

# Contracts for supply of digital content

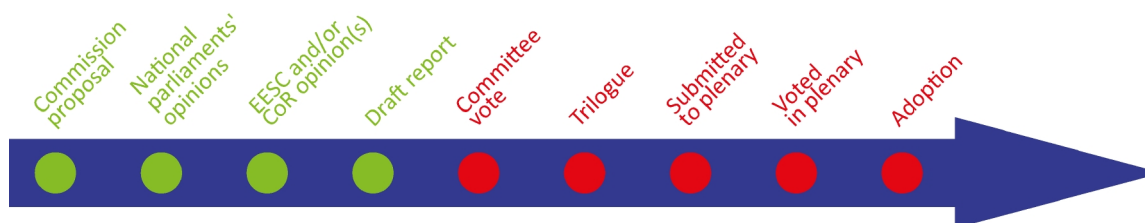
## SUMMARY

The digital content directive was proposed by the European Commission as part of a legislative package, alongside the online sales directive, to facilitate the development of the internal market for such content. The Council agreed on a general approach on the proposal on 8 June 2017. This seeks to clarify the relationship between the proposed contract law rules and the personal data protection regime – an issue which has been hotly debated. Furthermore, it strengthens the position of consumers with regard to conformity and remedies.

As for the Parliament, a draft report was published in November 2016 by the two co-rapporteurs, who proposed to expand the directive's scope to include digital content supplied against data that consumers provide *passively*, while also strengthening the position of consumers as regards criteria of conformity. Objective criteria would become the default rule, with a possibility to depart from them only if the consumer's attention were explicitly drawn to the shortcomings of the digital content.

## Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

<i>Committees responsible:</i>	Internal Market and Consumer Protection (IMCO) and Legal Affairs (JURI) (jointly)	COM(2015)634 of 9.12.2015
<i>Co-rapporteurs:</i>	Evelyne Gebhardt (S&D, Germany) and Axel Voss (EPP, Germany)	<i>procedure ref.:</i> 2015/0287(COD)
<i>Shadow rapporteurs:</i>	Eva Maydell (EPP, BG); Virginie Rozière (S&D, FR); Daniel Dalton (ECR, UK); Angel Dzhambazki (ECR, BG); Jean-Marie Cavada (ALDE, FR); Kaja Kallas (ALDE, EE); Dennis de Jong (EUL/NGL, NL); Jiří Maštálka (EUL/NGL, CZ); Julia Reda (Greens/EFA, DE); Laura Ferrara (EFDD, IT); Marco Zullo (EFDD, IT)	Ordinary legislative procedure
<i>Next steps expected:</i>	Adoption of committee report	



## Introduction

Contracts for the supply of digital content and services are concluded on a daily basis by millions of consumers. Digital content takes the form of computer programs and mobile applications, and also cultural and entertainment goods in digital form. Digital services include, for instance, [cloud computing services](#) or social media platforms. In this context, the Commission, as part of its [digital single market strategy](#), put forward a [proposal](#) for a directive on the supply of digital content to consumers (digital content directive, DCD) in order to grant consumers of digital content a set of uniform contractual rights applicable across the EU.

## Existing situation

At present, the supply of digital content and digital services at EU level falls within the scope of the maximum-harmonisation [Consumer Rights Directive](#) (CRD) and the minimum-harmonisation [e-Commerce Directive](#). However, neither of these sets out in detail the mutual rights and duties of the parties to a contract for supply of digital content or services. Some Member States [have addressed](#) the issue in special legislation or by extension of existing rules on contracts regarding tangible goods and services. The data protection aspects of consumers' activity in the digital environment are regulated in the General Data Protection Regulation ([GDPR](#)) which will apply from May 2018, and in the [e-Privacy Directive](#) (to be replaced by an [e-Privacy regulation](#)).

## The changes the proposal would bring

### Scope of application

The [proposed directive](#) would apply to contracts for the supply of digital content (concluded between consumers and businesses), where 'digital content' is understood as comprising both 'intangible goods' and services, i.e. data produced and supplied in digital form (e.g. video, audio, application, digital games, other software); a service allowing the creation, processing or storage in digital form of data provided by the consumer (e.g. cloud computing, or a website for editing images online); or a service allowing the sharing of data, and interaction with data in digital form, if those data are provided by other users of the service (e.g. social media websites). For the directive to apply, the digital content would have to be supplied against some form of counter-performance by the consumer, either monetary (payment of a price) or in the form of data (e.g. the consumer's personal data).

