A NOTE ON SERVICES IN THE EUROPEAN UNION REGULATIONS: IS ONLINE DIGITAL CONTENT A SERVICE?

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Abstract:
The first section analyses European Union legal texts on the goods-services distinction. They view the former as tangible entities, while the latter covers all intangible ones. The writing of the key article on services in the EU main Treaty may also be confusing. The second section explains the new approach of the service that the economic analysis has developed, especially relevant in the context of the knowledge economy. The third section shows that the Single Market Digital Strategy of the European Commission faces difficulties caused by the outdated service definition it uses. The problems affect the VAT rate applicable to intangible goods, regarded as services (e.g. e-books vs. tangible books), and the Directives or Communications handling the provision of Digital Content. This concept, coined among other things to bypass the outdated definition, induces a contorted law treatment of intangible goods and, at least, undue contractual idiosyncrasies. Adopting the new economic approach of the service would solve the problems underlined and help fostering the digital economy.

Résumé :
La première partie examine la réglementation de l’Union Européenne concernant la distinction biens-services. Elle montre qu’elle repose essentiellement sur l’opposition matérielité-immatérielité. Elle souligne également que la rédaction du principal article sur les services dans le Traité (TFUE) tend à introduire des confusions. La deuxième partie expose la nouvelle approche économique du service, particulièrement adaptée à l’économie de la connaissance. La troisième partie montre que la Stratégie pour un Marché Unique Digital est confrontée aux problèmes causés par l’utilisation d’une définition dépassée du service. Les difficultés concernent d’abord le taux de TVA applicable aux biens immatériels, considérés par l’UE comme des services (p.ex. les livres numériques opposés aux livres tangibles). Elles concernent ensuite les directives et communications qui s’intéressent à la fourniture du contenu numérique. Ce concept, notamment inventé pour contourner la conception dépassée du service, conduit à un traitement juridique contourné et au développement d’idiosyncrasies contractuelles injustifiées. L’adoption de la nouvelle approche économique du service permettrait de résoudre ces problèmes et de favoriser le développement de l’économie numérique.

JEL codes : L80; L86; K20; O34

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Introduction

In a judgment issued on March 2015 the 5th, about a dispute between inter alia the French Republic and the European Commission (EC), regarding the VAT rate applicable to digital books, the European Union Justice Court (EUJC) was driven to reiterate the criterions defining services and the VAT rate for “electronically supplied services”. The Court confirmed that, as for the European Union regulation, digital books were such services. Since these services may not benefit from a reduced VAT rate, digital books are to be taxed at the standard rate. Many observers consider that traditional paper and digital books are two forms of the same product, thus should not be fiscally discriminated. Four countries (France, Germany, Italy and Poland) have officially asked on March 2015 the 19th the EC to put an end to peculiar present situation. However, among several legal difficulties, this wish is confronted to the definition of services adopted by EU, which weaknesses the EUJC ruling underlines. These circumstances call for a study of the good-service distinction in use in the EU, its adverse consequences and the potential ways to overcome them.

Beyond theoretical matters, this subject is of major consideration since the EC has launched a Digital Single Market Strategy (COM 2015/192), aiming at “maximising the growth potential of our European Digital Economy” and “Creating the right conditions for digital networks and services to flourish”. The present European approach regarding digital content might be detrimental to this strategy as it will be suggested.

The paper is organised as follows. The first section studies the definition of the service as it appears in European legal texts. It will be the occasion to show that it owes much to the old economic conception of the service, but also that the European law very writing induces some confusion. The second section explains the new economic approach on the service and shows that it may help solving the digital product problems. The third section focuses on the specific regulation difficulties, brought into the Digital Strategy, by the European view on the service, especially regarding the VAT rate and Digital Content matters. It offers several suggestions to overcome them.

1. THE SERVICE IN EUROPEAN OFFICIAL TEXTS: A CONFUSIONIST CONCEPT?

Most frequently Directives and European regulations use the notion of service without explaining it, as if it was straightforward. It is not an uncommon practice, since for example, the Vienna 1980 United Nations Convention on Contracts for the International Sale of Goods (CCISG), never defines what a good, or conversely a service are (UNO 2010). Nonetheless, EU regulations happen to provide elements of characterisation, referring to the Rome Treaty n°60 article (respectively n°57 Treaty on the Functioning of the European Union, TFEU), which is dedicated to services. This article states that: “Services shall be considered to be ‘services’ (…), in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons” (Box n°1). Although it is not giving true clues on what services are, this approach delineates them by default.

2 “The supply of electronic books is an ‘electronically supplied service ...’ within the meaning of the second subparagraph of Article 98(2).”
3 The Article #1, only states: “This Convention applies to contracts of sale of goods (…)”
1.1. A residual notion: the service is a non-good

As a matter of fact, it is worth noticing that the text begins by declaring that services shall be non-goods, which is not entirely illuminating. Nevertheless, the reasoning of the Rome treaty indeed defines services by lack; as such, they correspond to economic transactions that are not concerning goods, capital or persons. While, even if the sentence may sound rather strange, everyone may easily understand that services are not capital or persons, the key difference between goods and services remains implicit and unexplained. However, this manner of defining services may be related to the fact that European treaties are interested in services in the perspective of international trade. Consequently, they are most probably influenced by the Balance of Payments approach, which Current Accounts are traditionally split between goods and a huge conglomerate of transactions that were, at the time of the Rome Treaty, called ‘invisibles’ and are generally associated with services. In this perspective services are a complementary set to goods.

Several European texts may illustrate this view, for instance the 2006 VAT Directive states in its article 24, § 1: “Supply of services’ shall mean any transaction which does not constitute a supply of goods” (TVA 2006/112).

