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CCBE comments on the IMCO/JURI report on the Proposal for a directive on certain aspects concerning contracts for the supply of digital content

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE welcomes the Draft Report submitted by the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs of the European Parliament on the Proposal for Directive on certain aspects concerning contracts for the supply of digital content (COM(2015) 634).

In view of its position adopted in March 2016 concerning contract rules for online purchases of goods and digital content (COM(2015) 634 and 635)[1], the CCBE wishes to present the following comments in respect of the Draft Report:

1) The insertion of "*digital services*" in Art. 1 and Art. 2 Par. 1a (definition)[2] and among others also Recital No 11[3] as a new cornerstone besides the supply of "*digital content*" seems to be highly adequate in order to better protect the interests of the consumer in a rapidly growing market and thus to better cover contractual problems relating to cloud storage and file hosting. The same is true with regard to the inclusion of "*dual purpose contracts*" (Recital 7a) into the scope of the Directive. Both amendments will certainly increase the level of consumer protection (Art. 114 Par. 3 TFEU)[4].

2) The problems that have arisen concerning the applicability of Directive 2015/634 in cases where the "*supplier*" has delivered digital content "*embedded*" in hardware (CD/DVD)[5] are now better taken into

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1 CCBE position concerning contract rules for online purchase of goods and digital content, March 2016.

2 *"Digital services" mean 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".*

3 "[...]*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 the Council and should cover, for example, video, audio, applications, digital games and 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 [...]."*

4 Whilst the UK delegation welcomes the recognition of the need to take into account the fact that, particularly with sole traders and SMEs, the concept of consumer is not always clear, it is suggested that a less cumbersome way of doing this would be to simply change the definition of consumer, both in the proposal and in the Consumer Rights Directive, rather than considering a new type of contract. Additionally, a more coherent definition of "consumer" could be achieved by amending it as follows: "who,....., is acting wholly or mainly for purposes which are outside his trade, business, craft or profession" Recital 7a also suggests that a person will always be treated as a consumer when trading partially for his trade; this is inappropriate because it would allow transactions entered as part of his business being made subject to consumer rules.
The Austrian delegation does not support the inclusion of „dual purpose contracts" because the scope of the directive should be strictly limited to B2C-contracts. Moreover, the proposed wording is too vague, would undoubtedly lead to numerous disputes on its scope and thus lead to legal uncertainties.

5 Art. 2 Par. 2 a of the Draft Report provides as definition:*""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."*

account on the basis of Amendment No 34 (Art. 3a)[6], as the new text proposed in this Draft Report offers more legal certainty than the proposal of the Commission.

3) The new text of Art. 3 Par. 4[7] causes many problems and does not serve the requirements of appropriate and effective consumer protection in such cases where the consumer provides personal data in respect of the performance of a contract.

3.1. It is of the utmost importance in view of the requirements of consumer protection that the supply of personal data is qualified as "*counter-performance*", and as being equivalent to the payment of a price, as provided for in Art. 3 Par. 1 of the Proposal.[8] It is well known that the supply of personal data by consumers is the back-bone of many enterprises rapidly expanding as the new giants of the internet-capitalism. However, consumers provide their personal data without any adequate monetary remuneration. This imbalance is taken into account in Art. 3 Par. 1 of the proposed Directive 2015/634 (as well as in Art. 3 Par. 1 as amended in this Draft Report[9]) where it is provided that the supply of personal data in exchange for digital content or digital services shall fall within the scope of Directive 2015/634.

3.2. The legal interrelation between the proposed Directive 2015/634 and the General Data Protection Regulation (EU) No 2016/679 (GDPR) is, generally speaking, such that the Regulation shall govern all those legal and contractual issues relating to the supply of personal data that fall into the scope of this Regulation. This is also reflected in Art. 3 Par. 8 of the Draft Report stating that this *"Directive is without prejudice to the protection of personal data as provided for by Directive 95/46/EC and by Regulation 2016/679 (EU)."*

3.2.1 In saying this, one has to bear in mind that Art. 6 Par. 1b)[10] of said Regulation does not adequately fulfil the due requirements of consumer protection, as the supply of personal data is not dependent upon the express consent of the consumer (Art. 7 of Regulation 2016/679) that can be withdrawn at any time if the consumer thinks fit.

3.2.2 Quite to the contrary, Art. 6 Par. 1b) of said Regulation holds that processing of personal data supplied by a consumer shall be qualified as being "*lawful*", provided that the processing of these personal data "*is necessary for the performance of a contract to which the data subject is party*". This implies that, due to the superiority of Regulation 2016/679 in respect of Directive 2015/634, that Art. 6 Par. 1b) of this Regulation, not requiring an explicit consent of the consumer to the processing of the personal data supplied, will govern almost all contracts in consideration of which the consumer has supplied its personal data in view of the "*performance of a contract*". The mere existence of such "*contract*", qualifies the processing of the personal data supplied pursuant to Art. 6 Par. 1b) of Regulation 2016/679 as being "*lawful*".

3.2.3 In this regard, it does not matter whether such contract provides for one or even for many "*purposes*", in respect of which the processing of the personal data supplied by the consumer is held to be "necessary" pursuant to Art. 6 Par. 1b). As long as such contract has been concluded and the supplier specifies the respective "*purposes*" (in all cases within the standards terms supplied) in respect of which the processing of personal data is held to be "*necessary*" for the due performance of such contract, the scheme of consumer protection pursuant to the provisions of Directive 2015/634 shall not apply. The consumer protection then rests with the provisions of data protection pursuant to Regulation 2016/679.

