in which termination operates**

A failure of the supplier to supply the digital content to the consumer in accordance with the contract is a breach which allows the consumer to terminate the contract, according to Article 11, titled “Remedy for the failure to supply”. Article 11, a very short one, makes a renvoi to article 13, titled “Termination”.

The supplier is also liable – and this occurs more frequently than the situation dealt with by Article 11 – to the consumer for the lack of conformity with the contract. Moreover, the supplier is liable for any lack of conformity which occurs during the period of time during which the digital content is supplied. Where the supplier has initially not failed to supply the digital content, interruptions of the supply making the digital content not available or accessible to the consumer over a short period of time are treated as non-conformity cases.

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<sup>3</sup> Vanessa Mak, PE 536.494

<sup>4</sup> Hugh Beale, Scope of application and general approach of the new rules for contracts in the digital environment, PE 536.493 (for this workshop)

The rule on conformity is stated by Art. 6. The digital content must primarily conform to the contract; in the absence of contractual stipulation, it is assessed according to an objective criterion: fitness for the purposes. Consequences of lack of conformity are dealt with by Article 12, "Remedies for the lack of conformity with the contract".

#### **1.4. Scope of Articles 13, 15, 16**

**Art. 13 is titled "Termination"**. This is misleading. Article 13 only envisages termination as a remedy for the lack of conformity with the contract. It directly follows article 12 and must be read as a direct application of article 12(5).

**While Article 13 applies where there is a non conformity. Article 15 applies where supplier has modified the main performance features. Article 16 applies to long term contracts, when there has been no non conformity, and no modification by supplier. It ensures that consumer may change its mind and switch to another supplier.**

Article 16 is titled "Right to terminate long term contracts". This gives the impression that for long term contracts, termination is entirely dealt with by article 16. That is not true: article 13 and article 15 also deal with termination of long term contracts.

#### **1.5. Termination : a "second step" remedy for the lack of conformity**

In case of lack of conformity of the digital content to the contract, the consumer may have:

- the digital content brought into conformity with the contract free of charge, or
- a price reduction or termination of the contract.

**There is a hierarchy of remedies.** In non-conformity cases, consumers are first entitled to have the digital content brought to conformity with the contract. Price reduction and termination are only second step remedies. The limits to the freedom to choose price reduction or termination, which are specified in Art. 12 of the proposed Directive, resemble the ones laid down in the proposed Directive for online and other distance sales, and the existing rules of Directive 99/44/EC on consumer sales.

The consumer may chose price reduction or termination when (Art. 12(3)):

- it is "impossible, disproportionate or unlawful" (rappr. Art. 12(1) as regard the right of consumer to have the digital content brought in conformity);
- the supplier has not completed the remedy within the time specified
- bringing the digital content in conformity would cause "significant inconvenience" to the consumer
- the supplier has declared, or it is equally clear from the circumstances that he will not bring the digital content in conformity with the contract.

The two-step remedy system reflects the concern of the Commission: the extensive rights the directive provides to the consumer should be balanced with the interests of the supplier

who should be given a second chance to properly perform the contract before consumer is given the right to terminate the contract or claim for price reduction.

**It is only as a second step, that the consumer is entitled to have the price reduced or the contract terminated.** The right of a consumer to have the contract terminated is thus limited. It applies for instance in cases where bringing the digital content to conformity is not possible and the non-conformity impairs the main performance features of the digital content.

Given the diversity of digital contents, there are **no fixed deadlines for the exercise of rights** (on this point, see further) **or the fulfilling of obligations.** The digital content should be brought into conformity with the contract "within a reasonable time from the time the supplier has been informed" (Art. 12.2) and **free of any costs.** For instance, the consumer should not bear costs associated with the development of an update for the digital content.

The main remedy - have the digital content brought into conformity with the contract free of charge - is a form of specific performance. It limits the right of a consumer to have the contract terminated and gives the supplier a second chance to perform the contract. It prevents the consumer from terminating immediately the contract upon breach (unless the supplier has "failed to supply the digital content", Art. 11). Consequently it deprives this consumer from a powerful bargaining tool : threatening to terminate the contract if the seller does not make good the performance in the conditions set forth by the consumer (see V. Mak, p. 15).

In many national legal systems, general contract law does not impose such a hierarchy (for a short description, see V. Mak, report, p. 16 ; see also the Impact Assessment, prec fn 1, p. 8).

## **1.6. An immediate right for termination in case fo failure to supply**

Article 11 which is titled "Remedy for the failure to supply" grants an immediate right for termination : "Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract immediately under Article 13".