Since a service is primarily defined as opposed to a good, it is necessary to delineate the characteristics of goods. Again, they are not explained in the European treaties. However, it is rather straightforward to understand, when reading other European legal texts, that they are characterised by their materiality or tangibility. This view is illustrated, for instance, by the 2006 VAT Directive which states in its article n°14 § 1, that “‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner”, or else by the sale Directive 1999/44 which states even more clearly in its art.1 (b) “consumer goods: shall mean any tangible movable item, (…)”. The (COM 2011/635) proposal for a Common European Sales Law, which will be commented below, uses the same definition in its article n°2, § h: “‘goods’ means any tangible movable items (…)”.

Since services are not typically immovable items, the main discrepancy between the two economic entities has to be the tangibility vs. intangibility opposition. As it may be deduced, a side effect of the European view is to establish a separation between tangible and intangible goods. Only the formers are deemed proper goods. Consequently, since it is neither an asset nor a person, an intangible good must be viewed as a service. In this line of reasoning, the article n°25 of the 2006 VAT Directive states that a supply of services may, inter alia, consist in “the assignment of intangible property”. Therefore, digital goods are services and, for instance, a digital book, regarded differently from its standard book counterpart, is one of them. The conjoined twins are hence detached. Following this European approach, the March the 5th judgement of the European Union Justice Court (EUJC), recalls that, since it is digitalised, the e-book is: “an electronically supplied service” (emphasis added). To prevent any misunderstanding, it has to be mentioned that this characterisation does not come from the type of supply digital products require, which departs from that of standard goods (i.e. they commonly need e-sale). It is the very fact that immaterial goods are intangible that legitimates the classification. Even if, as mentioned, the case of e-books has been very much publicised, the reasoning regards all digitalised goods, including music, images, movies… Let us notice that in the economic literature these goods are most often regarded as information.

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4 To be more specific, above all, the sentence aims at restricting services to those which are usually provided for remuneration.

5 The French version does only better on a pure literary point of view, since it avoids using twice the same word. It states that: “sont considérées comme services les prestations…”.

6 The supply of electronic books is an ‘electronically supplied service …’ within the meaning of the second subparagraph of Article 98(2).
goods (Shapiro and Varian, 1999). Anyhow, the EU approach has high stake consequences, as it will be shown in next sections.

Once selected, despite growing problems of relevance, the tangibility criterion becomes resisting and resilient. For instance, a revision of the VAT Directive aimed in 2009 at taking into account the technical progress occurring in the book industry\(^7\), and changed the sentence: “supply (…) of books” into “supply (…) of books on all physical means of support” (TVA 2009/47; see Annex n°1). Regardless of this change, the EU Justice Court 2015 ruling did not see any will to extend the notion of book, to digital books: the tangibility criterion remains unaffected. Let us mention that the exemplification list, provided in the VAT 2009/47 Directive Annex III, was not truly helping on this matter. Finally, a digital book is still deemed to be a service, while a paper book is a good.

This kind of classification problem is not unique. For instance it appeared previously in a fiscal dispute regarding the taxation of the printing industry, where the French government argued that “printing is a service activity”. The Court stated that “printing works should not be characterised as services, since the direct outcome of a printer activity is a material entity (…)” (EUCJ 1985)\(^8\). From what we may respectively induce that, according to this approach, both digital books and software publishing activities are services-producing activities. However, it will be argued below that they should not be regarded as such, because both produce information (thus intangible) goods.

When focusing on the materiality vs immateriality opposition, case and European laws mainly draw their inspiration from the traditional economic views. Indeed, if the standard economic approach uses several criteria to differentiate the service from the good, among which non-storability or the necessity to provide services in presence of a customer, intangibility is certainly the most prominent one. The 2004 World Investment Report for example, illustrates these views: “Services are usually perceived as intangible, invisible, perishable and requiring simultaneous production and consumption, while goods are tangible, visible and storable and do not require interaction between producers and consumers” (UNCTAD 2004 p. 145). By essence, digital goods such as e-books, when considered out off their carrier are obviously intangible and invisible.

This should be kept in mind since it has also major consequences for the sale contracts (COM 2011/83) especially its aftermath, i.e. online sales and digital content proposal (COM 2015/634).

Box n°1: service(s) in European Treaties

**Article #60 (Rome)/#50 (TEC)/#57 (TFEU)**

Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

‘Services’ shall in particular include:

(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;

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\(^7\) The n°4 recital of the Directive 2009/47 declares in its Annex III: “Directive 2006/112/EC should furthermore be amended (…) in order to clarify and update to technical progress the reference to books”.

\(^8\) « On ne saurait qualifier de « services » les travaux d'imprimerie, dès lors que les prestations de l'imprimeur conduisent directement à la fabrication d'un objet matériel » EUCJ/CJUE 1985.
(d) activities of the professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

1. 2 Service or services-producing activities?

The n°60 article of the Rome treaty depicts another peculiarity when it specifies that services includes inter alia: “activities of an industrial character; activities of a commercial character; activities of craftsmen; activities of the professions” (Box n°1).

This second oddity derives from the equivalence drawn between the term service(s), which in the article primarily designates an outcome (i.e. service provision), and the expression services activities, which refers to an economic sector or activity. In doing so there is an implicit but unwarranted logical shift. Yet, if services are mostly provided by services firms, they are also provided by firms belonging to other economic sectors, such as, for instance, manufacturing or construction. Activities of an industrial character or of craftsmen, which are included in the article’s list, are typical manufacturing activities, which nevertheless may provide services when they perform repair or installation.

For instance, for a craftsman the action of building a chimney falls under manufacturing, but its repair or else the installation of a chimney kit, fall under service provision. The two outcomes refer to separate legal contracts, on the one hand the sale contract and on the other hand the service contract (see further on). Nevertheless, it should be obvious that craftsmen activities, as well as “activities of an industrial character” are not services (activities). They do not belong to the same economic category as, self-employed professionals, or telecommunications, or else transportation activities… In other words, it is not because there may be manufacturing or construction services, that manufacturing or construction become services-producing industries. The article’s line that tends to assert the opposite is embarrassing and incorrect.

