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From:	Presidency
To:	Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - Progress report

I. Introduction

1. The Commission proposal for a Directive on certain aspects concerning contracts for the supply of digital content ('Directive on contracts for the supply of digital content', 'the proposed Directive') was submitted on 9 December 2015 as part of the 'Digital Single Market Strategy for Europe'¹. The Council (Justice and Home Affairs) held policy debates on this proposal in March (doc. 6150/16), June (doc. 9768/16) and December 2016 (doc. 14827/16).
2. The Maltese Presidency has included progress on this file among its top legislative priorities.

¹ 8672/15.

3. Building on the good progress achieved under the Netherlands and Slovak Presidencies, in particular the political guidelines approved by the Council (Justice and Home Affairs) in June 2016 (doc. 9768/16) and the results of the policy debate at the Council (Justice and Home Affairs) in December 2016, the Working Party on Civil Law Matters (Contract Law) continued its deliberations on the proposed Directive on the basis of a revised text jointly drawn up by the Slovak and the Maltese Presidencies in December 2016 (doc. 15674/16) and a number of compromise proposals of the Maltese Presidency on specific articles².
4. Three two-day Working Party meetings were dedicated to those discussions during the months of January, February and March 2017.
5. The Maltese Presidency has focussed its work on finding compromises on the main concepts and key issues of the proposed Directive, such as the rules on conformity and on remedies. The approach taken in the discussions was to examine related provisions together and to address them in clusters.

II. State-of-play of the clusters discussed

6. By applying this **cluster approach**, the main focus was put on the following substantive issues of the proposal:
 - **the conformity criteria;**
 - **the rules on the supply of the digital content or digital service, and on the remedies in case of failure to supply;**
 - **the remedies in case of lack of conformity;**
 - **time limits for the supplier's liability for non-conformity and the reversal of the burden of proof.**

² WK 489/2017 INIT, WK 1781/2017 INIT, WK 2137/2017 INIT, WK 2138/2017 INIT

7. Reflecting the political guidelines of the June 2016 Council (Justice and Home Affairs) and the results of the December 2016 JHA Council, the work of the Working Party on **conformity criteria** for the digital content and digital service (Articles 6, 6a and 7) is approaching its conclusion on the basis of a compromise that puts objective and subjective conformity criteria on an equal footing. There is also discussion on granting the supplier the possibility to deviate from the objective criteria provided that the consumer has been informed of this deviation and has expressly and separately agreed to it. However, some more work at technical level is needed in relation to the issue of third-party rights (Article 8), i.e. on the remedies available to the consumer in case the digital content or digital service is subject to third-party rights, such as intellectual property rights, that impede the use of the digital content or digital service in accordance with the contract.
8. Following an in-depth technical examination, very good progress has also been achieved in relation to the **obligation of the supplier to supply** the digital content or digital service and the corresponding rights of the consumer (Articles 5 and 11). Owing to a very constructive attitude of all Member States a common approach seems within reach. In particular, the Presidency is of the opinion that on the basis of the compromise currently discussed at technical level a proper balance between the interests of consumers and suppliers in relation to **remedies for the failure to supply** can be achieved. This compromise would include giving the supplier a second chance in case of failure to supply the digital content or digital service, subject to certain safeguards for the consumer where this second chance would not apply.
9. A lot of work has been devoted by the Council Working Party to the consumer's **remedies in case of non-conformity of the digital content or digital service** (Article 12). Thanks to the intensive efforts and again the very constructive approach of delegations in developing a converging position, progress has been achieved on this matter at technical level. Subject to an agreement on the overall package of consumer remedies and further technical discussions, the Presidency believes that a common approach for a balanced solution preserving both the interests of the supplier and the consumer is within reach.

10. As to the **time limits for the liability of the supplier for non-conformity and the related time limit for the reversal of the burden of proof** (Articles 9 and 10), the views of Member States still diverge despite discussions in the Council Working Party. Further technical work on this matter will be conducted to this end.
11. More technical work is also necessary in relation to the consumer's rights in the event of the **modification of the digital content or digital service by the supplier** (Article 15) and **termination in the case of long-term contracts** (Article 16). The Presidency notes however some converging trends among the delegations in relation to these Articles.

III. Relationship with data protection rules

12. On 6 December 2016, the **Council Legal Service** submitted a legal **opinion** on the **relationship between the proposed Directive and the Union's data protection legislation** (doc. 15287/16), which opinion was orally presented at the Working Party meeting on 23 February 2017.
13. By COREPER Decision of 10 January 2017, the **European Data Protection Supervisor (EDPS)** was requested to provide a **written opinion** on the data protection questions raised by the proposed Directive. In addition, the EDPS was invited to the meeting of the Working Party on Civil Law Matters (Contract Law) on 23 February 2017, to give an informal intervention and hold an exchange of views with the Member States' representatives ahead of the written opinion.
14. The discussion on data as a form of counter-performance and the corresponding provisions was postponed pending the written opinion of the EDPS on this important aspect of the proposed Directive. The EDPS opinion was received on 14 March 2017 (doc. 7369/17), enabling the matter to be further examined by the Working Party on Civil Law Matters (Contract Law) at its meeting at the end of April 2017.

15. The Presidency believes that the said opinions provide the necessary clarity and the basis for concrete technical solutions to progress on this matter.

IV. Other scope issues

16. The discussion in the Working Party has also advanced on the **scope of the proposal**, particularly in relation to the list of contracts which are to be excluded from its scope, as well as the interplay with the general contract laws of Member States (paragraphs 5 and 9 of Article 3).

V. Next steps

17. The Presidency strongly welcomes the excellent spirit of compromise that has emerged among Member States in the Council Working Party on Civil Law Matters (Contract Law). Due to this very constructive attitude, substantial progress in the negotiations has been possible, as described above.
18. In light of this, while acknowledging that further technical discussions are needed, the Presidency believes that the necessary compromises on the proposal for the Directive on contracts for the supply of digital content are within reach. Work on the proposed Directive will continue, bearing in mind the need to ensure that the interests of consumers and suppliers are balanced.
19. The Presidency is confident that this work can provide the basis for a successful mandate in Council by the end of the Maltese Presidency, paving the way for trilogue discussions between the incoming Estonian Presidency and the European Parliament where a vote in the lead Committees is expected at the end of May/June 2017.

IV. Conclusion

20. **COUNCIL is invited to take note of the above progress report.**