With such a system, the consumer will be eager to show that supplier "failed to supply the digital content" (art. 11), while the supplier will argue that some digital content was supplied, although not in conformity, so as to be able to have a second chance and try to bring it into conformity.

The distinction between "failure to supply" and "non conformity" cannot easily be transposed in the context of digital content. While it is easy to make for tangible goods, it is much more problematic for digital content and may expose the consumer to undue delay and cumbersome obligations before turning to another provider. **The supply of digital content, grossly not in conformity, should not deprive the consumer from claiming "immediate" termination under Article 13 and consumer should have a right to withhold payment.**

## 1.7. Termination and damages

Article 14 is titled "right to damages". Article 14.1 refers to **"any economic damage to the digital environment of the consumer caused by the lack of conformity with the contract or a failure to supply the digital content"**.

The Commission considers that the principle of the supplier's liability for damages is so essential that it should be regulated at Union level in order "to ensure that consumers do not suffer a detriment if their hardware or software is damaged by digital content which is not in conformity with the contract" (recital 44)."

However, Art. 14 only covers compensation for damages caused to the consumer's digital environment by a lack of conformity with the contract or a failure to supply the digital content and this leaves some questions open (see below)

As stated by Art. 14.2: " The Member States shall lay down detailed rules for the exercise of the right to damages" (on this point, see below).

## 2. TERMINATION (Article 13)

The rules of Article 13 reinforce consumer rights on their data and raise the attention on the interactions between contract law and the protection of individuals with regard to data.

### 2.1. Elements missing

- Scope of the rule should be better explained

**The rules set out in this provision are intended to apply to cases where the non-performing party (the supplier) is liable for the non-performance. In other words, it only applies where there is non-conformity. The title of Article 13 should make this very clear and so should the rule itself.**

It should also be made clear whether or not it also applies where the non-performance is excused so that the aggrieved party (the consumer) cannot benefit from its provisions.

- Any lack of conformity ?

Termination may cause serious detriment to the non-performing party whose expenses in preparing and tendering performance may not be recovered. This is the reason why, in general contract law, whether one party should have the right to terminate the contract depends upon a number of considerations. The performance may be so late or so defective that the aggrieved party cannot use it for its intended purpose, or the behavior of the non-performing party may in other respects be such that the aggrieved party should be permitted to terminate the contract. Similarly, in consumer contracts, Art. 3(6) of the Consumer goods directive (Directive 1999/44/EC) provides that the consumer is not entitled to terminate contract if the lack of conformity is minor.

Article 6, which is titled "Conformity of the digital content with the contract" does not make it very clear whether or not non-conformity should not be minor. It has specific rules which adopt the following approach : firstly, Article 6 gives importance to the contractual terms (Art. 6.1(a), (b), (c), (d)). This does not systematically ensure a strong protection for the consumer (see V. Mak 's report). Updates should also meet the conformity requirements of the contract. Secondly, Article 6 is also based on other elements, more objective, which are detailed in article 6.2 and only apply where the contract has not stipulated these conditions. The *expectations* a consumer may reasonably have in relation to digital content products is a relevant criterion, but because innovation is so important in this field, objective criteria are difficult to assess.

Article 12.1 sets the hierarchy between the remedies : it makes clear that the right of a consumer to have the contract terminated is limited to those cases where bringing the digital content to conformity is "impossible, disproportionate or unlawful". But it does not say anything as regard the requirement that the non-conformity "impairs the main performance features of the digital content" (see in this respect recital 37).

It is important that Art. 13 clearly states that not any lack of conformity may justify termination and in this respect. In the proposed directive, this requirement exists : it is in Art. 12.5 but it is not made clear enough. First, it comes too late ; second, the words used are too numerous and too technical to enable the reader identify quickly this requirement.

Art. 12.5 states : "The consumer may terminate the contract only if the lack of conformity with the contract impairs functionality, interoperability and other main performance

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

A modification of Art. 12.1 or 13.1 (this could even take the form of an explicit renvoi to article 12.5) would be advisable.

The same is true as regard the right to **partial termination** in case the lack of conformity, which is also consecrated.

The easier it is to terminate, the greater the abuses. There is a risk that the industry develops the practice of blacklisting consumers ; if you have terminated once, you may find yourself on a black list and have more difficulties to access some goods or services. The best way to fight this risk is to make sure that the supplier, who has the burden of proof, knows that this burden is alleviated by the fact that his obligations do not extend to any minor non-conformity.

- **Time limit**

Recital 43 of the proposed Directive states the following : “Due to its nature the digital content is not subject to wear and tear while being used and it is often supplied over a period of time rather than as a one-off supply. It is, therefore, justified not to provide a period during which the supplier should be held liable for any lack of conformity which exists at the time of the supply of the digital content. Consequently Member States should refrain from maintaining or introducing such a period. Member States should remain free to rely on national prescription rules ...”.

