

DRAFT

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# **Part I     Introductory provisions**

## **Chapter 1            General principles and application of the rules**

### **SECTION 1   GENERAL PRINCIPLES**

#### *Article 1*

##### ***Freedom of contract***

1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.
2. Parties may exclude the application of any of the provisions of this instrument, or derogate from or vary their effects, unless otherwise stated in those rules.

#### *Article 2*

##### ***Good faith and fair dealing***

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of the duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

#### *Article 3*

##### ***Co-operation***

The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

### **SECTION 2   APPLICATION OF THE RULES**

#### *Article 4*

##### ***Interpretation***

1. This instrument is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.
2. Issues within the scope of the instrument but not expressly settled by it are to be settled in accordance with the principles underlying it without recourse to the law that would be applicable in the absence of an agreement to use this instrument or to any other law.

3. Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

*Article 5*  
***Definitions***

For the purpose of this instrument, the following definitions apply:

- (1) 'contract' means an agreement intended to give rise to obligations or other legal effects;
- (2) 'good faith and fair dealing' means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question;
- (3) 'loss' means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment;
- (4) 'person' means any natural or legal person;
- (5) 'standard contract terms' means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties;
- (6) 'trader' means any natural person or any legal person who is acting for purposes relating to that person's trade, business, craft, or profession;
- (7) 'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession;
- (8) 'damages' means a sum of money to which a person may be entitled as compensation for loss, injury or damage;
- (9) 'price' means money that is due in exchange for goods sold, digital content supplied or for a service provided;
- (10) 'goods' means any tangible movable items; it excludes:
  - (a) electricity; and
  - (b) water and gas unless they are put up for sale in a limited volume or set quantity;
- (11) 'digital content' means data which is produced and supplied in digital form, whether or not according to the consumer's specifications; it excludes digital content pertaining to:
  - (a) financial services, including online banking services;
  - (b) legal or financial advice provided in electronic form
  - (c) electronic healthcare services;

- (d) electronic communications services and networks, and associated facilities and services;
  - (e) gambling;
  - (f) the provision of social networking services; and
  - (g) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;
- (12) 'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced;
- (13) 'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer;
- (14) 'related service' means any service related to goods or digital content, such as installation, maintenance or repair, provided by the seller of the goods or the digital content under the sales contract, the contract for the supply of digital content or a separate service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes any related:
- (a) transport services,
  - (b) training services,
  - (c) telecommunications support services; and
  - (d) financial services;
- (15) 'service provider' means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;
- (16) 'customer' means any person who purchases a related service;
- (17) 'distance contract' means any contract between the trader and the consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;
- (18) 'off-premises contract' means any contract between a trader and a consumer:
- (a) concluded in the simultaneous physical presence of the trader or, in case the trader is a legal person, the natural person representing the trader and the consumer in a place which is not the trader's business premises, or



concluded on the basis of an offer made by the consumer in the same circumstances; or

- (b) concluded on the trader's business premises or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the trader's business premises in the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer; or
- (c) concluded during an excursion organised by the trader or, in case the trader is a legal person, the natural person representing the trader with the aim or effect of promoting and selling goods or supplying digital content or services to the consumer;

(19) 'business premises' means:

- (a) any immovable retail premises where a trader carries out activity on a permanent basis, or
- (b) any movable retail premises where a trader carries out activity on a usual basis;

(20) 'commercial guarantee' means any undertaking by the trader or a producer to the consumer, in addition to his legal obligations under Article 107 in case of non-conformity to reimburse the price paid or to replace or repair or service goods or digital content in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

(21) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(22) 'public auction' means a method of sale where goods or digital content are offered by the trader to the consumer who attends or is given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or digital content.

## *Article 6* ***Reasonableness***

1. Reasonableness is to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved.

2. Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.

*Article 7*  
***No form required***

Unless otherwise stated in this instrument, a contract, statement or any other act which is governed by this instrument need not be made in or evidenced by a particular form.

*Article 8*  
***Not individually negotiated contract terms***

1. A contract term supplied by one party is not individually negotiated if the other party has not been able to influence its content.
2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proof that it has been.
4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.
5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.

*Article 9*  
***Termination of a contract***

1. To 'terminate a contract' means to bring to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.
2. Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance or for anticipated non-performance, the terminating party is also entitled to damages in lieu of the other party's future performance.
3. The effects of termination regarding the repayment of the price and the return of the goods or the digital content, and other restitutionary effects, are governed by the rules on restitution in Chapter 18.

*Article 10*  
***Mixed-purpose contracts***

1. Where a contract provides both for the sale of goods or the supply of digital content and for the provision of a service, the rules of Part IV of this instrument apply to the obligations and remedies of the parties as seller and buyer of goods or digital content and the rules of Part V of this instrument apply to the obligations and remedies of the parties as service provider and customer.
2. Where, in a contract falling under paragraph (1), the obligations of the seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination for non-performance of a part to which a part of the price can be apportioned, the buyer and customer may terminate only in relation to that part, unless the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
3. Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

*Article 11*  
***Notice***

1. This Article applies in relation to the giving of notice for any purpose under the rules of this instrument and the contract. ‘Notice’ includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.
2. A notice may be given by any means appropriate to the circumstances.
3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.
4. A notice reaches the addressee:
  - (1) when it is delivered to the addressee;
  - (2) when it is delivered to the addressee’s place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee’s habitual place of residence;
  - (3) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or
  - (4) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.

The notice is considered to have reached the addressee after one of the requirements under (a), (b), (c) or (d) is fulfilled, whichever is the earliest.

5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (4) or derogate from or vary its effects.

## *Article 12*

### ***Computation of time***

1. The provisions of this Article apply in relation to the computation of time for any purpose under this instrument.
2. Subject to paragraphs (3) to (7):
  - (a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;
  - (b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month.
3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.
4. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.
5. Where the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.
6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.
7. For the purposes of this Article:
  - (1) “public holiday” with reference to a Member State, or part of a Member State, of the European Union means any day designated as such for that Member State or part in a list published in the Official Journal of the European Union; and
  - (2) “working days” means all days other than Saturdays, Sundays and public holidays.

*Article 13*  
***Unilateral statements or conduct***

1. A unilateral statement indicating intention is to be interpreted in the way in which it could be expected to be understood by the person to whom it is addressed.
2. Where the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the person making the statement.
3. Articles 60 to 66 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.
4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention.
5. In this Article any reference to a statement includes a reference to conduct which can be regarded as the equivalent of a statement.

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## **Part II Making a binding contract**

### **Chapter 2 Pre-contractual information**

#### **SECTION 1 PRE-CONTRACTUAL INFORMATION TO BE GIVEN BY A TRADER DEALING WITH A CONSUMER**

##### *Article 14*

##### ***Duty to provide information when concluding a distance or off-premises contract***

1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:
  - (1) the main characteristics of any goods, digital content or services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or services;
  - (2) the price and additional charges, in accordance with Article 15;
  - (3) the identity and address of the trader, in accordance with Article 16;
  - (4) the contract terms, in accordance with Article 17;
  - (5) the rights of withdrawal, in accordance with Article 18;
  - (6) the existence and the conditions of the trader's after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy, where applicable;
  - (7) the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject and the methods for having access to it;
  - (8) the functionality, including applicable technical protection measures, of digital content, where applicable; and
  - (9) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.
2. The information provided, other than the addresses required by paragraph(1)(c), forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.
3. For a distance contract, the information required by this Article must:
  - (1) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;

- (2) be in plain and intelligible language; and
  - (3) so far as it is provided on a durable medium, be legible.
- 4. For an off-premises contract, the information required by this Article must:
  - (1) be given on paper or, if the consumer agrees, on another durable medium; and
  - (2) be legible and in plain, intelligible language.
- 5. This Article does not apply where the contract is:
  - (1) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
  - (2) concluded by means of an automatic vending machine or automated commercial premises;
  - (3) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.
- 6. The trader bears the burden of proof that it has provided the information required by this Article.