### Maximum harmonisation, mandatory vs default rules

The proposal aims at [maximum harmonisation](#), which means that Member States would not be allowed to provide for more consumer-friendly rules in their national legal systems within the directive's scope. The rules in the directive are to be mandatory, meaning that contracts may not deviate from them to the consumer's detriment.

### Conformity

#### *Criteria*

The proposal differentiates between subjective criteria of conformity (as laid down in the contract) and objective criteria (general expectations that consumers have for a given type of digital content). It gives priority to subjective criteria (contract), and allows objective criteria to be referred to only if the contract is silent or unclear in that regard. When objective criteria for conformity come into play, they must be applied taking into account whether the digital content was supplied in exchange for a price or another counter-performance (data).

*Burden of proof*

The burden of proof as to conformity of the digital content with the contract rests with the supplier (reversal of burden of proof in favour of the consumer). In certain situations the reversal of the burden of proof can be undone, however.

**Consumer remedies**

A consumer may terminate the contract immediately if the supplier has failed to supply the digital content. The consumer must be reimbursed 'without undue delay', and no later than 14 days from receipt of the termination notice. If the supplier did supply the digital content, but it does not conform to the contract, the consumer has the right to have the content brought into conformity free of charge, unless that would be impossible, disproportionate or unlawful. The supplier must cure the non-conformity 'within a reasonable time'.

The right to have the non-conformity cured is a primary remedy. Hence, the consumer may not demand a total or partial refund upfront, but must wait for the supplier to cure the digital content 'within a reasonable time'. Therefore, a consumer may terminate the contract or claim a partial refund (reduction in price) only if:

- cure of the non-conformity is impossible, disproportionate or unlawful;
- cure of the non-conformity was not completed within a 'reasonable' time (but such time is not defined in the proposal, leaving legal uncertainty);
- cure of the non-conformity would cause 'significant inconvenience' to the consumer;
- the supplier has declared they will not cure the non-conformity; or
- it is clear from the circumstances that the supplier will not cure the non-conformity.

The consumer's right to terminate, despite the uncured non-conformity of the digital content, is excluded if the non-conformity does not impair the functionality, interoperability or 'other main performance' features of the digital content (accessibility, continuity, security). The burden of proof lies with the supplier.

If the consumer purchased the digital content in exchange for a price, and is entitled to termination because of non-conformity, they may instead choose partial reduction in the price. Such a price reduction is in proportion to the reduced value of the digital content actually supplied, in comparison with the digital content that would have conformed to the contract.

**Legal consequences of termination by consumer**

The proposal contains detailed rules on parties' rights and duties upon termination (whether on account of non-supply or non-conformity). First of all, the supplier must reimburse the consumer without undue delay, but within no more than 14 days.

*Supplier's duty to refrain from using consumer's data*

If the consumer provided a counter-performance other than money (e.g. personal data), the supplier must take any appropriate measures to refrain from the use of that counter-performance. The same applies to content uploaded by the consumer (e.g. to the cloud, to a social media platform), except for content generated jointly by the terminating consumer and other users, if those other users are still using that content.

*Consumer's right to retrieve all content (exportability of data)*

Furthermore, the supplier must provide the consumer with technical means to retrieve all the content they provided, as well as any other data produced or generated by the consumer, to the extent that data has been retained by the supplier. This must be

returned to the consumer free of charge, within a reasonable time and in a commonly used format (e.g. a popular file format).

#### *Consumer's duty to stop using digital content and to return durable media*

If the digital content was not supplied on a durable medium, the consumer must refrain from using it, must not make it available to third parties and should delete it or make it otherwise unintelligible. Once the contract is terminated, the supplier has a right to prevent any further use of the digital content.

#### **Right to damages for economic harm caused to consumer's digital environment**

The proposal includes a rule regarding supplier's liability towards the consumer in cases where the non-conforming digital content or non-delivery of such content caused 'economic damage to the digital environment of the consumer'.

#### **Modification of digital content by supplier during time of subscription**

If the consumer purchased a subscription to digital content for a period of time, the supplier may modify that digital content only if the contract allows for it and provided that the consumer is notified, and has the right to terminate within 30 days of the notice. The supplier must then refund the consumer *pro rata temporis* for the unused period of subscription. If the consumer provided a counter-performance other than money (e.g. personal data), the supplier must stop using it.