Is the exercise of the right to terminate intended to be without a time limit ? Are national rules on prescription a good and sufficient solution ? Should there not be, at least, a reasonable time beyond which it is no longer possible to exercise the right to terminate by notifying a claim, within the context of article 13 (article 16 may still operate) ? If a right to terminate by notifying a claim is lost, does this mean that judicial termination is no longer possible ? The proposed directive does not deal with all these questions.

In situations where the aggrieved party may easily obtain a substitute performance, the right to terminate should be exercised without undue delay. In certain circumstances, it may be abusive for a consumer not to give notice within a reasonable time and then ask for termination and claim for important damages. The reasonable period of time, if it is introduced, leaves some margin of appreciation. For instance, it should be longer when a consumer must make enquiries as to whether it can obtain substitute performance from other sources.

### **No provision dealing with commercial guarantees**

As observed by H. Beale in his Briefing Paper<sup>5</sup>, there is one respect in which the protection given by the proposed directive is less than that provided by the other Proposal (on certain aspects concerning contracts for the online and other distance sales of goods): there is no provision dealing with commercial guarantees.

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<sup>5</sup> Hugh Beale, „Scope of application and general approach of the new rules for contracts in the digital environment, PE 536.493

## 2.2. Right to terminate the contract by notice

### Unilateral and/or judicial termination

Paragraph (1) of this Article affirms the principle that the right of a consumer to terminate the contract is exercised by notice to the supplier.

This provisions opens the door to “unilateral termination”: in other words, it is not necessary to go to court to ask for termination (judicial termination), and it is not certain whether or not judicial termination is permitted, instead of unilateral termination.

Some EU countries may have other rules as regard unilateral and judicial termination. For example, in France, unilateral termination has only been permitted recently by courts, and it is subject to strict conditions as regard the nature and importance of the breach, as well as the steps to be followed. In situations where these conditions are not met, judicial termination still prevails. In Bulgaria, if the supplier claims that the contract is not or cannot be terminated for this breach, the consumer has to seek confirmation from the court.

These examples show that the interaction between national rules which restrict unilateral termination and this provision will necessitate some clarification

### How to give notice

Art. 13(1) provides that the right of the consumer to terminate the contract is exercised by notice to the supplier, **given by any means**. The consumer may thus send an email, give a phone call etc.

In practice, the supplier chooses the means by which the consumer may possibly contact him for others requests. Could the supplier thereby limit the means to contact him to terminate the contract?

The Proposal’s lack of detailed rules on notices may lead to divergences not compatible with the full harmonisation objective.

There are no detailed provisions on how to give notice ; by contrast, Art. 10 of CESL provided detailed rules on this, essentially adopting the **receipt theory**. Presumably, the Commission wanted to leave this question to each Member State. However, in order to meet its goal, the proposed directive should give more guidance on the exercise of the right of termination, notably as to the formal requirements but also, as aforementioned, as to the time limit for termination by notice.

Another possibility would be to simply add that it is for the consumer to prove that he has given notice. This will bring in more certainty but may prejudice the consumer.

An example of the uncertainty which derives from such an approach is the following: Art. 13(2) mentions “receipt” of the notice. To what extent, if any, does this reference to a “receipt” implicitly limit the ways in which the consumer should act (may the consumer use, for instance, social networks ?). For this specific question, it could have been useful to specify that the consumer may also « make any other unequivocal statement setting out his decision to terminate the contract » (comp. Article 11 of Directive 2011/ 83/ EU of 25 October 2011 on CRD , on the exercise of the right of withdrawal : « (a) use the model

withdrawal form as set out in Annex I(B); or (b) make any other unequivocal statement setting out his decision to withdraw from the contract »).

### **2.3. Supplier's obligations where the consumer terminates the contract: Article 13(2) (a) (b) and (c)**

#### **Art. 13(2) (a)**

Where the consumer terminates the contract, "Reimbursement of the price to the consumer with undue delay and no later than 14 days from the receipt of the termination notice" is the first measure imposed on supplier in case of non-conformity.

It is important to stress this and underline that it is a major difference with article 16 which applies when the consumer exercises its right to terminate and there is no lack of conformity. This well shows that article 13, contrarily to what its title implies, does not deal with all termination cases.

**Article 13(2) (a)** does not state the manners in which payment should be made.

In the Consumer's rights directive (CRD directive), article 13(1) provides the following, where the consumer terminates the contract : « The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11. The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement ».