#### *Article 15*

#### ***Information about price and additional charges when concluding a distance or off-premises contract with a consumer***

- 1. The information to be provided under Article 14 (1) (b) must include:
  - (1) the total price inclusive of taxes, or where the nature of the goods, digital content or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; and
  - (2) where applicable, any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable.
- 2. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is calculated must be provided.
- 3. The trader must as soon as is feasible inform the consumer of the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.



4. If the business has not complied with the information requirements on additional charges or other costs as referred to in paragraphs (1)(b) and (2), the consumer is not liable to pay the additional costs and charges.

*Article 16*  
***Information about the identity and address of the trader***

The information to be provided under Article 14 (1) (c) must include:

- (a) the identity of the trader, such as its trading name,
- (b) the geographical address at which the trader is established;
- (c) the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with it efficiently;
- (d) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and
- (e) if different from the address given according to point (b) and (d), the geographical address of the trader, and where applicable that of the trader on whose behalf it is acting, to which the consumer can address any complaints.

*Article 17*  
***Information about the contract terms when concluding a distance or off-premises contract with a consumer***

1. The information to be provided under Article 14 (1) (d) must include:
- (a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the services;
  - (b) where applicable, the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; and
  - (c) the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader, where applicable.

*Article 18*  
***Information about rights of withdrawal when concluding a distance or off-premises contract***

2. Where the consumer has a right of withdrawal under Chapter 4, the information to be provided under Article 14 (1) (e) must include the conditions, time limit and procedures for exercising that right in accordance with Appendix I(A), as well as the model withdrawal form set out in Appendix I(B).



3. Where applicable, the information to be provided under Article 14(1)(e) must include the fact that the consumer will have to bear the cost of the return of the goods in case of withdrawal and, for distance contracts, if the goods by their nature cannot be normally returned by post, the cost of returning the goods.
4. Where the consumer can exercise the right of withdrawal after having made a request for the provision of services to begin during the withdrawal period, the information to be provided under Article 14(1)(e) must include the fact that the consumer would be liable to pay the trader the amount referred to in Article 46 (5).
5. The duty to provide the information required by paragraphs (1), (2) and (3) may be fulfilled by supplying to the consumer the Model instructions on withdrawal set out in Appendix I(A). The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions correctly filled in.
6. Where a right of withdrawal does not apply in accordance with points (c) to (i) of Article 41 paragraph (2) and paragraph (3) of that Article, the information to be provided under Article 14 (1) (e) must include a statement that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal.

#### *Article 19*

##### ***Off-premises contracts: further information requirements and confirmation***

1. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or, if the consumer agrees, on a different durable medium, including where applicable, the confirmation of the consumer's consent and acknowledgment according to Article 41(3)(d) .
2. Where the consumer wants the provision of services to begin during the withdrawal period provided for in Article 43(2), the trader must require that the consumer makes such an express request on a durable medium.

#### *Article 20*

##### ***Distance contracts: further information and other requirements***

1. When a trader makes a telephone call to a consumer, with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call.
2. If the distance contract is concluded through a medium which allows limited space or time to display the information, the trader must provide on that particular medium prior to the conclusion of such a contract at least the information required by this paragraph. The other information referred to in Article 14 shall be provided by the trader to the consumer in an appropriate way in accordance with the requirements of Article 14 (3). The information required is:
  - (a) the main characteristics of the goods, digital content or services, as required by Article 14 (1) (a);

- (b) the identity of the trader, as required by Article 16(a);
  - (c) the total price, including all items referred to in Article 14 (1) (b) and Article 15 (1) and (2);
  - (d) the right of withdrawal; and
  - (e) where relevant, the duration of the contract, and if the contract is for an indefinite period, the requirements for terminating the contract, referred to in Article 17 (1) (b).
3. A distance contract to be concluded by telephone is valid only if the consumer gives consent by an explicit statement indicating the agreement to conclude a contract. The trader must provide the consumer with a confirmation of that agreement on a durable medium.
4. The trader must give the consumer a confirmation of the contract concluded, including where applicable, of the consent and acknowledgement of the consumer according to Article 41(3)(d), and all the information referred to in Article 14 on a durable medium. The trader must give this information in reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the supply of digital content or the performance of the service begins, unless the information has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.
5. Where the consumer wants the provision of services to begin during the withdrawal period provided for in Article 43(2), the trader must require that the consumer makes such an express request on a durable medium.

#### *Article 21*

#### ***Duty to provide information when concluding contracts other than distance and off-premises contracts***

1. In contracts other than distance and off-premises contracts, a trader has a duty to provide to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, the following information, if not already apparent from the context:
- (a) the main characteristics of any goods, digital content or services to be supplied, to an extent appropriate to the medium and to the goods, digital content or services;
  - (b) the price and additional charges, in accordance with Article 15(1);
  - (c) the identity of the trader, such as the trader's trading name, the geographical address at which he is established and his telephone number;
  - (d) the contract terms in accordance with Article 17;
  - (e) the existence and the conditions of the trader's after-sale services, commercial guarantees and complaints handling policy, where applicable;

- (f) the functionality, including applicable technical protection measures of digital content, where applicable; and
  - (g) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.
2. This article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion.

*Article 22*  
***Burden of proof***

The trader bears the burden of proof that it has provided the information required by this Section.

*Article 23*  
***Mandatory nature of rules***

The parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

**SECTION 2 PRE-CONTRACTUAL INFORMATION TO BE GIVEN BY A TRADER  
DEALING WITH ANOTHER TRADER**

*Article 24*  
***Duty to disclose information about goods and services in contracts between traders***

1. Before the conclusion of a contract for the supply of goods or services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of any goods or services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
2. In determining whether paragraph (1) requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
  - (1) whether the supplier had special expertise;
  - (2) the cost to the supplier of acquiring the relevant information;
  - (3) the ease with which the other trader could have acquired the information by other means;
  - (4) the nature of the information;
  - (5) the apparent importance of the information to the other trader; and

(6) good commercial practice in the situation concerned.

(7)

### **SECTION 3: CONTRACTS TO BE CONCLUDED BY ELECTRONIC MEANS**

#### *Article 25*

##### ***Duties where the contracts are to be concluded by electronic means***

1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve any individual communication on the part of the trader.
2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.
3. The trader must provide information about the following matters before the other party makes or accepts an offer:
  - (1) the technical steps to be taken in order to conclude the contract;
  - (2) whether or not a contract document will be filed by the trader and whether it will be accessible;
  - (3) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
  - (4) the languages offered for the conclusion of the contract;
  - (5) the contract terms.
4. The trader must ensure that the contract terms referred to in paragraph (3)(e) are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.
5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.

#### *Article 26*

##### ***Additional information requirements in distance contracts to be concluded by electronic means***

1. Where a distance contract which is to be concluded by electronic means would oblige the consumer to make a payment, the trader must make the consumer aware in a clear and prominent manner, and directly before the consumer places the order, of the information required by Article 14 (1)(a), Article 15 (1) and (2), and Article 17 (1) (b).

2. The trader must ensure that the consumer, when placing the order, explicitly confirms that the order implies an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this subparagraph, the consumer is not bound by the contract or order.
3. The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.

*Article 27*  
***Burden of proof***

In relations between a trader and a consumer, the trader bears the burden of proof that it has provided the information required by this Section.