#### **Termination of long-term contracts (over 12 months)**

The proposal provides for special rules applicable to long-term contracts, defined as those that last over 12 months (also as a result of totalling renewed periods of subscription). In the case of such contracts, consumers may terminate them by giving notice to the supplier by any means. The contract will be ended within 14 days of the moment when the supplier receives the notice.

#### **Procedural rule: enforcement**

The proposal introduces a procedural rule, providing that Member States must ensure that 'adequate and effective means' exist to ensure compliance with the directive. In particular, Member States must allow for an administrative or judicial (civil, criminal) procedure to be launched by certain bodies and organisations.

### **Preparation of the proposal**

During summer 2015, the Commission conducted a [public consultation](#) to which a total of 189 stakeholders [replied](#). The proposal was accompanied by an [impact assessment](#), which was [analysed](#) by the EPRS Ex-Ante Impact Assessment Unit.

### **Stakeholders' views**

#### **Consumers and businesses**

The [European Consumer Organisation \(BEUC\)](#) considers consumers of digital goods should receive protection at least equal to that enjoyed by consumers of tangible goods, and in some aspects they may need additional protection. As regards businesses, the European Association of Craft, Small and Medium-sized Enterprises ([UEAPME](#)) considered that the rules applicable to digital products should be the same as for tangible products and that the quality of digital content should be defined in contracts, rather than through mandatory legislative rules. [BusinessEurope](#), the EU-wide federation of national business interest groups, pointed out that, even if specific rules on supply of digital content did not exist, general contract law still applied, in particular with regard to pre-contractual information duties incumbent upon suppliers.

### European Law Institute

In 2016, the European Law Institute (ELI) published a [statement](#) on the proposal. The ELI pointed out that many rules of the DCD 'offer insufficient protection to consumers and would reduce the level of protection currently available under the national laws', especially with regard to the conformity criteria. Secondly, ELI considers that the DCD 'is not co-ordinated properly with other pieces of EU law, in particular the [Consumer Sales Directive], the [proposed Online Sales Directive] and the [\[GDPR\]](#)'. Furthermore, ELI noted that the rules of DCD are full of 'contradictions, ambiguities and legal uncertainty' which need to be eliminated.

### Legal scholars

In 2017, a collective volume came out, devoted entirely to Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps with contributions from 12 scholars. In the introductory chapter, Reiner Schulze, Dirk Staudenmayer and Sebastian Lohsse considered that personal data 'is the currency of tomorrow' and welcomed the idea of 'paying by data' by consumers. They acknowledged, however, that the entry into force of the [GDPR](#) will require adjustments in the text. Hugh Beale focused on the consumer's right to damages (article 14 DCD) and on the public enforcement of the directive (article 16 DCD). Aurelia Colombi Ciacchi and Esther van Schagen discussed the conformity criteria, concluding that the Commission proposal 'protects suppliers' interests better than consumer interests' and that 'the level of consumer protection under the draft [DCD] seems lower than that of the Consumer Sales Directive'. Martine Behar-Touchais discussed consumer remedies, concluding that the rules of the proposal may cause difficulties when applied in practice. Piotr Machnikowski analysed the problem of damages, focusing on article 14 DCD, noting that the scope of harmonisation in the proposal is rather narrow. Sebastian Martens also focused on article 14 DCD in the context of [consequential loss](#), concluding that the proposal 'is far from [being] future-proof', due to the fact that it is 'tailor made for some very specific types of digital content, only'. Fryderyk Zoll discussed the issue of personal data as remuneration in the DCD proposal. He called for a clarification of the directive to address the issue of withdrawal of consent by the consumer under the [GDPR](#). Rolf Weber analysed the interplay of the DCD and data protection law in the context of termination, concluding that the rules of the proposed DCD on this topic are not sufficient and 'could be improved'. Gerald Spindler focused on the interplay between DCD and copyright law, concluding that the DCD 'is a step in the right direction', but further legislation is still necessary. Susana Navas Navarro focused on user-generated content, criticising the proposal for 'trying to adapt at all costs the digital [world] to the analogue world'. She pointed out that 'digital consumers' include also 'libraries, teachers, journalists, lawyers, and different professionals', whilst the definition of consumer in the DCD is narrower. In her view, with digital content the borderline between consumer and professional is becoming blurred ('*iConsumer as prosumer*').

### Advisory committees

In April 2016, the European Economic and Social Committee delivered its [opinion](#) on the proposal (rapporteur: Jorge Pegado Liz, Various Interests – Group III, Portugal), arguing that the directive should, in principle, be a minimum harmonisation instrument. Nevertheless, if maximum harmonisation is to be pursued, the legal form of the instrument should be a regulation.