Would it not be possible to adopt a similar provision?

Besides, there is no provision on interests for late reimbursement made by the supplier. Since late reimbursement is very common such a provision would be welcome. In spite of the willingness of the Commission not to rule on this, it seems that this is an important aspect of the consumer's protection when he terminates the contract and that this should not entirely be left to the Member states.

Interests should be due in case of late payment. Besides, some form of modulation of the interests due should be envisaged, according to the importance of the delay.

Inspiration could be drawn from the following provision of the French code of consumption, Art. L. 121-21-4, al. 3 : « In addition, the amounts due shall automatically be increased by the statutory interest rate if the reimbursement is made no later than ten days after the expiry of the periods set by the first two paragraphs, 5% if the delay is between ten and twenty days, 10% if the delay is between twenty and thirty days by 20% if the delay is between thirty and sixty days, 50% between sixty and ninety days and five extra points per new month delay to the product price and the legal interest rate" »

**Art. 13(2) (b)** deals with contracts for the supply of digital content where consumers give a "counter-performance other than money" such as personal data in return for access to that content are subject to specific rules. The supplier can give the data back but this does not suffice : according to Art. 13(2) (b), the supplier shall refrain from using the counter-performance other than money which the consumer has provided in exchange for the



digital content and other data . This is hardly workable where the data have been processed by the supplier or passed on to third parties. Besides, Article 7(3) of the proposed Data Protection Regulation provides : "The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal".

The provision tries to specify the scope and extent of this new obligation to refrain which can be classified as an obligation "no to do" / "de ne pas faire").

In particular, Art. 13(2) (b) provides for an exception to this obligation : the supplier is allowed to keep using content provided by the consumer "which has been generated jointly has been generated jointly by the consumer and others who continue to make use of the content. This exception does not seem to apply when the consumer terminates a long term contract (Article 16(4) (a)). No explanation is given for this.

Articles 13(2) (c) describes the supplier's obligations in order to enable the consumer to fulfill its own obligation following termination : "the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format".

The same rules apply, with some slight differences spotted below, which may be pure omission, when a consumer terminate long term contracts. According to Art. 16(4) (b): "the supplier shall provide the consumer with technical means to retrieve all ~~any~~ content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent this data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge without significant inconvenience, in reasonable time and in a commonly used data format". ("free of charge" has been added by the author).

In practice, some suppliers providing cloud storage already apply a similar rule for all cases of termination of the contract. Once the contract is terminated, users have a period (often 30 days) to download data stored on the cloud.

It is difficult to imagine all the consequences that termination may have on suppliers. This is also difficult as regards consumer's obligations.

## **2.4. Consumer's obligations : Art. 13(2) (d) and (e)**

Restitutions following termination of digital content contracts, are subject to specificities which do not occur with other contracts. One of them is that in the context of digital content contracts, it may be impossible, or at least very difficult, for the consumer to return the content.

**Obligations on the consumer differ according to the medium** and this distinction is made clear by (d) and (e) :

- Where digital content was not supplied on a durable medium, the consumer "shall refrain from using the digital content or making it available to third parties, in particular by deleting the digital content or rendering it otherwise unintelligible" (d).
- If the digital content was supplied on a durable medium, the consumer shall return the durable medium to the supplier without undue delay and in any event no later than 14 days from the receipt of the supplier's request. He shall also delete any

usable copy of the digital content, render it unintelligible or otherwise refrain from using it or making it available to third parties (e).

Here are some of the difficulties that Art.13(2) (d) may raise:

- The obligation of the consumer to return the digital content, or to delete it or render it otherwise unintelligible requires skills that the consumer does not have.
- How will supplier make sure that a consumer has actually rendered the digital content unusable ? This is easy when suppliers just have to cut off access to a digital content service (see Art. 13(3) of the proposal); this is the case, for instance, for subscription to a multimedia streaming service such as Netflix for example). But, when files have been transferred to the consumer, it is no longer possible; this is notably the case for movies, music, or software, when provided on a durable medium).

## **2.5. No payment for the value of the benefit owed by the consumer**

Art. 13(4) states that "the consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract".

It adopts the rule that when a consumer made use of non-conforming goods before termination, no payment for use may be charged (CJEU, *Quelle judgement*).<sup>6</sup>

The proposed directive made the policy decision not to charge the consumer a payment for the value of the benefit that he enjoys by keeping the digital content. This rule is legitimate when the lack of conformity prevents the consumer from using the digital content. One does not have to pay for a digital content one cannot use.