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6 *"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."*

7 *"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 [...]."*

8 *"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."*

9 *"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."*

10 *"Processing shall be lawful only if and to the extent that at least one of the following applies: a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; b) processing is necessary fort he performance of a contract to which the data subject is party [...]."*

3.2.4 This is, in rather strict terms, the position taken by the Draft Report in the amended Art. 3 Par. 4.[11] It is, however, open to some practical doubts whether the amended version of Art. 3 Par. 4 is better designed to serve the legitimate needs of consumer protection in case the consumer has supplied its personal data "*for free*" in consideration of a contract, than the version provided for in the Proposal of Directive 2015/634.[12] Whilst the Draft Report requires that the personal data provided "*are exclusively used*" to supply the digital content, the Proposal of the Commission for Directive 2015/634 addresses this issue with the words "*strictly necessary for the performance of the contract*".

3.2.5 The lack of adequate consumer protection in these instances becomes apparent if one takes the example of a long-term contract in consideration of which the consumer has supplied its personal data as counter-performance of a given contract, offering certain "*services*" for free. Take as an example the "*contract*" offered by Facebook. This company offers a large variety of "*services*" within the scope of one single contract, all of them are designed to be to the benefit of a consumer. Even new "*services*" may be offered by Facebook to the consumer as the contracting party during the course of such contract. The due performance of any and all of these "*services*" then will be covered by Art. 3 Par. 4 as amended in this Draft Report, as all of such "*services*" ("*purposes*") will be "*exclusively used by the supplier to supply the digital content or services*". Thus, the requirements of consumer protection will be restricted to the data protection rules of Regulation 2016/679, including Art. 6 Par. 1 b), not requiring an explicit consent of the consumer to utilize the personal data so supplied by the consumer.

3.3. The CCBE is of the opinion that the amendment of Art. 3 Par. 4 in the Draft Report and its limitation goes too far (see Explanatory Statement of the Draft Report). The needs of adequate consumer protection are better served by the somewhat stricter version proposed by the Commission holding that Directive 2015/634 shall become applicable in respect of the consumer providing its personal data as a counter-performance, unless the processing of such data is "*strictly necessary for the performance of a contract*".

3.4. However, apart from this argument, the CCBE believes that the needs of adequate consumer protection require that Directive 93/13/EC on Unfair Terms of Contract must be expanded to the needs of digitalisation. In referring to the "*contract*" offered by Facebook (vide 3.2.5 supra) as an example, it seems mandatory to insert a new clause as black-listed to the effect that every single – new – "*service*" ("purpose") within the scope of a "*contract*" in consideration of which the consumer has to supply its personal data, requires a separate contractual consent. In other words: long-term contracts, covering more than one or even a variety of such "*services*" ("*purposes*") may not be "*created*" by virtue of standard terms of contract.

4) The CCBE agrees that the amended version of Art. 5 Par. 2 of the Draft Report is better designed[13] to serve the practical needs, as the supply of digital content or digital services shall be effected "*without undue delay, but not later than 30 days from the conclusion of the contract*". On the basis of this text the consumer is in a much better position to assess whether there is a delay of the supplier, and the supplier has adequate time to affect such supply.

5) Whether the amendment in Art. 4a[14] of the Draft Report is in all aspects a step into the right direction, seems doubtful.

5.1. First, it might, strictly legally speaking, seem troublesome to stipulate the legal consequences of violating the rules of a Regulation within the scope of a (subordinated) Directive. Second, as long as Art. 6 Par. 1b of Regulation 2016/679 holds that the processing of personal data is "*lawful*"

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11 *Vide footnote No 4. In this respect the amended version of Art. 3 Par. 8 should also be taken into account (supra 3.2).*

12 *"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 perfomance of the contract ...]."*

13 *The Text of the Commission is: "The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise.[...]"*

14 Art. 4a of the Draft Report reads as follows*: "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 ritht afforded to the consumer as a data subject under Directive 95/46/EC and Regulation 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 2016/679 shall not be binding upon the consumer.[...]"*

insofar as such processing is held to be "*necessary for the performance of a contract*", there is hardly any room for contract terms violating the regime of further rules of Regulation 2016/679.

5.2. Thus, the sounder approach seems to be, as proposed hereinabove, to amend the scope of Directive 93/13/EC on Unfair Contract Terms on the basis of a black list in view of the imminent risks of digitalisation, being to the detriment of the basic value of free choice and general freedom of the consumer. There is, by now, ample evidence that there is a high risk of manipulation of the free will of the consumer due to the growing influence of the algorithms of the computers processing the personal data of the consumer, being driven by the dominant commercial interest of the suppliers and/or their clients. These risks have to be fenced by operation of the law within the scope of Directive 93/13/EC, as Regulation 2016/679 does not afford such adequate protection concerning unfair contract terms.

6) The CCBE welcomes the amendments in Art. 15 of the proposed Directive, as the Draft Report is considered to be more consumer-friendly. Provided that a long-term contract has been concluded between a supplier and a consumer, any alteration of the *"functionality, interoperability and other main performance features of the digital content or digital services,"* may only be affected by the supplier, provided that lit. a) "*the contract allows and gives valid reasons for such an alteration"*[15] and provided furthermore that (lit. aa) *"such an alteration can reasonably be expected by the consumer"*.[16] These important safeguards were missing in the proposed Directive.

[15] The text proposed by the Commission stated *"the contract so stipulates".*
[16] The text proposed by the Commission did not provide for any such safeguard.