Finally, including activities (an economic sector approach) in a characterisation of the service (product approach), tends to obscure the whole article.

It is worth reminding that, on a statistical point of view, the two perspectives are undoubtedly distinct. On the one side there are activities classifications, such as for instance the UNSTATS International Standard Industry Classification (ISIC), on the other side

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9 This last word is a poor translation of the French « professions libérales », which meaning would have been better rendered by “self-employed professionals”.

« Professional: this Major Occupational Group (MOG) includes occupations concerned with the study, application, and/or administration of physical, mathematical, scientific, engineering, architectural, social, medical, legal statute, biological, behavioral, library, and/or religious laws, principles, practices or theories. Some occupations are concerned with interpreting, informing, expressing, or promoting ideas, products, etc. by written, artistic, sound or physical mediums. (…) » CF. Standard Occupational Classification 2010 manual BLS.

10 It is worth stressing that this kind of mix-up would not have been possible with goods. Indeed the word goods may not designate an activity.

11 In this regard, Art. 8 of Regulation (2011/282) or its n°12 recital accurately explains: « It is necessary, (...), to establish that a transaction which consists solely of assembling the various parts of a machine provided by a customer must be considered as a supply of services (...)”.

product classifications, such as for instance the UNSTATS Central Product Classification (CPC). Consequently the service, as an outcome entity, cannot be mistaken with services activities. The Balance of Current Accounts’ approach, which understandably the writers of the Rome Treaty article had in mind, basically follows a product rationale, inspired by the CPC\textsuperscript{13}.

The product / economic sector muddle, brought in by the Rome Treaty, eventually goes through most European regulations. Sometimes legal texts regard the service as a provided entity (product approach; VAT Directive), sometimes as an activity (economic sector approach; Services Directive), but they all refer to the same n°60 article without specifying what aspect is addressed. In this way, article n°4 of the 2006 Services Directive, when referring to the beginning of the aforementioned article, reads: “‘service’ means any self-employed economic activity, normally provided for remuneration” (DIR 2006/123), thus targeting services activities. The reference is rather incorrect since, in the article, the corresponding sentence concerns service provision and not services activities. It is thus inaccurately that the word service is here employed for services activities, even if it designates the Directive main object.

At this stage of the analysis, it is worth emphasising that, to avoid the confusion between the service and the services activities, the economic literature usually save the singular service for the outcome, and uses the plural services to designate activities. But the n°60 (57 TFEU) article, from its very beginning, utilises the plural services, especially when designating an outcome, which certainly adds interpretation complications. Moreover, in the last paragraph the English version refers to “the person providing a service”, whereas the French text reads “le prestataire”, which may relate to a natural person, but more certainly to a moral one (i.e. a firm). The English version is more ambiguous, because many readers will read a \textit{natural} person rather, than a \textit{moral} person. For its part, the services Directive surely entertains the confusion, when it uses the singular service to designate a services activity. This kind of mix-up might illuminate the problems met with e-books (respectively digital products), which categorisation within the service category might come from reflections about the alleged services-producing firms that provide them. In a nutshell, there might be a mix-up between the potential cataloguing of the provider, and that of the provided outcome.

In this regard, in the VAT Directive (2006/112, article n°24; Box n°2), the provision of services is defined in relation with a delivery; in substance a service provision is a delivery of service\textsuperscript{14}. Yet above all, the delineation of the service as a product, like for all categories of products, should rather be done using fabrication specificities\textsuperscript{15}. In not doing so, when pointing on sale (delivery), the European law approach both, indecisively separates goods from services and incorporates Trade within Services provision.

\textsuperscript{13} Sure enough the discussed wording of the Rome Treaty was probably a simplified writing. Nevertheless, being included in a seminal law Treaty, it produces undue consequences. Over simplified writings, may have adverse legal consequences.

\textsuperscript{14} The French text is clearer than the English one: « Est considérée comme «prestation de services» toute opération qui ne constitue pas une livraison de biens ». The English translation refers to the term “supply” which is usually the counterpart to “offre” in French, whereas the word “prestation” designates both the making and the delivery of a service. Thus the expression “service provision” would have been better. The sentence would have been: “Shall be regarded as services provision any economic transaction that is not a delivery of goods”.

\textsuperscript{15} Those circumstances result from the definition of economic activity coined by the European Case Law, which ignores production and is only interested in exchange (Bernard 2009). In the economic sense, according to the French statistical division INSEE: “The economic activity of a productive unit is the process which leads to the manufacturing of a product or to the provision of a service” « l’activité économique d’une unité de production est le processus qui conduit à la fabrication d’un produit ou à la mise à disposition d’un service ». 
Article 25 of the VAT 2006/112 Directive illustrates this extension: “A supply of services may consist, inter alia, in (...) the assignment of intangible property (...)” (Box n°2). A service provision may thus consist in a pure transfer of a good\textsuperscript{16}, i.e. a simple change in ownership, with no transformation\textsuperscript{17}. From an economic point of view, this operation belongs to Trade. Indeed, as underlines the 2008 ISIC manual: « sale without transformation » belongs to wholesale or retail trade (G major section)\textsuperscript{18}. Providing a service supposes at least a minimal transformation of the material object or the individual on which it is applied. Incidentally in agreement with this economic approach, the implementation regulation (REG 2011/282) creates a warranted exclusion to the VAT Directive general principles, when it states that: “The supply of prepared or unprepared food or beverages or both, whether or not including transport but without any other support services, shall not be considered restaurant or catering services (...)” (Article n°6 al.2). Although, the rationale of this consideration is not explained to the reader and may seem illegitimate given EU references, its economic motive comes straightforwardly from the fact that, what the quoted sentence merely describes is Trade.