The rule is more debatable if a consumer, in spite of the lack of conformity, still had some benefit. In such a situation, he still is not liable to pay a reasonable sum to the supplier. The rule is appropriate, be it only for practical reasons : in practice, asking for a partial payment necessitates to compare and contrast the value of the performance received to that of the promised performance.

## **2.6. Rights to terminate be combined with Damages (Article 14)?**

Could damages be added to termination ? This situation may occur when the consumer has suffered loss because of the non-conformity. These damages could follow from the non-performance itself, but also be caused by the termination which, for instance, obliges the consumer to purchase a similar product at a higher price. Indeed, if the consumer suffered a severe lack of conformity, he may wish to terminate and also claim damages, either when damages follow from the non-performance or when termination itself causes a prejudice (for instance when purchase of a similar product elsewhere is at a higher price).

As above stated, Member States should lay down the detailed conditions for the exercise of the right to damages. The Proposed directive has a rule on damages but this rule has a limited scope : it is restricted to cases where damage has been done to the digital content and hardware of the consumer.

Recital (44) explains the rule : " the principle of the supplier's liability for damages is an essential element of the contracts for supply of digital content. In order to increase

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<sup>6</sup> Judgment of the Court (First Chamber) of 17 April 2008 -*Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände*

consumers' trust in digital content this principle should thus be regulated at Union level to ensure that consumers do not suffer a detriment if their hardware or software is damaged by digital content which is not in conformity with the contract".

Recital (44) further indicates that Member States should "lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract".

As explained by H. Beale in his Briefing paper<sup>7</sup>: "Art 14 might be interpreted as requiring full harmonisation of only the consumer's right to compensation for damage to the consumer's digital environment, leaving damages for other losses to national law. But it seems to be the intention that Member States may not give the consumer any right to damages for other losses caused by either non-conformity or the trader's failure to supply digital content; it is only the detailed conditions of the exercise of the right to damages that is left to Member States. This is confirmed by the Recitals and the Explanatory Memorandum". If this is the case, this may considerably restrict the protection offered to the consumers as regard damages.

The applicable law will establish under which condition a consumer may obtain damages in addition to other remedies (J. Smits Briefing Paper, p. 11). Art. 14 (2) well shows the limits of the full harmonisation process.

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<sup>7</sup> Hugh Beale, „Scope of application and general approach of the new rules for contracts in the digital environment, PE 536.493

### **3. MODIFICATION OF THE DIGITAL CONTENT : ART. 15**

Art. 15 aims at defining the conditions under which a supplier may modify the contract and those under which the consumer has a right to terminate the contract. In its current form, it is not very clear and it seems to give too much power to the industry to modify unilaterally the content of the contract. For instance, does Art 15 apply if the consumer is offered the choice of an upgrade (particularly dangerous without a warning of its potential effects)? It is not clear enough.

The Impact assessment (prec., p. 47) notes the following as regard this right to terminate the contract : the proposed directive "also allows consumers to get out of a contract if the modified digital content no longer matches what the consumer wanted to acquire at the time of conclusion of the contract. The inclusion of such a rule is broadly supported by all stakeholders, with the exception of a digital technology industry association that seems reluctant towards the right to terminate a contract where discounts were provided to the consumer for a certain period of time. Business associations argue that this right should be granted under the condition that the termination is notified to the trader in advance, while the main European consumer organisation links the exercise of this right to the possibility to retrieve data".

#### **3.1. Modification for the benefit of the consumer and modification to its detriment**

For several reasons, mainly technological, the supplier may have to change features of the digital content supplied over a period of time. Usually, such changes, although they create obsolescence of the product, improve the digital content. This is the reason why the parties to the contract often include clauses in the contract which allow the supplier to undertake modifications.

Such modifications may however have a negative effect for the consumer. For example, a software update can make this software incompatible with the consumer's computer because the operating system of the computer is too old and cannot support the new version of the software.

#### **3.2. Scope of the supplier's obligation under article 15**

Because of the way article 15 is phrased, the scope of the supplier's obligation under Art. 15 is not easy to ascertain.

Art. 15 applies "Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract". The first limit is rather self-evident : Art . 15 does not concern instantaneous contracts.

The second limit deals with the modification itself. Here, article 15 is not very clear.

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

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

- (c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice;
- (d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Article 13(2)(c).

Art. 15 first gives an authorization. But it is not entirely clear whether, when the main performance features of the digital content are modified and this does not adversely affect access to or use of the digital content by the consumer, article 15 also applies. Probably not. It will be necessary, but also very difficult, to ascertain whether or not the modification "adversely" affects access to or use of the digital content by the consumer. This will require a case by case analysis, made on subjective rather than objective criteria.