*Article 28*  
***Mandatory nature of rules***

In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

## **SECTION 4 DUTY TO ENSURE THAT INFORMATION SUPPLIED IS CORRECT**

*Article 29*  
***Duty to ensure that information supplied is correct***

1. A party who supplies information before or at the time a contract is concluded, whether in compliance with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.
2. A party to whom incorrect or misleading information has been supplied in breach of the duty referred to in paragraph 1, and who reasonably relies on that information in concluding a contract with the party who supplied it, has the remedies set out in Article 30.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

## **SECTION 5 REMEDIES FOR BREACH OF INFORMATION DUTIES**

### *Article 30*

#### ***Remedies for breach of information duties***

1. Where a party has failed to comply with any duty imposed by Articles 14 to 29 and as a result a contract has been concluded which the other party would not have concluded, or would not have concluded on the same contract terms, the first party is liable for loss caused to the other party by the failure. Articles 162, 163 and 164 apply with appropriate adaptations.
2. If the trader has not complied with the information requirements on additional charges or other costs as referred to in Article 15, or on the costs of returning the goods as referred to in Article 18(2) the consumer is not liable to pay the additional costs and charges.
3. The remedies provided under this Article are without prejudice to any remedy which may be available under Article 43 (2), Article 49 or Article 50.
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

## **Chapter 3 Conclusion of contract**

### *Article 31*

#### ***Requirements for the conclusion of a contract***

1. A contract is concluded if:
  - (1) the parties reach an agreement;
  - (2) they intend the agreement to have legal effect; and
  - (3) the agreement, supplemented if necessary by rules of this instrument, has sufficient content and certainty to be given legal effect.
2. Agreement may be reached by acceptance of an offer or by other statements or conduct.
3. The intention of the parties that the agreement will have legal effect is to be determined from their statements and conduct interpreted in accordance with the rules on interpretation in Article 13.

4. If one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

### *Article 32* **Offer**

1. A proposal is an offer if:
  - (1) it is intended to result in a contract if it is accepted; and
  - (2) it has sufficient content and certainty for there to be a contract.
2. An offer may be made to one or more specific persons.
3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise. Unless the circumstances indicate otherwise, a proposal by a trader to supply goods or digital content at a stated price, made by a display of goods or digital content or made in a public advertisement or a catalogue referring to an identified stock, is an offer to any person who may lawfully buy the goods or the digital content to supply them at that price until the goods or the digital content displayed or the stock is exhausted.

### *Article 33* **Revocation of offer**

1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.
2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.
3. A revocation of an offer is ineffective if:
  - (1) the offer indicates that it is irrevocable;
  - (2) the offer states a fixed time for its acceptance; or
  - (3) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### *Article 34* **Rejection of offer**

When a rejection of an offer reaches the offeror, the offer lapses.



*Article 35*

***Acceptance***

1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.
2. Silence or inactivity is not in itself acceptance.

*Article 36*

***Time of conclusion of the contract***

1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.
2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.
3. Where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

*Article 37*

***Time limit for acceptance***

1. An acceptance of an offer is effective only if it reaches the offeror within any time limit fixed by the offeror.
2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.
3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

*Article 38*

***Late acceptance***

1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.
2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.

*Article 39*

***Modified acceptance***

1. A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.



2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.
3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.
4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:
  - (1) the offer expressly limits acceptance to the terms of the offer;
  - (2) the offeror objects to the additional or different terms without undue delay; or
  - (3) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

#### *Article 40*

#### ***Conflicting standard contract terms***

1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance.
2. No contract is concluded if one party:
  - (1) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph (1); or
  - (2) without undue delay, informs the other party of such an intention.

### ***Chapter 4 Rights to withdraw in distance and off-premises contracts between traders and consumers***

#### *Article 41*

#### ***Right to withdraw***

1. The consumer has a right to withdraw during the period provided in Article 43, without giving any reason, and at no cost to the consumer except as provided in Article 46, from:
  - (1) a distance contract, or

- (2) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price.

2. Paragraph (1) does not apply to:

- (a) a contract concluded by means of an automatic vending machine or automated commercial premises;
- (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;
- (c) a contract for the supply of goods or services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;
- (d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;
- (e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;
- (f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
- (g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
- (h) a contract concluded at a public auction; and
- (i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.

3. Paragraph (1) does not apply in the following situations:

- (1) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;
- (2) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;
- (3) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed after delivery;
- (4) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and with the acknowledgement by the consumer of losing the right to withdraw, and

- (5) the consumer has specifically requested the trader to visit the consumer's home for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional services or goods.
4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter the consumer may withdraw the offer even if it would otherwise be irrevocable.

#### *Article 42*

##### ***Exercise of right to withdraw***

1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal specified in Article 43.
2. The consumer exercises the right to withdraw by informing the trader of the consumer's decision to withdraw. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix I(B) or any other unequivocal statement setting out the decision to withdraw.
3. Where the trader gives the consumer the option to withdraw electronically on the trader's website, and the consumer does so, the trader has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.
4. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

#### *Article 43*

##### ***Withdrawal period***

1. The withdrawal period expires after fourteen days from:
  - (1) in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services:
    - (i) the day on which the consumer has taken delivery of the goods;
    - (ii) where the contract is for the sale of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer has taken delivery of the last item;
    - (iii) where the goods consist of multiple lots or pieces, the day on which the consumer has taken delivery of the last lot or piece; or

- (iv) where the contract is for regular delivery of goods during a defined period of time, the day on which the consumer has taken delivery of the first item;
  - (2) in the case of a contract for related services concluded after the goods have been delivered, the day of the conclusion of the contract; and
  - (3) in the case of a contract for the supply of digital content:
    - (i) where the digital content is supplied on a tangible medium, the day when the consumer has taken delivery of the tangible medium in accordance with subparagraph (a);
    - (ii) where the digital content is not supplied on a tangible medium, the day of the conclusion of the contract.
2. If the trader has not provided the consumer with the information referred to in Article 18 (1), the withdrawal period expires:
- (1) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1 (a) to (c); or
  - (2) where the trader provides the consumer with this information within this one year, after fourteen days from the day the consumer receives the information.
3. A communication of withdrawal is timely if sent before the end of the withdrawal period.

*Article 44*  
***Effects of withdrawal***

*Withdrawal terminates the obligations of both parties under the contract.*

*Article 45*  
***Obligations of the trader in case of withdrawal***

- 1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw in accordance with Article 42. The trader must carry out such reimbursement 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.
- 2. Notwithstanding paragraph (1), the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.
- 3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied

evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.

4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

#### *Article 46*

#### ***Obligations of the consumer in case of withdrawal***

1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader to receive them without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw to the trader in accordance with Article 42, unless the trader has offered to collect the goods. This deadline is met if the goods are sent back by the consumer before the period of fourteen days has expired.
2. The consumer has to bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.
3. The consumer is liable for any diminished value of the goods only where that results from handling them in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has failed to provide information about the right to withdraw in accordance with Article 18 (1).
4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.
5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.
6. The consumer is not liable for the cost for:
  - (1) services performed, in full or in part, during the withdrawal period, where:
    - (i) the trader has failed to provide information in accordance with points (1) or (3) of Article 18; or
    - (ii) where the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 19(2) and Article 20(5);

- (2) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:
- (i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 43(1);
  - (ii) the consumer did not acknowledge losing the right of withdrawal when giving the consent; or
  - (iii) the trader has failed to provide the confirmation in accordance with Article 20(4).
7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.

*Article 47*  
**Ancillary contracts**

1. Where a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 42 to 46, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in the rules applicable under paragraphs (2) and (3). For this purpose an ancillary contract means a contract by which a consumer acquires goods, digital content or services related to a distance contract or an off-premises contract and these goods, digital content or services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.
2. The provisions of Article 44, Article 45 and Article 46 apply accordingly to ancillary contracts to the extent that those contracts are governed by this instrument.
3. For ancillary contracts which are not governed by this instrument the applicable law governs the obligations of the parties in the event of withdrawal.

*Article 48*  
**Mandatory nature**

The parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.



## Chapter 5 Defects in consent

### *Article 49*

#### ***Mistake***

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  - (1) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
  - (2) the other party:
    - (i) caused the mistake;
    - (ii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duties under Chapter 2, Sections 1 to 4;
    - (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded under a mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or
    - (iv) made the same mistake.
2. A party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party.
3. An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

### *Article 50*

#### ***Fraud***

1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.
2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.
3. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:

- (1) whether the party had special expertise;
- (2) the cost to the party of acquiring the relevant information;
- (3) the ease with which the other party could have acquired the information by other means;
- (4) the nature of the information;
- (5) the apparent importance of the information to the other party; and
- (6) in contracts between traders good commercial practice in the situation concerned

*Article 51*  
**Threats**

A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of an imminent and serious harm which it is wrongful to inflict, or of an act which it is wrongful to use as a means to obtain the conclusion of the contract.