Nonetheless, besides classification considerations, it is of major importance to analytically separate the economic operation of making available (Trade), and the entity which is subject to the transfer, which may be a good or a service. European texts under consideration tends to assimilate the former with the latter, when the delivery is made online (Cf. Article n°7 of the implementation regulation 2011/ 282 al.1&2). Yet in Trade, when VAT is at stake, the tax weights on the product sold, not on the economic operator.

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<thead>
<tr>
<th>Box n°2: Directive 2006/112/CE VAT</th>
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<tr>
<td><strong>Article 24</strong></td>
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<tr>
<td>‘Supply of services’ shall mean any transaction which does not constitute a supply of goods.</td>
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<tr>
<td>(...)</td>
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<tr>
<td><strong>Article 25</strong></td>
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<td>A supply of services may consist, inter alia, in one of the following transactions:</td>
</tr>
<tr>
<td>(a) the assignment of intangible property, whether or not the subject of a document establishing title;</td>
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<td>(...)</td>
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This section explained that European texts regard service as a non-good, i.e. primarily a non tangible entity. Besides, the writing of the main Treaty article, give rise to confusion between the service as a product, and services as activities. The definition incorporates Trade in services. The major upshot is that digital goods are seen as services. For instance an e-book is regarded as a service, whereas a traditional book is with no question a good. The two forms

\textsuperscript{16} Provided it is intangible, this aspect will be addressed below.

\textsuperscript{17} « ‘Electronically supplied services’ (...) shall include services which are delivered over the Internet or an electronic network and the nature of which renders their \textit{supply essentially automated and involving minimal human intervention}, (...) », (Regulation 2011 / 282, art. 7 al.1) bold emphasis added.

\textsuperscript{18} « This section includes wholesale and retail sale (i.e. sale without transformation) of any type of goods and the rendering of services incidental to the sale of these goods. Wholesaling and retailing are the final steps in the distribution of goods. (...) Sale without transformation is considered to include the usual operations (or manipulations) associated with trade (...) » (UNO 2008 p. 179).
of the same product are thus analysed in disconnected ways. The second section will show that recent economic analyses provide a way to overcome those inopportune views.

2. THE NEW ECONOMIC APPROACH OF THE SERVICE

New Information and Communication Technologies (NICT), especially digitalisation and internet access, have made obsolete the traditional views on the service. On the one hand, they loosen the proximity relationship that linked consumers and providers, since several services can be provided from a distant place. On the other hand, several goods can be dematerialised and instantly provided to the consumer using download, conferring them the look of services, i.e. a combination of intangibility and customer-provider direct link. Several authors thus consider that the separation between goods and services has faded away, or even has lost significance (Pilat and Wölfl 2005). However, as maybe understood with the EU literature and at least for fiscal or legal matters, this difference is of critical interest. Yet, sticking to the old way of thinking, as UE law or CJEU do, is increasingly less and less defendable. Fortunately, based on Hill’s works (1977, 1999) there has been a revival of the economic notion of service, which may help overcoming EU regulations ambiguities.

1.1 The ownership criterion

The new approach does not rely on tangibility to separate goods from services, but on the contrast between flows and stocks. A service is a flow, meaning that it is a transformation: “a change in the condition of a person, or of a good belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic unit” Hill (1977, p. 318). Being a change, the service cannot be seized, thus is indeed not tangible. This fact has often been equated to immateriality, giving rise to the idea that the contrast between goods and services relied primarily on physicality. Sure enough, tangible movable item are goods as for instance the 1999/44 Directive on certain aspects of the sale of consumer goods states (see Art. 2 a.l.b). However, this is too narrow a view and a misleading simplification. On the one hand goods are not only tangible items, on the other hand, immateriality is for services a state of fact, not a founding criterion. Intangibility is thus neither a decisive, nor an exclusive attribute. More crucial is the fact that a service cannot be cut off from its provider or recipient, i.e. is not in itself separable. As a consequence it is not prone to ownership rights, whereas a good whether tangible or not, definitely is.

A flow is indeed not an identifiable, individualised entity, over which ownership rights could be established. Hill (1999 pp. 441-42) stresses that “Because it [service] is not an entity, it is not possible to establish ownership rights over a service and hence to transfer ownership from one economic unit to another”. It is necessary to make clear the reasoning; the very service, i.e. the outcome of the productive process, cannot give rise to ownership rights, even if it may be applied on an object apt to ownership rights. This feature chiefly stems from an actual unfeasibility, owing to production specificities, which prevents to isolate the proper provided service. For instance, repair is a process which is applied on third party property, which outcome is not transferable disjointedly from the means (whether human or technical) that allows performing it. As for the repaired object, it accepts ownership rights. When the process applies to a natural person (e.g. health or education services), no ownership rights may be established.
This perspective may be connected to the traditional civil law partition between Real Rights, which are attached to a thing, and Personal Rights which a person possesses in relation strictly to the duties owed to him by others. Real Rights give an immediate and direct power on the considered thing, which is expressed in ownership rights; whereas Personal Rights posit their owner in front of a person with whom he is linked by a contractual agreement. They give their owner the right to require from others the fulfilment of obligations.

With the new approach, the good-service separation is preserved and grounded on more illuminating and effective principles. One, rather unexpected but decisive consequence, is that proper services cannot be stolen, at least in the traditional sense that applies to goods. This feature stems indeed from the fact that, by essence a flow is not seizable or separable, thus stealing it, is out of reach. From an analytic point of view, this is entirely consistent with the fact that a service cannot bear ownership rights. For instance, stealing a service of transport supposes to rob either, the transportation means (whatever it may be), or the transportation voucher, or else to be a stowaway. In none of these circumstances the service itself is stolen, i.e. in a separated way that might allow using it further on. Even the illegal taking of a transportation ticket is not stealing a service, but a purchase instrument.

The new economic approach has been endorsed by the System of National Accounts (SNA) (see box n°3), and the Balance of Payments (BoP manuals).