### **3.3. Conditions under which the supplier may modify the contract**

Art. 15 sets 3 main conditions and one additional condition, which only applies when the consumer actually terminates the contract:

- Prior agreement : '(a) the contract so stipulates'
- prior information of the consumer : "(b) the consumer is notified reasonably in advance of the modification by an explicit notice on a durable medium"
- the right for the consumer to terminate the contract : "(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".

The additional condition, which only applies when the consumer terminates the contract, is the following : "(d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Art- 13(2)(c)".

Art. 15 (c) is not properly phrased. It should make more explicit that "within no less than 30 days from the receipt of the notice" applies to the period before which no change may be made by the supplier, and not to the period during which the consumer may exercise its right of termination (as aforementioned, no time limit has been set for the exercise of such a right and besides, should it apply to the consumer, it would be « within no **more** » than 30 days... ).

In this respect, inspiration could be drawn from a similar rule which applies in French law when a mobile operator or an Internet service provider decides to change the terms of contracts concluded with consumers. Not only does the text limit the exercise of the right of termination to 4 months, but is also recalls that no termination can occur once the consumer has accepted the modification

The French Code of consumption, article L. 121-84 : Article L121-84<sup>8</sup> provides: "Any plan to amend the contractual conditions for supplying an electronic communications service shall be made known to the consumer by the service provider at least one month before it becomes effective, along with information which enables the latter, until such time as he has expressly accepted the new terms and conditions, to cancel the contract without charge and without entitlement to compensation during the four months that follow the amendment's entry into force. For fixed-term contracts which do not contain a clause which precisely determines the eventualities which can give rise to a contractual amendment or a new clause relating to price changes, the consumer may demand application of the initial

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<sup>8</sup> inserted by Act No. 2004-669 of 9 July 2004 Article 114 Official Journal of 10 July 2004

conditions throughout the contractual term. Any offer to supply an electronic communications service shall be accompanied by specific information on the provisions applicable to subsequent amendments to the contractual conditions”.

In accordance with case law from the EU Court of Justice on unfair terms, the supplier should not only notify the consumer in the terms and conditions of the possibilities for modification and the right to terminate, but is obliged to do so 'in plain, intelligible language' (CJEU, Case 472/10 Invitel and Case C-92/11 RWE). The proposed Directive does not include such a requirement - perhaps it should.

### **3.4. Suppliers obligation after consumer's termination**

Art. 15(2) establishes the consequences of consumer's termination for the supplier and determines its obligations according to the way payment was made.:

“Where the consumer terminates the contract in accordance with paragraph 1, where relevant,

- (a) the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content.
- (b) the supplier shall refrain from the use of the counter-performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer”.

It is a general principle, stated by recital 41, that “Where the contract is terminated, the consumer should not be required to pay for the use of digital content which is not in conformity with the contract because that would deprive the consumer of effective protection”.

Since the consumer was able to use the digital content before its modification, it is normal to limit reimbursement to the period of time after the modification of the contract. If the conditions of Article 15 are met, then, in spite of the practical difficulties it may raise, such a payment should be the rule.

The expression “where relevant” will enable the parties (or the judge) to alleviate this obligation when irrelevant. It will also play in favor of supplier, since it also applies to the supplier's obligation to refrain, under 2 (b). By imposing on the supplier an obligation to refrain from the use of the counter-performance other than money, Article 15(2) b well shows the specificity of restitutions in the context of supply of digital content.

## **4. "RIGHT TO TERMINATE LONG TERM CONTRACTS": ART. 16**

"Competition is an important element for a well-functioning digital single market. In order to stimulate such a competition, consumers should be enabled to respond to competitive offers and to switch between suppliers. In order to make this work in practice, they should be able to do so without being hindered by legal, technical or practical obstacles, including contractual conditions or lack of means for retrieving all data uploaded by the consumer, produced by the consumer with the use of the digital content or generated through the consumer's use of the digital content. However, it is also important to protect existing investments and the trust in concluded contracts. Therefore consumers should be given the right to terminate long-term contracts under certain balanced conditions (...)".

Recital (46) gives the rationale behind Article 16. This text not only consecrates the right to terminate long term contracts (this is a normal right) but it tries to strike the right balance between the parties' rights and obligations, a difficult task as regard these types of contracts.

Art. 16(1) establishes that where the contract provides for the supply of the digital content for an indeterminate period or where the initial contract duration or any combination of renewal periods exceeds 12 months, the consumer shall be entitled to terminate the contract any time after the expiration of the first 12 months period

The period of 12 months makes the text applicable only to contracts concluded for more than 12 months, "irrespective of whether the contract is of indeterminate duration or is extended automatically or following a subsequent agreement by the parties" (recital 46). Article 16 could have been conceived differently so as to meet its goal.

