Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The growth potential of e-commerce in the Union has not yet been fully exploited. The Digital Single Market Strategy for Europe tackles in a holistic manner the major obstacles to the development of cross-border e-commerce in the Union in order to unleash this potential. Ensuring better access for consumers to digital content and digital services, and making it easier for businesses to supply digital content and digital services, can contribute to boosting the Union's digital economy and stimulating overall growth.

(2) Article 26(1) and (2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, which is to comprise an area without internal frontiers in which the free movement of goods and services is ensured. Article 169(1), and point (a) of Article 169(2), TFEU provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market. This Directive aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.

(3) Certain aspects concerning contracts for the supply of digital content or digital services should be harmonised, taking as a base a high level of consumer protection, in order to

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achieve a genuine digital single market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises ('SMEs').

(4) Businesses, especially SMEs, often face additional costs, stemming from differences in national mandatory consumer contract law rules, and legal uncertainty when offering cross-border digital content or digital services. Businesses also face costs when adapting their contracts to specific mandatory rules for the supply of digital content or digital services, which are already being applied in several Member States, creating differences in scope and content between specific national rules governing such contracts.

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

(6) In order to remedy such problems, both businesses and consumers should be able to rely on fully harmonised contractual rights in certain core areas concerning the supply of digital content or digital services across the Union. Full harmonisation of some key regulatory aspects would considerably increase legal certainty for consumers and businesses.

(7) Harmonised consumer contract law rules in all Member States would make it easier for businesses, especially SMEs, to supply digital content or digital services across the Union. They would provide businesses with a stable contract law environment when supplying digital content or digital services in other Member States. They would also prevent legal fragmentation that otherwise would arise from new national legislation regulating specifically digital content and digital services.

(8) Consumers should benefit from harmonised rights for the supply of digital content and digital services that provide a high level of protection. They should have clear mandatory rights when they receive or access digital content or digital services from anywhere in the Union. Having such rights should increase their confidence in acquiring digital content or digital services. It should also contribute to reducing the detriment consumers currently suffer, since there would be a set of clear rights that will enable them to address problems they face with digital content or digital services.

(9) This Directive should fully harmonise certain key rules that have, so far, not been regulated at Union or national level.

(10) This Directive should define its scope in a clear and unequivocal manner and provide clear substantive rules for the digital content or digital services falling within its scope. Both the scope of this Directive and its substantive rules should be technologically neutral and future-proof.

(11) This Directive should lay down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or a digital

service. For this purpose, rules on the conformity of digital content or a digital service with the contract, remedies in the event of a lack of such conformity or a failure to supply and the modalities for the exercise of those remedies, as well as on the modification of digital content or a digital service, should be fully harmonised. Fully harmonised rules on some essential elements of consumer contract law would make it easier for businesses, especially SMEs, to offer their products in other Member States. Consumers would benefit from a high level of consumer protection and welfare gains by fully harmonising key rules. Member States are precluded within the scope of this Directive from providing for any further formal or substantive requirements. For example, Member States should not provide for rules on the reversal of the burden of proof that are different from those provided for in this Directive, or for an obligation for the consumer to notify the trader of a lack of conformity within a specific period.

(12) This Directive should not affect national law to the extent that the matters concerned are not regulated by this Directive, such as national rules on the formation, validity, nullity or effects of contracts or the legality of the digital content or the digital service. This Directive should also not determine the legal nature of contracts for the supply of digital content or a digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, should be left to national law. This Directive should also not affect national rules that do not specifically concern consumer contracts and provide for specific remedies for certain types of defects that were not apparent at the time of conclusion of the contract, namely national provisions which may lay down specific rules for the trader's liability for hidden defects. This Directive should also not affect national laws providing for non-contractual remedies for the consumer, in the event of lack of conformity of the digital content or digital service, against persons in previous links of the chain of transactions, or other persons that fulfil the obligations of such persons.