Box n°3: The service in the UNO 2009 SNA manual

“Services are the result of a production activity that changes the conditions of the consuming units, or facilitates the exchange of products or financial assets. (…) services are outputs produced to order and typically consist of changes in the conditions of the consuming units realized by the activities of producers at the demand of the consumers. [They] are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. By the time their production is completed, they must have been provided to the consumers.”

SNA 2009 § 6.17

In a way EU law, acknowledges that ownership rights are connected to goods. The 2006 VAT Directive Art. 14 al.1. reads: “‘Supply of goods’ shall mean the transfer of rights to dispose of tangible property as owner”; the Directive on consumer rights (2011/83) art. 2. 5 states: “‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer” (italic emphasis added). In both cases, goods are associated with ownership or transfer of rights; conversely services should be recognised being deprived from this characteristic. Nevertheless, EU regulations do not draw the full consequences of this feature, because they are not fully aware of its critical nature. This circumstance carries adverse effects.

1.2 The case for intangible goods and originals

An adverse consequence of the EU traditional views on services is that intangible goods are treated as quasi-services. However, this view of principle is not workable (see third section). The new approach on the contrary promotes an integrated and more consistent treatment of both material and immaterial goods, distinct from that of services. As such, it allows conciliating the treatment of goods independently from their physical aspect. This sub-
section explains the new approach on intangible goods, which are composed of two classes of goods: originals and copies.

The new economic approach calls immaterial goods such as patents, source code of software, architect plan, copyrights… “originals”. Even if an original may be embedded in a physical carrier, the original itself is immaterial, because it is the result of an intellectual creation. It must be stressed that the original is not the first physical materialisation of a plan, book, patent, music or movie, the original is the corresponding intellectual production that may be stored on a physical mean (Hill 2003). As Hill’s (2003 p. 13) puts it: “(…) the author’s manuscript of a book, such as a new Harry Potter book, is not the original. The original consists of the original story and ideas which are contained in the manuscript, and then copied into subsequent printed books”. Thus the original is pure information, but organised in a specific way that enhances knowledge. The term original has been chosen to highlight that it is the outcome of a creative process and that its value stems from the very first outcome of this process. An original is a good as Hill (1999 p. 441-42) has explained: “An original is the archetypal immaterial good. It is a good because it is an entity over which ownership rights can be established and which is of economic value to its owner”. It possesses all the features of merchandise, for the physical aspect.

Originals must be distinguished from their copies for two reasons.

On the one hand, contrary to a transaction concerning an original, a transaction concerning a copy is linked to its mode of transfer, i.e. to its final carrier. When an editor buys an original novel, it may have a paper or a file appearance. Nevertheless, the contingent carrier does not alter its value or the agreed price. When a customer buys a copy of a novel, he chooses between a paper book and an e-book (good purchase), or else a library or online temporary access (service purchase), the transaction and the price are attached to the form of the sale, i.e. the provision mode.

On the other hand an original is an asset, whereas a copy is an ordinary good. In other words originals belong to investment goods, because the expenses they have required will generate future incomes, i.e. will have durable revenue effects. Copies are consumption goods, whether final or intermediary. This perspective is now adopted by the last revisions of SNA and BOP (IMF 2009 § 10.138).

An original may be duplicated as many times as necessary with no alteration of information. These copies are ordinary goods, which, especially in the case of digital copies, might be viewed as, as effective as the original, since they are truly alike. Nevertheless, the contract, rights and obligations that are attached to each of them are not alike. For instance a consumer good contract does not permit extensive duplication. The type of the contract also determines within which category, i.e. goods or services, the provision of a good falls. When a good, whether tangible or not, is sold outright the transaction relates to a sale contract. When it is rendered accessible through a contract of license use (limited duration of use) or access (remote file operated on the cloud), i.e. being rented, the transaction is a service one. In this latter case there is no ownership transfer, only a temporary right to use. These views are essential to the treatment of digital content in the proposal Directive (COM 2015/634, further on).

3. SERVICES AND INFORMATION GOODS WITHIN THE DIGITAL STRATEGY

The EU views regarding goods and services have undesirable consequences on recent regulations aiming at fostering the Digital Economy. Because they are not entirely workable, they induce difficulties on the treatment of digital goods, they generate the need for special cases and contractual contortions. Those difficulties constitute a significant burden and might
impede the goal sought. Two fields, both incorporated in the Digital Strategy, have especially been affected: VAT and online Digital Content provision.

3.1 Adverse consequences of the outdated notion of service for VAT

In the Digital Single Market Strategy for Europe Communication, the EC states that: «The Commission is working to minimise burdens attached to cross-border e-commerce arising from different VAT regimes, provide a level playing field for EU business and ensure that VAT revenues accrue to the Member State of the consumer» (COM 2015/192 p. 8).

According to EU law, only goods and a few selected services may benefit from reduced VAT rates (Annex n°1). Consequently to fulfil the aforementioned goals, there is a need of a clear understanding of what a service is, and a precise delineation of the boundary between goods and services. But on these two aspects, the EU approach is somewhat unworkable and surely outdated.

A minor consequence of the discussed inadequacies relates to the categorisation of the production of public utilities, such as electricity, gas... At least, as from Directive 1999/44/EC (Art.1 al.2b), EU law regards their outcome as services, because prima facie it looks intangible. It is worth remarking that this seeming intangibility is not of the same nature, as that of information goods. It is merely visual, because public utilities outcomes may be tangible by other major senses, such as feeling or the sense of smell, or even in some circumstances that of hearing. Nonetheless, since several EU members wish to be able to apply reduced VAT rate to public utilities, an exception to EU principles had to be created. Indeed Art. 15. al.1 of the VAT 2006/112 Directive states: “Electricity, gas, heat, refrigeration and the like shall be treated as tangible property”. In fact this special provision might have been easily avoided. Because they are separable from their provider as well as their recipient, and accept ownership rights, these outcomes are actually goods. Moreover, their sale, when priced by the volume, should plainly belong to the sale contract (see next sub section). There is hence no need of juridical complications or contortions; public utilities have only to be recognised as what they indeed are: goods-producing activities. It would be much simpler and effective.