### **4.1. Title of Art. 16**

Art.16 is titled "Right to terminate long term contracts". This broad title gives the impression that for all long term contracts, termination is dealt with by article 16. In fact, it is only applicable to termination where there is neither a lack of conformity nor a modification which adversely affects the consumer, that is to say termination which is outside the scope of articles 13 and 15.

Art. 13 and 15 are also applicable to long term contracts. Art. 13 applies where there is a non-conformity. Article 15 applies where supplier has modified the main performance features.

Therefore, the title of Art. 16 should be made more explicit : the text gives the consumer a right to terminate a long term contract (12 months or more), independent of any non-conformity or modification by the supplier.

Besides, this title seems to indicate that long-term contracts are all contracts concluded for at least 12 months. In reality, Art. 16 is for termination of contracts with an indefinite period. In the 2010 edition of the Unidroit Principles, there is no express reference to long-term contracts in the black-letter rules. However, for the sole purpose of laying down different rules on restitution in case of termination, Articles 7.3.6 and 7.3.7 refer to "contracts to be performed at one time" and "contracts to be performed over a period of time".



## **4.2. Why a minimum 12 months period ?**

The right to terminate the contract is only given "after the expiration of the first 12 months period".

Recital 46 explains that the period of 12 months is justified "to protect existing investments and the trust in concluded contracts". However, it makes no distinction is made between the type and content of long-term contracts.

This justification is not applicable where contracts are supplied on a very large scale, to millions of consumers and where no tangible good is provided (such as a telephone) in exchange for the contract. In such situations, the 12 months period during which the consumer may not terminate appears to be too long. On the contrary, if a valuable good is provided, it may be too short, unless some form of reimbursement is made by the consumer.

## **4.3. Coonditions under which the consumer has a right to terminate contracts**

Arti. 16(1) establishes the conditions under which, after the expiration of the first 12 months period, the consumer has a right to terminate the contract and the conditions under which such termination becomes effective : "The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means. The termination shall become effective 14 days after the receipt of the notice".

Art. 16(2) provides that notification is made "by notice to the supplier given by any means".

For unilateral termination and the lack of formal requirement, the same observations apply as those already made as regards Art. 13. We will therefore concentrate on the consequences of termination.

## **4.4. Consequences of termination**

As previously seen, the distinction between contracts where a price is paid and other contracts is important. In both cases, the consumer is given a unilateral right to put an end to the contract (what about the supplier ?), but the conditions are not the same.

Art. 16(3) provides that "Where the digital content is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content supplied corresponding to the period of time before the termination becomes effective".

This rule on payment by consumer shows the difference between termination for non-conformity (article 13) and termination for any reason, as envisaged in Art. 16.

Art. 16(4) states the other consequences of termination of long term contracts.

As it is not possible to comment the text in detail here, we will limit our observations to some key findings.

Art. 16(4) (a) states that "the supplier shall take all measures which could be expected in order to refrain from the use of other counter-performance than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer".

The text is not very precise and one may therefore wonder how efficient it will be.



This rule differs from the applicable rule in case of termination for a lack of conformity (Art. 13.2 (b)). Oddly, when contrasted, word by word, with Art. 13.2 (b), it may appear more strict : the supplier may have to refrain from the use of all counter-performances provided by the consumer including the content which has been generated jointly by the consumer and others who continue to make use of the content”.

Art. 16(4) (b) establishes that “the supplier shall provide the consumer with technical means to retrieve ~~all~~ any content provided by the consumer and any other data produced or generated through the consumer’s use of the digital content to the extent this data has been retained by the supplier. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format”.

This rule is the same as in case of termination of the contract because of a lack of conformity (Art. 13.2 (c)) and similarly, the same problem may occur as regards the consumer’s ability to retrieve the content.

The same can be said when it comes to the consumer’s obligation, : according to Art. 16.4 (c) : “where applicable, the consumer shall delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it including by making it available to a third party”.

Finally, Art. 16(5) provides :

“Upon termination, the supplier may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph (4) point (b)”.

This may create a lot of problems for the consumer. This rule is efficient in order to prevent the consumer from using a digital content when the contract has been terminated. But the danger is that suppliers use this right before the consumer has retrieved its data, since no there is no fixed period provided but merely a “reasonable time” for doing this (Art. 16.4 (b)). The difficulty is to articulate the right for the consumer to retrieve the content and the right for the supplier to prevent further use of the digital content to the consumer. The idea is that the trader may disable the software provided the consumer can still retrieve the data.