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

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

(15) Member States should also remain free, for example, to regulate the rights of parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether a consumer, in cases of a lack of conformity, is to be entitled to withhold payment of the price or part thereof until the trader has brought the digital content or digital service into conformity, or whether the trader is to be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with the obligation provided for in this Directive to return the tangible medium to the trader.

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(16) Member States should also remain free to extend the application of the rules of this Directive to contracts that are excluded from the scope of this Directive, or to otherwise regulate such contracts. For instance, Member States should remain free to extend the protection afforded to consumers by this Directive also to natural or legal persons that are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or SMEs.

(17) The definition of a consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, Member States should also remain free to determine, in the case of dual purpose contracts, where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered a consumer.

(18) This Directive should apply to any contract whereby the trader supplies or undertakes to supply digital content or digital service to the consumer. Platform providers could be considered to be traders under this Directive if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the supply of digital content or a digital service. Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a trader under this Directive.

(19) The Directive should address problems across different categories of digital content, digital services, and their supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content or digital service, this Directive should cover, inter alia, computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media. As there are numerous ways for digital content or 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 content or access to the use of social media, this Directive should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service. However, this Directive should not apply to internet access services.

(20) This Directive and Directive (EU) 2019/771 of the European Parliament and of the Council[(3)] should complement each other. While this Directive lays down rules on certain requirements concerning contracts for the supply of digital content or digital services, Directive (EU) 2019/771 lays down rules on certain requirements concerning contracts for the sale of goods. Accordingly, in order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for traders of digital content, this Directive should also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content. However, instead of the provisions of this Directive on the trader's

obligation to supply and on the consumer's remedies for failure to supply, the provisions of Directive 2011/83/EU of the European Parliament and of the Council[(4)] on obligations related to the delivery of goods and remedies in the event of the failure to deliver should apply. In addition, the provisions of Directive 2011/83/EU on, for example, the right of withdrawal and the nature of the contract under which those goods are supplied, should also continue to apply to such tangible media and the digital content supplied on it. This Directive is also without prejudice to the distribution right applicable to these goods under copyright law.

(21) Directive (EU) 2019/771 should apply to contracts for the sale of goods, including goods with digital elements. The notion of goods with digital elements should refer to goods that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. Digital content or a digital service that is incorporated in or inter-connected with goods in that manner should fall within the scope of Directive (EU) 2019/771 if it is provided with the goods under a sales contract concerning those goods. Whether the supply of the incorporated or inter-connected digital content or digital service forms part of the sales contract with the seller should depend on the content of this contract. This should include incorporated or inter-connected digital content or digital services the supply of which is explicitly required by the contract. It should also include those sales contracts which can be understood as covering the supply of specific digital content or a specific digital service because they are normal for goods of the same type and the consumer could reasonably expect them given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in previous links of the chain of transactions, including the producer. If, for example, a smart TV were advertised as including a particular video application, that video application would be considered to be part of the sales contract. This should apply regardless of whether the digital content or digital service is pre-installed in the good itself or has to be downloaded subsequently on another device and is only inter-connected to the good.
For example, a smart phone could come with a standardised pre-installed application provided under the sales contract, such as an alarm application or a camera application. Another possible example is that of a smart watch. In such a case, the watch itself would be considered to be the good with digital elements, which can perform its functions only with an application that is provided under the sales contract but has to be downloaded by the consumer onto a smart phone; the application would then be the inter-connected digital element. This should also apply if the incorporated or inter-connected digital content or digital service is not supplied by the seller itself but is supplied, under the sales contract, by a third party. In order to avoid uncertainty for both traders and consumers, in the event of doubt as to whether the supply of the digital content or the digital service forms part of the sales contract, Directive (EU) 2019/771 should apply. Furthermore, ascertaining a bilateral contractual relationship, between the seller and the consumer, of which the supply of the incorporated or inter-connected digital content or digital service forms part should not be affected by the mere fact that the consumer has to consent to a licensing agreement with a third party in order to benefit from the digital content or the digital service.