The major adverse effect nevertheless comes with the dichotomous treatment of information goods, depending on whether information is embedded in a carrier or not.

Indeed (intangible) digital goods are regarded by EU principles as services, whereas there material equivalents, are regarded as goods, thus inducing fiscal distortions (for instance with e-books). Yet, since the carrier, i.e. the physical aspect, is not the main source of the economic value, it should not serve as a determining characteristic. EC is well aware of the problem and has proposed two ways to overcome it; both are contorted and rather unsatisfactory.

First, concerning the fiscal distortion, EC advertised in May 2015 his intention to re-examine the case of e-books in the next future: “The Commission will (…) explore how to address the tax treatment of certain e-services, such as digital books and online publications, in the context of the general VAT reform.” COM (2015/192 p.8). This orientation however threatens creating a new particular case for “certain e-services”, especial to “online publication”. Since EC appropriately wishes to avoid “discriminations between suppliers” or “fragmentation between the different distribution channels” (recital 11 and 12 of COM 2015/634), it would be much simpler, more consistent and more effective, to regard those

For instance see recital 5 of Directive 2011/83 on Consumer Rights (Annex n°1).
Reiterated it in April 2016 the 7th.
pseudo “e-services”, as what they actually are: an element of a wider intangible goods set. This would also prevent from creating distortions against others intangible electronically provided goods, such as music or movies, also incorrectly regarded as e-services. In other words, all information goods should be regarded as goods. It would be an effective way to foster e-economy, since all the corresponding digital goods would be on the same fiscal level as their tangible counterparts.

Since this approach might raise the fear that an adjustment of EU Treaties would be required. It is worth emphasising that the Treaties do not preclude intangible goods from being goods, only the derived regulations did so.

Second, EC endeavoured in 2015 to eliminate the dichotomous situation created for digital content, with the (DIR 2011/83) Consumer Rights Directive (See Annex n°2), in launching two combined proposals. The first one labelled “on certain aspects concerning contracts for the online and other distance sales of goods” (COM 2015/635), otherwise called the Online Sale Directive, aims at offering an European law framework for goods sold online. The second, the proposal “on certain aspects concerning contracts for the supply of digital content” (COM 2015/634), also called the Digital Content Directive, is devoted to all digital content (i.e. mainly service-alike supposed entities).

Because digital content included in a carrier is correctly regarded as a good by EU principles, but for inappropriate reasons (materiality), the abovementioned effort has generated regulations complexities. At first the 2011/83 Consumer Rights Directive, had decided to include them within the sale of goods contract. Indeed its recital (19) states: “If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive”, i.e. within the scope of this Directive they belong to the sale contract (Annex n°2). The consequence of this view is what has been previously referred as the dichotomy approach. Indeed, the sale of digital content is addressed in two different legal ways, whether being included in a carrier or not. But a second thought convinced the EC that, splitting those information goods between tangible and intangible was not actually consistent. Accordingly, Recital 11 & 12 of the new Digital Content proposal (i.e. mainly dedicated to the sale of service-alike entities) declares: “this Directive should apply to all digital content independently of the medium used for its transmission. (...) This Directive should apply to goods such as DVDs and CDs, incorporating digital content in such a way that the goods function only as a carrier of the digital content. The Directive should apply to the digital content supplied on a durable medium, independently whether it is sold at a distance or in face-to-face situations, so as to avoid fragmentation between the different distribution channels" (COM 2015/634). Still, the EC did not change its erroneous “materialists” principles. In other words the implicit reasoning is as such: despite the fact that tangible digital content is a good and intangible digital content a service, they will be addressed jointly. This situation generates some sort of a paradox and calls for extraordinary legal provisions.

This contorted solution induces complexity on two grounds.

First, it necessitates separating digital content integrated in physical goods such as CDs and DVDs, from that integrated in other goods, such as washing machine or cars... which cases are planned to remain treated by the Online Sale Directive dedicated to standard goods (COM 2015/635). Indeed, recital (13) of this proposal Directive, states: “This Directive should not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content. However, this Directive should apply to digital content integrated in goods such as household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods” (COM 2015/635; bold emphasis added). Yet, the separation between the two types of goods embedding digital
content, might not be easy to implement. As Mak (2016) puts it: “(...) one may wonder whether that distinction is workable in practice. If, for example, the software in a car is hacked, that might also influence the safety of the car for driving. In that case, are we dealing with a case of non-conformity of goods or non-conformity of digital content (in relation to its security)?” (bold emphasis already in the original text).

Second, not all the properties of the tangible information goods would be addressed by the extended proposal on Digital Content (COM 2015/634). Several would remain addressed by the previous 2011/83 Consumer Rights Directive. The recital (12) of the 2015/634 proposal reads: “The Directive 2011/83 should continue to apply to those goods, including to obligations related to the delivery of goods, remedies in case of the failure to deliver and the nature of the contract under which those goods are supplied. The Directive is also without prejudice to the distribution right applicable to these goods under copyright law”\(^{21}\). Therefore the juridical remits of CDs DVDs sale and use would be dealt by two Directives, although presently only one suffices.

Both envisioned solutions add complexity. It would be simpler and more effective to regard all these products as information goods, and address them as such. It is most probable that this complexity will constitute a burden for the strategy sought and for further regulation development. Besides, to fulfil its all-encompassing goal, the EC broadly extends the concept of Digital Content not only to incorporate both intangible and tangible information goods\(^{21}\), but also information services (see Annex n°2). This move, combined with the outdated view on goods and services, has consequences which the next sub-section addresses.