*Article 52*  
**Unfair exploitation**

A party may avoid a contract if, at the time of the conclusion of the contract:

- (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and
- (b) the other party knew or could be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

*Article 53*  
**Notice of avoidance**

1. Avoidance is effected by notice to the other party.
2. A notice of avoidance is effective only if it is given within:
  - (1) six months in case of mistake; and
  - (2) one year in case of fraud, threats and unfair exploitation;

after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely.



*Article 54*  
**Confirmation**

If the party who is entitled to avoid a contract confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.

*Article 55*  
**Effects of avoidance**

1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.
2. Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.
3. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent, is regulated by the rules on restitution in Chapter 17.

*Article 56*  
**Damages for loss**

A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.

*Article 55*  
**Exclusion or restriction of remedies**

1. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, directly or indirectly exclude or restrict remedies for mistake.

*Article 58*  
**Choice of remedy**

A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either of the remedies.

## **Part III Assessing what is in the contract**

### **Chapter 6 Interpretation**

#### *Article 59*

##### ***General rules on interpretation of contracts***

1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs (1) and (2), the contract is to be interpreted according to the meaning which a reasonable person would give to it in the circumstances.

#### *Article 60*

##### ***Relevant matters***

In interpreting a contract, regard may be had, in particular, to:

- a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the interpretation which has already been given by the parties to expressions which are similar to those used in the contract;
- (d) practices which the parties have established between themselves;
- (e) the meaning commonly given to expressions in the branch of activity concerned;
- (f) the nature and purpose of the contract;
- (g) usages; and
- (h) good faith and fair dealing.

#### *Article 61*

##### ***Reference to contract as a whole***

Expressions used in a contract are to be interpreted in the light of the contract as a whole.

*Article 62*  
***Linguistic discrepancies***

Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.

*Article 63*  
***Preference for negotiated contract terms***

Contract terms which have been individually negotiated prevail over those which have not.

*Article 64*  
***Preference for interpretation which gives contract terms effect***

An interpretation which renders the contract terms effective prevails over one which does not.

*Article 65*  
***Interpretation in favour of consumers***

1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer prevails unless the term was supplied by the consumer.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

*Article 66*  
***Interpretation against supplier of a contract term***

Where, in a contract which does not fall under Article 65, there is doubt about the meaning of a contract term which has not been individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

## Chapter 7 Contents and effects

### *Article 67* ***Contract terms***

The contract terms are derived from:

- (a) the agreement of the parties, subject to any mandatory rules of this instrument;
- (b) any usage or practice by which parties are bound under Article 68;
- (c) any rule of this instrument which applies in the absence of an agreement of the parties to the contrary; and
- (d) any contract term implied under Article 69.

### *Article 68* ***Usages and practices in contracts between traders***

- 1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
- 2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
- 3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of this instrument.

### *Article 69* ***Contract terms which may be implied when necessary to fill a gap***

- 1. Where it is necessary to provide for a matter which is not regulated by the agreement of the parties, any usage or practice or any rule of this instrument, an additional contract term may be implied, having regard in particular to:
  - (1) the nature and purpose of the contract;
  - (2) the circumstances in which the contract was concluded; and
  - (3) the requirements of good faith and fair dealing.
- 2. Any contract term implied under paragraph (1) is, where possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.
- 3. Paragraph (1) does not apply if the parties have deliberately left a matter unprovided for, accepting that one or other party would bear the risk.

#### Article 70

##### ***Contract terms derived from certain pre-contractual statements***

1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement becomes a contract term unless:
  - (1) the other party was aware when the contract was concluded, or could be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or
  - (2) the other party's decision to conclude the contract could not have been influenced by the statement.
2. For the purposes of paragraph (1), a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.
3. Where the other party is a consumer then, for the purposes of paragraph (1), a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

#### Article 71

##### ***Duty to raise awareness of not individually negotiated contract terms***

1. Contract terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
2. For the purposes of this Article, *in relations between a trader and a consumer* contract terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

#### Article 72

##### ***Additional payments in contracts between a trader and a consumer***

1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional

payment. If the consumer has made the additional payment, the consumer may recover it.

2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

#### *Article 73*

##### ***Merger clauses***

1. Where a contract document contains a clause stating that the document embodies all contract terms (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.
2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.
3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.
4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

#### *Article 74*

##### ***Determination of price***

Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

#### *Article 75*

##### ***Unilateral determination by a party***

1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.
2. The parties may not exclude the application of this Article or derogate from or vary its effects.

#### *Article 76*

##### ***Determination by a third party***

1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.

2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.
3. For the purpose of paragraph (1) a 'court' includes an arbitral tribunal.

*Article 77*  
***Language***

Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

*Article 78*  
***Contracts of indeterminate duration***

1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not say when the contractual relationship is to end, it may be terminated by either party by giving a reasonable period of notice not exceeding two months.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this article or derogate from or vary its effects.

*Article 79*  
***Contract terms in favour of third parties***

1. The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.
2. The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.
3. A contracting party who is bound under the contract to perform an obligation in favour of the third party may assert against the third party all defences which the contracting party could assert against the other party to the contract.
4. The third party may reject the right by notice to either of the contracting parties, if that is done without undue delay after being notified of the right and before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.
5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred.



## **Chapter 8      Unfair contract terms**

### **SECTION 1   GENERAL PROVISIONS**

#### *Article 80*

##### ***Effects of unfair contract terms***

1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.
2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

#### *Article 81*

##### ***Exclusions from unfairness test***

1. Contract terms are not subjected to an unfairness test under Sections 2 or 3 of this Chapter if they reflect rules of this instrument which would apply if the terms did not regulate the matter.
2. The unfairness test under Section 2 of this Chapter does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 83.
3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

#### *Article 82*

##### ***Mandatory nature***

The parties may not exclude the application of this Chapter or derogate from or vary its effects.

### **SECTION 2   UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN A TRADER AND A CONSUMER**

#### *Article 83*

##### ***Duty of transparency in contract terms not individually negotiated***

Where a trader supplies contract terms which have not been individually negotiated with the consumer, it has a duty to ensure that they are drafted and communicated in plain, intelligible language. Contract terms are not presented in an accessible way if they are in a place where the consumer cannot be expected to find them.

#### *Article 84*

##### ***Meaning of unfair in contracts between a trader and a consumer***

1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
  - (1) whether the trader complied with the duty of transparency set out in Article 83;
  - (2) the nature of what is to be provided under the contract;
  - (3) the circumstances prevailing during the conclusion of the contract;
  - (4) to the other contract terms; and
  - (5) to the terms of any other contract on which the contract depends.

#### *Article 85*

##### ***Contract terms which are always unfair***

A contract term is always unfair for the purposes of this Section if its object or effect is to:

- (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or by someone acting on behalf of the trader;
- (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence
- (c) limit the trader's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
- (d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;
- (e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
- (f) give the trader the exclusive right to determine whether the goods, digital content or services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
- (g) provide that the consumer is bound by the contract when the trader is not;

- (h) require the consumer, if terminating the contract, to use a more formal method than that by which the contract was concluded;
- (i) grant the trader a shorter notice period to terminate than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or services not actually delivered, supplied or rendered at all;
- (k) determine that non-individually negotiated contract terms prevail or have preference over contract terms which have been individually negotiated.

#### *Article 86*

#### ***Contract terms which are presumed to be unfair***

A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:

- (1) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;
- (2) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
- (3) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;
- (4) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;
- (5) require a consumer who fails to perform his or her obligations to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance ;
- (6) entitle a trader to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for services not yet supplied in the case where the trader withdraws from or terminates the contract;
- (7) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- (8) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;
- (9) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of

indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract;

- (10) enables a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided or any other features of performance;
- (11) provide that the price of goods, digital content or services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
- (12) oblige a consumer to perform all his or her obligations where the trader fails to perform its own;
- (13) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
- (14) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;
- (15) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
- (16) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;
- (17) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;
- (18) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
- (19) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- (20) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- (21) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;

- (22) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- (23) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or services longer than one year, unless the consumer may terminate at all times with a termination period of no more than 30 days.