#### **4.5. “Long term contracts”: further thoughts**

There is no express reference to long-term contracts in the proposed directive, apart from Art. 16. Art. 6(3) refers to **“digital content supplied over a period of time”**.

In practice, contracts for the supply of digital content will often be “long-term” (for an indefinite period) and it may be interesting to reflect upon the specificities of such contracts.

In view of the fact that most digital long-term contracts are “evolutionary” in nature, mainly for technological reasons, even where the parties address at length what are to be the terms of their contract, their conduct over time may deviate from those terms and for quite good reasons, particularly as regard the supplier.

The reference to **“practices which the parties have established between themselves”** or to “the conduct of the parties subsequent to the conclusion of the contract” as a means of interpretation of long-term contracts for the supply of digital content is therefore important. However, to allow interpretation by custom or practice is dangerous for the consumer. In CESL it would have applied only to B2B.

**The duty of co-operation between the parties in the course of the performance** of the contract, which, in many Member States, is an application of the general principle of good faith and fair dealing, also is particularly relevant in the context of long-term contracts and this is also true in the context of digital content (see Art. 9(3)).

## 5. CONCLUSION

The current proposal adds to existing fragmentation of consumer remedies in sales contracts. They were adopted after the experiences drawn from previous comprehensive initiatives. It fills a gap but, at the same time, it makes the regulatory framework more complicated. An extra layer of fully harmonised rules for some topics of distance sales and digital contents contracts will be added to the existing framework, with a high overall level of consumer protection. For the suppliers, it is regrettable that in many respect, the directive does not dispense them to look into national laws as many topics are not covered. It is doubtful whether this inconvenient is compensated by the objectives pursued and whether a Directive on digital content contracts could meet its goals: enhance consumer protection and provide greater legal certainty for businesses and consumers in the EU.

The proposed directive raises a number of points that would necessitate further consideration. Some of them are general, others are more specific to termination. Only a few ones, related to the topics discussed in this briefing paper, will be pointed out in this conclusion.

The proposal does not classify digital content contracts as sales or services contracts. This new approach will lead to difficulties for the transposition of the directive into national laws, unless Member States are asked to introduce the rules in national legislation as rules on a new "specific contract" (contrat spécial). The definition of 'digital content' will create new borderline problems, particularly as regard the Internet of Things which are included so far. Most Member States have no specific national legislation on digital content and contracts for the supply of digital content are categorised differently from one Member State to another: these contracts are either considered as sales contracts, services contracts or rental contracts

The absence of a common regime as regard notification, and particularly of a time limit for the consumer's right to terminate for non-conformity hinders full harmonization. Limitation periods greatly differ - and so do their legal regimes- in Member States. In case of non-notification within a certain time frame, the consumer loses its right in some Member States while in others, he does not.

Some Member States (the UK, the Netherlands) have enacted mandatory rules on contracts for the supply of digital content. These rules have different scopes (in the United Kingdom the rules only cover digital content paid for with money, while in the Netherlands, digital content supplied on a medium or through downloading that is paid for against the supply of the consumer's personal data, is also covered). In Dutch law the consumer has the right to withhold payment until the trader performs according to the contract, the UK Consumer Rights Act does not provide consumers such a right. Withholding payment for lack of conformity is an important issue which would necessitate further harmonization.

Lack of conformity is a central notion in the proposed directive. The criteria should be made clearer and more apparent, particularly as regard the right to terminate the contract.

The provision on damages does not meet the concerns as regard a high level of consumer protection. Nor does it satisfy the full harmonization process as Member states will not be allowed to maintain or introduce more protective rules.

The proposed directive is limited to B2C transactions. Differences in bargaining power are frequent in B2B relations. The need to protect SMEs has been pointed out in the Digital Single Market Strategy and should be analyzed in the context of other actions announced in the Strategy.







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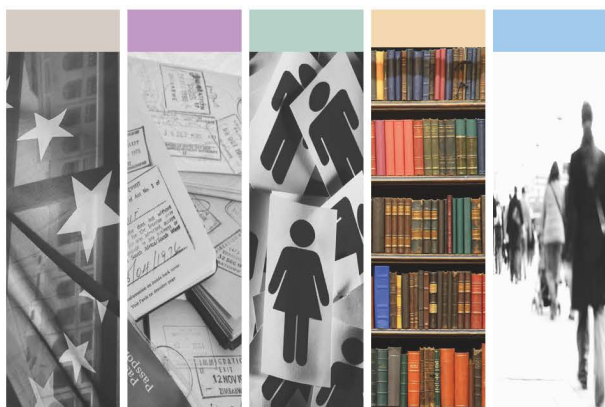
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