3.2 A non sale, non service contract for on line sale and digital content?

The European digital single market strategy for a “better access for consumers and businesses to online goods and services across Europe” (COM 2015/633), aims at adapting the legal framework set by the 2011/83 Directive on Consumer Rights, to the quick economic change on online markets. It relies on the two complementary projected Directives that were evoked in the last sub-section: i.e. the Online Sale proposal (COM 2015/635) and the Digital Content proposal (COM 2015/634)\(^{22}\). As explained in the previous sub-section, the first Directive neither applies to services, nor to digital content, including “any durable medium incorporating digital content where the durable medium has been used exclusively as a carrier”. Hence all provisions concerning the supply of digital goods are gathered in the second Directive, together with those concerning digital services (see Annex n°2). The new strategy thus aims at creating a specific harmonised European legal frame for all types of digital supply. But in doing so it protracts old problems, while raising several new ones.

Indeed, the desire of a global integrated approach is confronted to the wrong conception of the boundary between the service and the good. This prevents giving a clear answer to the question: to what type(s) of contract(s) should the supply of digital content belong? Moreover this also prevents understanding that, if the true nature of that dissimilarity was understood, it

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\(^{21}\) As a matter of fact, the reading of this provision is far from being straightforward, especially in the French version. A clarifying suggestion would be to interchange “including to” with “especially concerning” in the published document. As for the French version: “La Directive 2011/83/UE devrait continuer à s’appliquer à ces produits, notamment aux obligations relatives à la livraison des biens, aux modes de dédommagement en cas de non-livraison et à la nature du contrat en vertu duquel sont fournis les biens ». An interchange of “notamment aux obligations », with « notamment pour ce qui est des obligations »… would help the reader.

\(^{22}\) Even if it belongs to the same package, the paper does not consider the (2015/627) proposal concerning the cross-border portability of online content services in the internal market, which object is too distant from that of the article. Anyhow, online content services should not be mistaken with the e-supply of digital content services.
would be much simpler and more effective, to relate each piece of digital content supply to the corresponding relevant sale, service or rental contracts.


Usually, depending on the nature of the supplied object, the supplier-customer relationship belongs to the sale, the service or the rental contracts. However, the Directive on Consumer Rights (DIR 2011/83), which is presently in effect, decided that the supply of public utilities and intangible information goods, would not belong to these known contracts (see Annex n°2).

Since EU regards Public Utilities and intangible information goods as services or so, their supply should understandably belong to the services contract. Yet, it does not fit, because supplying these products is not actually selling a service. Indeed these pseudo-services are actually provided like goods (see previous sub-section), for which a definite transfer and a time of possession may be identified. Whereas, for instance, the provision of a service is generally done over a period of time (Box n°3). As it may be inferred from the last observations, the dissimilarities in the supply of goods and services induce significant contractual divergences (see Mak 2016 and next paragraphs). Anyhow, on the one hand, because of its superseded principles; EU law could not recognise the outcome of the activities under consideration as proper goods. But on the other hand, because of practical incompatibilities, it could not include them within the services contract. Consequently it created for them an idiosyncratic situation, which is neither that of sale, nor that of service contracts. Recital (19) of actual Directive 2011/83 Consumer Rights, indeed states: «(...) Similarly to contracts for 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, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, **neither as sales contracts nor as service contracts**” (bold added). It is rather unexpected and inexplicable. On the one hand, why the sale of public utilities' outcomes, which usually goes by volume and which bear the key characteristics of goods, do not belong to the sale contract? Likewise, why intangible information goods which are sold outright are not also associated with the sale contract. On the other hand, why information services are not linked to the appropriate, rental or service contract? Unfortunately, the new Digital Strategy prolongs that nebulous idiosyncratic approach.

The new 2015 Digital Strategy proposals protract the singularities

The “neither sales contracts, nor service contracts” orientation, is endorsed by the Single Market Digital Strategy proposals. Creating a specific approach for all Digital Content is certainly a way to bypass the lack of understanding of what truly distinguishes goods from services, but unfortunately it tends to develop contractual confusion and fragmentation.

The Digital Content Directive proposal purposely adopts a very broad approach encompassing both information goods and e-services: «the definition of digital content is deliberately broad and encompasses all types of digital content, including for example, downloaded or web streamed movies, cloud storage, social media or visual modelling files for 3D printing, in order to be future-proof and to avoid distortions of competition and to create a level playing field” (COM 2015/634 p. 11). But as Sénéchal (2015) already remarked about the Common European Sales Law Directive proposal (COM 2011/635), the growth of digital

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23 The Directive 2011/83 depicts one example, within its recital # 40: “In the case of service contracts, the withdrawal period should expire after 14 days from the conclusion of the contract. In the case of sales contracts, the withdrawal period should expire after 14 days from the day on which the consumer or a third party other than the carrier and indicated by the consumer, acquires physical possession of the goods” (italic emphasis added).
supply does not cause the disappearance of the “logic of possession”. Thus it is crucial to remember that --for good reasons-- digital supply may still meet the sale economic model and its contractual framework. The attempt to create an idiosyncratic digital content supply contract, leads to something rather fuzzy. So she pleads that, it would be more consistent to separate the contractual treatment of the supply of “digital content”, in two different ways, depending on that “logic of possession”. On the one hand, the sale contract would fit for the possession compliant digital content (i.e. according to this paper: information goods). On the other hand, service or rental contracts would apply for the deprived “logic of possession” digital content (i.e. according to this paper: e-services). In the field of the Common European Sales Directive proposal (COM 2011/635), it could have been achieved by simply removing all references to “access” in the definition of the contract for supply of digital contract (Sénéchal 2015 p.450). Needless to say, that those juridical suggestions would have matched with the new good-service approach and confirm its soundness.