### **SECTION 3 UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN TRADERS**

#### *Article 87*

#### ***Meaning of “unfair” in contracts between traders***

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
  - (1) it is a term forming part of not individually negotiated terms supplied by one party; and
  - (2) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
  - (1) the nature of what is to be provided under the contract;
  - (2) the circumstances prevailing during the conclusion of the contract;
  - (3) the other contract terms; and
  - (4) the terms of any other contract on which the contract depends.

## **Part IV Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content**

### **Chapter 9 General provisions**

#### *Article 88*

##### ***Non-performance and fundamental non-performance***

1. Non-performance of an obligation is any failure to perform the obligation, whether or not the failure is excused, and includes:
  - (a) non-delivery or delayed delivery of the goods;
  - (b) non-supply or delayed supply of the digital content,
  - (c) delivery of goods which are not in conformity with the contract
  - (d) supply of digital content which is not in conformity with the contract,
  - (e) non-payment or late payment of the price; and
  - (f) any other purported performance which is not in conformity with the contract.
2. Non-performance of an obligation by one party is fundamental if:
  - (1) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
  - (2) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.

#### *Article 89*

##### ***Excused non-performance***

1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.
3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party became, or could be expected to have become, aware of these

circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

*Article 90*  
***Change of circumstances***

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
2. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations in accordance with good faith and fair dealing with a view to adapting or terminating the contract.
3. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:
  - (1) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
  - (2) terminate the contract at a date and on terms to be determined by the court.
4. Paragraphs (2) and (3) apply only if:
  - (1) the change of circumstances occurred after the time when the contract was concluded;
  - (2) the aggrieved party did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
  - (3) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.
5. For the purpose of paragraphs (3) and (4) a 'court' includes an arbitral tribunal.

*Article 91*  
***Extended application of rules on payment and goods or digital content not accepted***

1. Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12 apply with appropriate adaptations to other payments.
2. Article 98 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when that person is bound to do so.



## **Chapter 10      The seller's obligations**

### **SECTION 1   GENERAL PROVISIONS**

#### *Article 92*

#### ***Main obligations of the seller***

1. The seller of goods or the supplier of digital content (in this part called also the seller) must:
  - (1) deliver the goods or supply the digital content;
  - (2) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied; and
  - (3) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.
2. In addition to paragraph 1, the seller must ensure that the buyer has the right to use the digital content in accordance with the contract
3. The goods or the digital content must be in conformity with the contract.

#### *Article 93*

#### ***Performance by a third party***

1. A seller may entrust performance to another person, unless personal performance by the seller is required by the contract.
2. A seller who entrusts performance to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

### **SECTION 2   DELIVERY**

#### *Article 94*

#### ***Place of delivery***

1. Where the place of delivery cannot be otherwise determined, it is:
  - (1) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has

undertaken to arrange carriage to the buyer, the consumer's place of residence at the time of the conclusion of the contract;

(2) in any other case,

- (i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier;
- (ii) where the contract does not involve carriage, the seller's place of business at the time of conclusion of the contract.

2. If the seller has more than one place of business, the place of business for the purposes of point (b) in paragraph (1) is that which has the closest relationship to the obligation.

#### *Article 95* ***Method of delivery***

1. Unless agreed otherwise, the seller fulfils the obligation to deliver:

- (1) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods or the digital content to the consumer;
- (2) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or
- (3) in cases that do not fall within (a) or (b), by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.

2. In paragraph 1 (a) and (c), any reference to the consumer or the buyer includes a third party, not being the carrier, indicated by the consumer or the buyer in accordance with the contract.

#### *Article 96* ***Time of delivery***

- 1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered without undue delay after the conclusion of the contract.
- 2. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract.

*Article 97*

***Seller's obligations regarding carriage of the goods***

1. Where the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.
2. Where the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
3. Where the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

*Article 98*

***Goods or digital content not accepted by the buyer***

1. A seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.
2. The seller is discharged from the obligation to deliver if the seller:
  - (1) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or
  - (2) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer.
3. The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

*Article 99*

***Effect on passing of risk***

The effect of delivery on the passing of risk is regulated by Chapter 14.

**SECTION 3 CONFORMITY OF THE GOODS AND DIGITAL CONTENT**

*Article 100*

***Conformity with the contract***

1. In order to conform with the contract, the goods or digital content must:
  - (1) be of the quantity, quality and description required by the contract;

- (2) be contained or packaged in the manner required by the contract; and
  - (3) be supplied along with any accessories, installation instructions or other instructions required by the contract.
2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 101, 102 and 103, save to the extent that the parties have agreed otherwise.
3. In a consumer sales contract, any agreement derogating from the requirements of Articles 101 and 103 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it. The parties may not, to the detriment of the consumer, exclude the application of this paragraph or derogate from or vary its effects.

*Article 101*  
***Criteria for conformity of the goods and digital content***

The goods or digital content must:

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;
- (b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;
- (c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;
- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;
- (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 70; and
- (g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.

#### *Article 102*

##### ***Incorrect installation under a consumer sales contract***

1. Where goods or digital content supplied under a consumer sales contract are incorrectly installed, any non-conformity resulting from the incorrect installation is regarded as non-conformity of the goods or the digital content if:
  - (1) the goods or the digital content were installed by the seller or under the seller's responsibility; or
  - (2) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

#### *Article 103*

##### ***Third party rights or claims***

1. The goods or the digital content must be free from any right or not obviously unfounded claim of a third party.
2. As regards rights or claims based on intellectual property, the goods or the digital content must be free from any right or not obviously unfounded claim of a third party:
  - (1) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract;
  - (2) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract; and
  - (3) which the buyer did not know of or could not be expected to have known of at the time of the conclusion of the contract.

#### *Article 104*

##### ***Limitation on conformity of digital content***

Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has subsequently become available.

#### *Article 105*

##### ***Buyer's knowledge of non-conformity in a contract between traders***

In a contract between traders, the seller is not liable for any non-conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the non-conformity.

*Article 106*  
***Relevant time for establishing conformity***

1. The seller is liable for any non-conformity which exists at the time when the risk passes to the buyer under Chapter 14.
2. In a consumer sales contract, any non-conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods, digital content or the nature of the non-conformity.
3. In a case governed by Article 102 paragraph (1) (a) any reference in paragraphs (1) or (2) of this Article to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. In a case governed by Article 102 paragraph (1) (b) it is to be read as a reference to the time when the consumer had reasonable time for the installation.
4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.
5. The parties may not, to the detriment of a consumer, exclude the application of this Article or derogate from or vary its effect.

## **Chapter 11      The buyer's remedies**

### **SECTION 1   GENERAL PROVISIONS**

*Article 107*  
***Overview of buyer's remedies***

1. In the case of a non-performance of an obligation by the seller, the buyer may:
  - (1) require performance, which includes repair or replacement of the goods or digital content, under Section 3 of this Chapter;
  - (2) withhold the buyer's own performance under Section 4 of this Chapter;
  - (3) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;
  - (4) reduce the price under Section 6 of this Chapter; and
  - (5) claim damages under Chapter 16.
2. If the buyer is a trader:
  - (1) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and

- (2) the buyer's rights to rely on non-conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.
3. If the buyer is a consumer:
  - (1) the buyer's rights are not subject to cure by the seller; and
  - (2) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.
4. Paragraph (1)(d) does not apply to a contract for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.
5. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph (1) except requiring performance and damages.
6. The buyer may not resort to any of the remedies referred to in paragraph (1) to the extent that the buyer caused the seller's non-performance.
7. Remedies which are not incompatible may be cumulated.

#### *Article 108*

#### ***Limitation of remedies for digital content not supplied in exchange for a price***

Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in Article 107 paragraph (1) (a) to (d). The buyer may only claim damages under Article 107 paragraph (1) (e) for loss or damage caused to the buyer's property, including hardware, software and data, by the non-conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.