The Common European Sales Directive proposal (COM 2011/635) was postponed in late 2014, but the present Online Sale Directive proposal (COM 2015/635) is somehow its child. Many of its provisions find their origin in it (see COM 2015/635 p. 14). Unfortunately the clarifications called upon by Sénéchal (2015) have not been listened. On the contrary, all Digital Content has been included in the Digital Content Directive proposal (2015/634), driving away, for information goods, the link with the Online Sale of Goods.

The Digital Content proposal Directive (COM 2015/634) leaves to the Member States the choice to decide how to classify digital content supply between, sale, service, rental or sui generis contracts. This choice is surprising considering a full harmonisation Directive, but it expresses an attempt to avoid cutting through practical and theoretical dilemmas, and probably conceals a true desirable choice.

Two sources of dilemmas are at stake. On the practical hand, one stems from the fact that Members states have already begun to choose between the various contractual possibilities. This aspect is nevertheless out of the focus of this article. On the theoretical hand, the other dilemma stems from the will to apply an integrated approach to all digital content supply, irrespective of their, wrongly understood, good or service nature. Allowing Member States to choose may be viewed as a Solomon King’s type solution, but it is also a Pontius Pilate’s one. It will necessarily lead to various choices, hence a legal fragmentation among the EU. The truth however is that, the extent of choice is actually restricted, by definite specificities of the various types of supply addressed in the proposal. As Mak (2016 p. 15) points it: “Whereas certain types of digital content could be treated as goods—e.g. software, e-books, content delivered on a tangible medium—other types do not fit well in this framework. Services through which digital content provided by the consumer is stored or processed (e.g. cloud services or social media platforms) are not so much similar to contracts for the sale or supply of goods, as they are to services. In these types of contracts, the performance rendered by the supplier is not related to the supply of a good—tangible or intangible—but rather to the supply of a service, which exists in storing data provided by the consumer, or enabling the sharing of such data. In fact, the proposed Directive even refers to these types of digital content contracts as services (Art. 2(1))”. It may also be added that conformity to the contract, which is one of the main subjects of the proposal, does not embody the same obligations for the supplier of digital content, whether concerning goods-type supply, services-type provision or else rental-type. Anyhow, according to Mak (2016) a consistent and desirable solution appears to be the sui generis regime, in other words a “neither sales contracts, nor service contracts, nor rental contracts” solution.

While this solution prevents the legal fragmentation among Member States, it does not overcome the theoretical difficulties. The very source of juridical problems concerning the so-called digital content supply does not primarily stem from its digital nature, but from a poor
understanding of where the critical boundary between goods and services is. What she points out is perfectly illustrating that weakness. When all information goods are regarded as goods, contractual exceptions are no more needed, and the classification of digital content supply between sales or service contracts comes easily.

Surely enough Recital 11 of COM 2015/634 digital content Directive rightly stresses that: “Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers”. This goal would much better be fulfilled with a clear understanding of what goods and services are, than by setting a broad and fuzzy category of digital content, which necessarily remains technology dependant, associated to a *sui generis* contract.

## Conclusion

It has been shown that EU regulations rely on an outdated conception of the good-service boundaries, based on tangibility. This view, largely shared in the 1960-70 economic literature, has now been successfully challenged by a new one. The new perspective refers to the capacity to establish or not ownership rights and better fits to the knowledge economy. It was adopted by the SNA and the BoP in 2008.

Actually, the EC has launched a Digital Single Market Strategy aimed at fostering economic growth in the digital and internet fields. However, this strategy faces difficulties regarding the VAT rate and the legal framework to be set for the provision of Digital Content. In both domains the outdated definition of the service that the EU uses, creates fiscal distortions, induces legal contortion (inventing unnecessary exceptions, for instance for Public Utilities), and steers making up an idiosyncratic type of contract ("neither sale, nor service" contract). Altogether the superseded definition of the service generates complexity in the regulations. All these problems might be solved by adopting the new approach on the service and recognising that digital goods, even intangible, are goods. Consequently, many legal exceptions would disappear and the legal ties between sellers and customers, applicable to digital content, would easily fall under the usual categories of sale, service or rent. This move would not need modifying the EU Treaties since, although the TFEU n°60 article on services incorporates several weaknesses, it does not state that their characteristic is intangibility.

### ANNEXES

#### Nº1: THE SUPPLY OF GOODS AND SERVICES IN VAT DIRECTIVES 2006/112 ANDD 2009/47 (EXCERPTS)

Art. 14

1. ‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner.

Art. 15

1 Electricity, gas, heat, refrigeration and the like shall be treated as tangible property.

(...)

Art. 24

1. ‘Supply of services’ shall mean any transaction which does not constitute a supply of goods.

(...)

Art. 25 A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title ;

(...)

Art. 56 Supply of miscellaneous supply services

(...)

...
(a) transfers and assignments of copyrights, patents, licences, trade marks and similar rights;

(k) electronically supplied services, such as those referred to in Annex II;

Art. 98 Reduced rates

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III

Of which (as modified by the 2009/47 Directive)

‘(6) supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children’s picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising;’; (italic emphasis added)

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N°2: SERVICES, GOODS AND DIGITAL CONTENT IN DIRECTIVE 2011/83 AND PROPOSAL 2015/634

A) in the Consumer Rights 2011/83 Directive (excerpts)

(5) (...) in particular in the services sector, for instance utilities, (...)

(19) Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this Directive. If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive. Similarly to contracts for 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, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts. (...)

Art. 2

(3) ‘goods’ means any tangible movable items (...)

(5) ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services;

(6) ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;

(11) ‘digital content’ means data which are produced and supplied in digital form;

B) in the Digital Content proposal 2015/634 Directive (excerpts)

Art. 2

1. 'digital content' means

(a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,

(b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and

(c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service;

(...)

11. ‘durable medium’ means any instrument which enables the consumer or the supplier to store information addressed personally to that person 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.
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