#### *Article 109*

#### ***Limits on derogation from consumer's remedies for non-conformity***

In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, directly or indirectly exclude the application of any Article which grants remedies to the consumer in respect of a non-conformity, or derogate from or vary the effect of such Article before the non-conformity is brought to the trader's attention by the consumer.

## **SECTION 2 CURE BY THE SELLER**

#### *Article 110*

#### ***Cure by the seller***

1. A seller who has tendered performance early and who is notified that it is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.



2. In cases not covered by paragraph (1) a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the non-conformity, offer to cure it at the seller's own expense.
3. The buyer may refuse the offer of cure only if:
  - (1) cure cannot be effected promptly and without significant inconvenience to the buyer;
  - (2) the buyer has reason to believe that the seller's future performance cannot be relied on; or
  - (3) delay in performance would amount to a fundamental non-performance.
4. The offer to cure is not precluded by notice of termination.
5. If the offer of cure is not refused by the buyer, the seller has a reasonable period of time to effect cure.
6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

### **SECTION 3 REQUIRING PERFORMANCE**

#### *Article 111*

#### ***Requiring performance of seller's obligations***

1. The buyer is entitled to require performance of the seller's obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
  - (a) performance would be unlawful or impossible; or
  - (b) the burden or expense of performance would be disproportionate to the benefit the buyer would obtain.

#### *Article 112*

#### ***Consumer's choice between repair and replacement***

1. Where, in a consumer sales contract, the trader must remedy a non-conformity under Article 111(2) the consumer may choose between repair and replacement unless the one chosen would be unlawful or impossible or, compared to the other, would impose costs on the seller that would be disproportionate taking into account:

- (1) the value the goods would have if there were no lack of conformity;
  - (2) the significance of the lack of conformity; and
  - (3) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the non-conformity by repair or replacement in accordance with paragraph (1), the consumer may resort to other remedies, except withholding performance, only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days.

*Article 113*  
***Return of replaced item***

1. Where the seller has remedied the non-conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.
2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

**SECTION 4 WITHHOLDING PERFORMANCE OF BUYER'S OBLIGATIONS**

*Article 114*  
***Right to withhold performance***

1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.
2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.

**SECTION 5 TERMINATION**

*Article 115*  
***Termination for non-performance***

1. A buyer may terminate the contract if the seller's non-performance under the contract is fundamental.

2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the non-conformity is insignificant.

#### *Article 116*

##### ***Termination for delay in delivery after notice fixing additional time for performance***

1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.
2. The period is taken to be of reasonable length if the seller does not object to it without undue delay.
3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.

#### *Article 117*

##### ***Termination for anticipated non-performance***

A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.

#### *Article 118*

##### ***Scope of right to terminate***

1. Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part, unless the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
2. Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

#### *Article 119*

##### ***Notice of termination***

A right to terminate under this Section is exercised by notice to the seller.

*Article 120*  
***Loss of right to terminate***

1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.
2. Paragraph (1) does not apply:
  - (1) where the buyer is a consumer; or
  - (2) where no performance at all has been tendered.

**SECTION 6 PRICE REDUCTION**

*Article 121*  
***Right to reduce price***

1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time it was made compared to the value of what would have been received by a conforming performance.
2. A buyer who is entitled to reduce the price under paragraph (1) and who has already paid a sum exceeding the reduced price may recover the excess from the seller.
3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

**SECTION 7 REQUIREMENTS OF EXAMINATION AND NOTIFICATION IN A CONTRACT BETWEEN TRADERS**

*Article 122*  
***Examination of the goods in contracts between traders***

1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances not exceeding 14 days from the date of delivery of the goods, supply of digital content or performance of services. Failure to do so may result in the buyer losing the right to rely on the non-conformity under Article 123.
2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
3. If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

*Article 123*

***Requirement of notification of non-conformity in sales contracts between traders***

1. In a contract between traders the buyer may not rely on a non-conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the non-conformity.
2. The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the non-conformity, whichever is later.
3. The buyer in any event loses the right to rely on a non-conformity if the buyer does not give the seller notice of the non-conformity within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.
4. Where the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (3) does not expire before the end of the agreed period.
5. Paragraph (3) does not apply in respect of the third party claims or rights referred to in Article 103.
6. The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.
7. The seller is not entitled to rely on the provisions of this Article if the non-conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer.

## **Chapter 12      The buyer's obligations**

### **SECTION 1   GENERAL PROVISIONS**

#### *Article 124*

##### ***Main obligations of the buyer***

1. The buyer must:
  - (a) pay the price;
  - (b) take delivery of the goods or the digital content; and
  - (c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.
2. Paragraph 1 (a) does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

### **SECTION 2   PAYMENT OF THE PRICE**

#### *Article 125*

##### ***Means of payment***

1. Payment may be made by the means of payment indicated by the seller or, if there is no indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction .
2. A seller who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The seller may enforce the original obligation to pay only if the order or promise is not honoured.
3. The buyer's original obligation is extinguished if the seller accepts a promise to pay from a third party with whom the seller has a pre-existing arrangement to accept the third party's promise as a means of payment.
4. In a contact between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means.

#### *Article 126*

##### ***Place of payment***

1. Where the place of payment cannot otherwise be determined it is the seller's place of business at the time of conclusion of the contract.

2. If the seller has more than one place of business, the place of business is that which has the closest relationship to the obligation to pay.

*Article 127*  
***Time of payment***

1. Payment of the price is due at the moment of delivery.
2. The seller may reject an offer to pay before payment is due if the seller has a legitimate interest in so doing.

*Article 128*  
***Payment by a third party***

1. A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.
2. The seller cannot refuse payment by a third party if:
  - (1) the third party acts with the assent of the buyer; or
  - (2) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time payment is due.
3. Payment by a third party in accordance with paragraphs (1) or (2) discharges the buyer from liability to the seller.
4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs (1) or (2) the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.

*Article 129*  
***Imputation of payment***

1. Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.
2. If the buyer does not make a notification under paragraph (1) the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.
3. An imputation under paragraph (2) is not effective if it is to an obligation which is not yet due or is disputed.
4. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:
  - (1) the obligation which is due or is the first to fall due;
  - (2) (b) the obligation for which the seller has no or the least security;



- (3) (c) the obligation which is the most burdensome for the buyer;
- (4) the obligation which arose first.

If none of those criteria applies, the payment is imputed proportionately to all the obligations.

- 5. The payment may be imputed under paragraph (2) or (4) to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.
- 6. In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.

### **SECTION 3 TAKING DELIVERY**

#### *Article 130* ***Taking delivery***

The buyer fulfils the obligation to take delivery by:

- (a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and
- (b) taking over the goods, or the documents representing the goods, or digital content, as required by the contract.

#### *Article 131* ***Early delivery and delivery of wrong quantity***

- 1. If the seller delivers the goods or supplies the digital content before the time fixed, the buyer may take delivery or, if the buyer has a legitimate interest in so doing, refuse to take delivery.
- 2. If the seller delivers a quantity of goods or digital content less than that provided for in the contract the buyer may take delivery or, if the buyer has a legitimate interest in so doing, refuse to take delivery.
- 3. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.
- 4. If the buyer retains the excess quantity it is regarded as having been supplied under the contract and must be paid for at the contractual rate.
- 5. In a consumer sales contract paragraph (4) does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.
- 6. This article does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price

## **Chapter 13      The seller's remedies**

### **SECTION 1    GENERAL PROVISIONS**

#### *Article 132*

#### ***Overview of seller's remedies***

1. In the case of a non-performance of an obligation by the buyer, the seller may:
  - (1) require performance under Section 2 of this Chapter;
  - (2) withhold the seller's own performance under Section 3 of this Chapter;
  - (3) terminate the contract under Section 4 of this Chapter; and
  - (4) claim interest on the price or damages under Chapter 16.
2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph (1) except requiring performance and damages.
3. The seller may not resort to any of the remedies referred to in paragraph (1) to the extent that the seller caused the buyer's non-performance.
4. Remedies which are not incompatible may be cumulated.

### **SECTION 2    REQUIRING PERFORMANCE**

#### *Article 133*

#### ***Requiring performance of buyer's obligations***

1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.
2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.

### **SECTION 3    WITHHOLDING PERFORMANCE OF SELLER'S OBLIGATIONS**

#### *Article 134*

#### ***Right to withhold performance***

1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.

2. A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.

## **SECTION 4 TERMINATION**

### *Article 135*

#### ***Termination for fundamental non-performance***

A seller may terminate the contract if the buyer's non-performance under the contract is fundamental.

### *Article 136*

#### ***Termination for delay after notice fixing additional time for performance***

1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.
2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period according to Article 168(2).
3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.
4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

### *Article 137*

#### ***Termination for anticipated non-performance***

A seller may terminate before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.

*Article 138*  
***Scope of right to terminate***

5. Where the buyer's obligations under the contract are to be performed in separate parts, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part, unless the non-performance is fundamental in relation to the contract as a whole.
6. Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.

*Article 139*  
***Notice of termination***

A right to terminate under this Section is exercised by notice to the buyer.

*Article 140*  
***Loss of right to terminate***

1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the non-conformity.
2. A seller loses a right to terminate by notice under Articles 137 unless the seller gives notice of termination within a reasonable time after the right has arisen.
3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.

## **Chapter 14      Passing of risk**

### **SECTION 1   GENERAL PROVISIONS**

#### *Article 141 Effect of passing of risk*

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### *Article 142 Identification of goods or digital content to contract*

The risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.

### **SECTION 2   PASSING OF RISK IN CONSUMER SALES CONTRACTS**

#### *Article 143 Passing of risk in a consumer sales contract*

1. In a consumer sales contract, the risk does not pass until the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied.
2. In a contract for the supply of digital content not supplied on a tangible medium, the risk does not pass until the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.
3. Except where the contract is a distance or off-premises contract, paragraph (1) and (2) do not apply where the consumer fails to perform the obligation to take over the goods or the digital content and the non-performance is not excused under Article 89. In this case the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed.
4. Where the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.

5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

### **SECTION 3 PASSING OF RISK IN CONTRACTS BETWEEN TRADERS**

#### *Article 144*

##### ***Time when risk passes***

1. In a contract between traders the risk passes when the buyer takes over the goods or the documents representing them.
2. Paragraph (1) is subject to Articles 145, 146 and 147.

#### *Article 145*

##### ***Goods placed at buyer's disposal***

1. If the goods are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over, unless the buyer was entitled to withhold taking of delivery under Article 114.
2. If the goods are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place.

#### *Article 146*

##### ***Carriage of the goods***

1. This Article applies to a contract of sale which involves carriage of goods.
2. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.
3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.
4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

#### *Article 147*

##### ***Goods sold in transit***

1. This Article applies to a contract of sale which involves goods sold in transit.
2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.

3. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

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# **Part V Obligations and remedies of the parties to a related service contract**

## **Chapter 15 Obligations and remedies of the parties**

### **SECTION 1 APPLICATION OF CERTAIN GENERAL RULES ON SALES CONTRACTS**

#### *Article 148*

#### ***Application of certain general rules on sales contracts***

1. The rules in Chapter 9 of Part IV apply for the purposes of this Part.
2. Where a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated.

### **SECTION 2 OBLIGATIONS OF THE SERVICE PROVIDER**

#### *Article 149*

#### ***Obligation to achieve result and obligation of care and skill***

1. The service provider must achieve any specific result required by the contract.
2. In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the service with the care and skill which a reasonable service provider would exercise under the circumstances and in conformity with any statutory or other binding legal rules which are applicable to the service.
3. In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:
  - (1) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the customer;
  - (2) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and
  - (3) the time available for the performance of the service.
4. Where in a contract between a trader and a consumer the service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 102.
5. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

*Article 150*  
***Obligation to prevent damage***

The service provider must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the service.

*Article 151*  
***Performance by a third party***

1. A service provider may entrust performance to another person, unless personal performance by the service provider is required.
2. A service provider who entrusts performance to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

*Article 152*  
***Obligation to provide invoice***

Where a separate price is payable for the service, and the price is not a lump sum agreed at the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.

*Article 153*  
***Obligation to warn of unexpected or uneconomic cost***

1. The service provider must warn the customer and seek the consent of the customer to proceed if:
  - (1) the cost of the service would be greater than already indicated by the service provider to the customer; or
  - (2) the service would cost more than the value of the goods or the digital content after the service has been provided, so far as this is known to the service provider.
2. A service provider who fails to obtain the consent of the customer in accordance with paragraph (1) is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods or digital content after the service has been provided.

### **SECTION 3 OBLIGATIONS OF THE CUSTOMER**

#### *Article 154* ***Payment of the price***

1. The customer must pay any price that is payable for the service in accordance with the contract.
2. The price is payable when the service is completed and the object of the service is made available to the customer.

#### *Article 155* ***Provision of access***

Where it is necessary for the service provider to obtain access to the customer's premises in order to perform the service the customer must provide such access at reasonable hours.

### **SECTION 4 REMEDIES**

#### *Article 156* ***Remedies of the customer***

1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely:
  - (1) to require performance;
  - (2) to withhold the customer's own performance;
  - (3) to terminate the contract;
  - (4) to reduce the price; and
  - (5) to claim damages.
2. Without prejudice to paragraph (3), the customer's remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.
3. In the case of incorrect installation under a consumer sales contract referred to in Article 102 the consumer's remedies are not subject to a right of the service provider to cure.
4. The customer, if a consumer, has the right to terminate the contract for any non-conformity in the service provided unless the non-conformity is insignificant.
5. Chapter 11 applies with the necessary adaptations, in particular:

- (1) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 110 (5) should not exceed 30 days;
- (2) in relation to the remedying of a non-conforming performance Articles 112 and 113 do not apply; and
- (3) Article 157 applies instead of Article 123.

#### *Article 157*

##### ***Requirement of notification of non-conformity in service contracts between traders***

1. In a service contract between traders, the customer may rely on a non-conformity only if the customer gives notice to the service provider within a reasonable time specifying the nature of the non-conformity.
2. The time starts to run when the service is completed or when the customer discovers or could be expected to discover the non-conformity, whichever is later.
3. The service provider is not entitled to rely on this Article if the non-conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the customer.

#### *Article 158*

##### ***Remedies of the service provider***

1. In the case of a non-performance by the customer, the service provider has, with the adaptations set out in paragraph (2), the same remedies as are provided for the seller in Chapter 13, namely:
  - (1) to require performance;
  - (2) to withhold the service provider's own performance;
  - (3) to terminate the contract; and
  - (4) to claim interest on the price or damages.
2. Chapter 13 applies with the following adaptations:
  - (1) Article 159 applies instead of Article 133 (2); and
  - (2) any other necessary adaptations.

#### *Article 159*

##### ***Customer's right to decline performance***

1. The customer may at any time give notice to the service provider that performance, or further performance, of the service is no longer required.
2. Where notice is given under paragraph (1):

- (1) the service provider no longer has the right or obligation to provide the service;  
and
  - (2) the customer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

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## **Part VI Damages and interest**

### **Chapter 16 Damages and interest**

#### **SECTION 1 DAMAGES**

##### *Article 160*

##### ***Right to damages***

1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.
2. The loss for which damages are recoverable includes future loss which the buyer could expect to occur.

##### *Article 161*

##### ***General measure of damages***

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

##### *Article 162*

##### ***Foreseeability of loss***

The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.

##### *Article 163*

##### ***Loss attributable to creditor***

The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.

##### *Article 164*

##### ***Reduction of loss***

1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

*Article 165*  
***Substitute transaction***

A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.

*Article 166*  
***Current price***

Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

**SECTION 2 INTEREST ON LATE PAYMENTS: GENERAL PROVISIONS**

*Article 167*  
***Interest on late payments***

1. Where payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus two percentage points. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.
2. The creditor may recover damages for any further loss.

*Article 168*  
***Interest when the debtor is a consumer***

1. When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 167 only when non-performance is not excused.
2. Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.
3. A term of the contract which fixes a rate of interest higher than that provided in Article 167, or accrual earlier than the time specified in paragraph (2) of this Article is not binding to the extent that this would be unfair according to Article 84.
4. Interest for delay in payment cannot be added to capital in order to produce interest.



5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

### SECTION 3 LATE PAYMENTS BY TRADERS

#### *Article 169*

#### ***Rate of interest and accrual***

1. Where a trader delays the payment of a price due under a contract for the supply of goods, digital content or services without being excused under Article 89, interest is due at the rate specified in paragraph (5).
2. Interest at the rate specified in paragraph (5) starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:
  - (a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or
  - (b) 30 days after the date of receipt of the goods, digital content or services, if the date under (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.
3. Where conformity of goods, digital content or services to the contract is to be ascertained by way of acceptance or examination, the 30 day period under paragraph (2) (b) begins on the date of the acceptance or the date the examination procedure is finalised. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of services, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 171.
4. The period for payment determined under paragraph (2) cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 171.
5. The interest rate for delayed payment is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus eight percentage points. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.
6. The creditor may recover damages for any further loss.

*Article 170*  
***Compensation for recovery costs***

1. Where interest is payable in accordance with Article 169, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor's recovery costs.
2. The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph (1) and incurred due to the debtor's late payment.

*Article 171*  
***Unfair contract terms relating to interest for late payment***

1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the product or the service.
2. For the purpose of paragraph 1, a contract term providing for a time or period for payment or a rate of interest less favourable to the creditor than the time, period or rate specified in Articles 168 or 169, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 170 is presumed to be unfair.
3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.

*Article 172*  
***Mandatory nature***

The parties may not exclude the application of this Section or derogate from or vary its effects.

## **Part VII Restitution**

### **Chapter 17 Restitution**

#### *Article 173*

##### ***Restitution on avoidance or termination***

1. In so far as a contract is avoided or terminated by either party, each party is obliged to return what that party ("the recipient") has received from the other party.
2. The obligation to return what was received includes any natural and legal fruits derived from what was received.
3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 9 (2), unless the nature of the contract is such that part performance is of no value to one of the parties.

#### *Article 174*

##### ***Payment for monetary value***

1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.
2. The monetary value of goods is the value they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.
3. Where a service contract is avoided or terminated by the customer after the service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the service.
4. In a case of digital content the monetary value of what was received is the amount the consumer saved by making use of the digital content.
5. Where the recipient has obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for avoidance or termination, the other party may choose to claim the substitute or the monetary value of the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods or digital content when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute.

6. In a case of digital content which is not supplied in exchange for the payment of a price, no restitution shall be made.

#### *Article 175*

##### ***Payment for use and interest on money received***

1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:
  - (a) the recipient caused the ground for avoidance or termination;
  - (b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or
  - (c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.
2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 167, where :
  - (a) the other party is obliged to pay for use; or
  - (b) it would otherwise be inequitable that interest is not paid, in particular when the recipient gave cause for the contract to be avoided.
3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received or interest on money received in any circumstances other than those set out in Paragraphs 1 and 2.

#### *Article 176*

##### ***Compensation for expenditure***

1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.
2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

#### *Article 177*

##### ***Equitable modification***

Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the obliged party did not cause, or lacked knowledge of, the ground for avoidance or termination.

*Article 178*  
***Mandatory nature of rules***

In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of the Articles of this Chapter or derogate from or vary their effects.

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## **Part VIII      Prescription**

### **Chapter 18      Prescription**

#### **SECTION 1   GENERAL PROVISION**

##### *Article 179*

##### ***Rights subject to prescription***

A right to performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.

#### **SECTION 2   PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT**

##### *Article 180*

##### ***Short and long period***

There are two periods of prescription. The short period is two years. The long period is ten years or, in the case of a right to damages for personal injuries, thirty years.

##### *Article 181*

##### ***Commencement***

1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.
2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.
3. Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each non-performance of the obligation.

### SECTION 3 EXTENSION OF PERIOD

#### *Article 182*

#### ***Suspension in case of judicial and other proceedings***

1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.
2. Suspension lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.
3. Paragraphs (1) and (2) apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.
4. Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.

#### *Article 183*

#### ***Postponement of expiry in the case of negotiations***

If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.

#### *Article 184*

#### ***Postponement of expiry in case of incapacity***

If a person subject to an incapacity is without a representative, the short and long periods of prescription of a right held by that person do not expire before one year has passed after either the incapacity has ended or a representative has been appointed.



## **SECTION 4 RENEWAL OF PERIOD**

### *Article 185*

#### ***Renewal by acknowledgement***

If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run.

## **SECTION 5 EFFECTS OF PRESCRIPTION**

### *Article 186*

#### ***Effects of prescription***

1. After expiry of the short or long period of prescription the debtor is entitled to refuse performance and the creditor loses all remedies for non-performance except withholding performance.
2. A prescribed right may nonetheless be relied on as a defence or for purposes of set-off.
3. Whatever has been paid or transferred by the debtor in performance of the obligation may not be reclaimed merely because the period of prescription had expired.
4. The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.

## **SECTION 6 MODIFICATION BY AGREEMENT**

### *Article 187*

#### ***Agreements concerning prescription***

1. The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.
2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.
3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.
4. The parties may not exclude the application of this Article or derogate from or vary its effects.
5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.

## Appendix I

### Information concerning the exercise of the right of withdrawal

#### A. Model instructions on withdrawal

##### Right of withdrawal

You have the right to withdraw from this contract within 14 days without giving any reason.

The withdrawal period expires after 14 days from the day 1.

To exercise the right of withdrawal, you must inform us <sup>[2]</sup> of your decision to withdraw from this contract by a clear statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory. <sup>[3]</sup>

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

##### Effects of withdrawal

If you withdraw from this contract, we will reimburse all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement. <sup>[4]</sup>

<sup>[5]</sup>

<sup>[6]</sup>

##### Instructions for completion:

<sup>[1]</sup> Insert one of the following texts between inverted commas here:

- a) in the case of a service contract or a contract for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium: "of the conclusion of the contract.";
- b) in the case of a sales contract: "on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.";
- c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: "on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last good.";

- d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: "on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last lot or piece.";
- e) in the case of a contract for regular delivery of goods during a defined period of time: "on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first good."

2 Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address here.

3 If you give the option to the consumer to electronically fill in and submit information about his or her withdrawal from the contract on your website, insert the following here: "You can also electronically fill in and submit the model withdrawal form or any other clear statement on our website [insert internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a withdrawal on a durable medium (e.g. by e-mail) without delay."

4 In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following here: "We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest."

5 If the consumer has received goods in connection with the contract, insert the following here:

a insert either:

- "We will collect the goods."; or
- "You shall send back the goods or hand them over to us or \_\_\_\_ [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your withdrawal from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired."

b insert either:

- "We will bear the cost of returning the goods."; or
- "You will have to bear the direct cost of returning the goods."; or
- If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: "You will have to bear the direct cost of returning the goods, \_\_\_\_ EUR [insert the amount]."; or if the cost of returning the goods cannot reasonably be calculated in advance: "You will have to bear the direct cost of returning the goods. The cost is estimated to a maximum of approximately \_\_\_\_ EUR [insert the amount]"; or
- If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer's

home at the time of the conclusion of the contract: "We will collect the goods at our own expense."

Ⓒ "You are only liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods."

6 In the case of a contract dealing with the provision of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, insert the following: "If you requested to begin the performance of services or the supply of water/gas/electricity/district heating [delete where inapplicable] during the withdrawal period, you shall pay us an amount which is in proportion to what has been provided until you have communicated us your withdrawal from this contract, in comparison with the full coverage of the contract.".

## B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To [here the trader's name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:
- I/We\* hereby give notice that I/We\* withdraw from my/our\* contract of sale of the following goods\*/for the provision of the following service\*
- Ordered on\*/received on\*
- Name of consumer(s)
- Address of consumer(s)
- Signature of consumer(s) (only if this form is notified in writing)
- Date

\* Delete as appropriate.