## National parliaments

National parliaments could express their opinion under the [subsidiarity check procedure](#) by 8 March 2016. A reasoned opinion was submitted only by the French [Senate](#).

## Opinion of the European Data Protection Supervisor

In April 2017, the European Data Protection Supervisor (EDPS), upon request of the Council, issued an [opinion](#) on the proposal. The EDPS was particularly critical of the proposal's idea of treating personal data as an object of contractual counter-performance ('paying by data' instead of by money). The EDPS took the view that personal data may be viewed exclusively from a fundamental rights perspective, and therefore cannot be monetised. In order to avoid treating consumer data as counter-performance, the EDPS suggested two alternatives: either to use the notion of 'services' under TFEU (and as in the e-Commerce Directive) also to include services provided for free, or to expand the scope of the proposal to cover all gratuitous service provision (regardless of whether consumers provide their data or not). The EDPS was also very critical of the idea of granting consumers contractual remedies with regard to retrieval and erasure of data, arguing that only one set of remedies (those in the [GDPR](#)) should be available to consumers. He also stressed that the legal requirements for processing personal data are laid down in the GDPR, and this issue should not be addressed in legislation on contract law. In his view, the proposal overlaps with GDPR and its adoption in the original form would lead to inconsistencies.

## Parliamentary analysis

The **Members' Research Service** of EPRS published four research papers addressing the topic of the proposal. First, in September 2016 it published an in-depth analysis on [Contract law and the Digital Single Market](#) that analysed in detail the contract law-related aspects of the digital single market strategy and explored regulatory options in anticipation of the proposal. Following this publication, the Members' Research Service held a [policy hub](#) with Prof. Martijn Hesselink. In May 2016, an in-depth analysis on [Contracts for supply of digital content: A legal analysis of the Commission's proposal for a new directive](#) was published, followed by a policy hub with Professor Marco Loos. Finally, in March 2017 a third in-depth analysis on the topic entitled [Towards new rules on sales and digital content: Analysis of the key issues](#) was published, accompanied by a policy hub with Prof. Vanessa Mak and Prof. Piotr Tereszkiwicz. Apart from that, a briefing entitled [Contracts for the supply of digital content and personal data protection](#), published in May 2017, focused on the interaction between the two legal regimes in the context of the opinion of the EDPS.

In February 2016, the EPRS **Ex-Ante Impact Assessment Unit** published an [initial appraisal of the Commission's impact assessment](#) in which it pointed out that the consumer *acquis* was currently undergoing a 'regulatory fitness check' (REFIT) that would feed into the debate on the proposals. Also in February 2016 the **Policy Department for Citizens Rights and Constitutional Affairs** organised a [workshop on 'New rules for contracts in the digital environment'](#) for the Legal Affairs Committee with the participation of academic experts. In April 2016, the EPRS **Policy Cycle Unit** published an [implementation appraisal](#) on the subject.

## Legislative process

### Referral to EP committees

Within the EP, the proposal was referred jointly (under Rule 55) to the Internal Market and Consumer Protection Committee (rapporteur: Evelyne Gebhardt, S&D, Germany) and Legal Affairs Committee (rapporteur: Axel Voss, EPP, Germany), and opinions were sought from the Civil Liberties, Justice and Home Affairs (LIBE) Committee (rapporteur: Marju Lauristin, S&D, Estonia).

### Draft report of the co-rapporteurs

#### *Definition of digital content, digital services and digital environment*

In their [draft report](#) unveiled in November 2016, the co-rapporteurs seek to modify the title of the proposal to reflect the fact that it also applies to **digital services**. Likewise, the definition of 'digital content' is reduced to 'data produced and supplied in digital form', whilst a new notion of 'digital service' is introduced to encompass services allowing (a) the creation, processing or storage of data provided by the consumer, as well as (b) the sharing of and interaction with data uploaded by others or by the consumer. Under the original proposal, these services were encompassed by the definition of 'digital content'. The rapporteurs also propose to define explicitly the notion of '**embedded digital content or digital service**', which would mean pre-installed digital content that operates as an integral part of the goods and cannot easily be de-installed by the consumer or that is necessary for the conformity of the goods with the contract. The definition of '**digital environment**' is expanded to cover not only hardware and digital content, but also explicitly software.

#### *Data as counter-performance*

The original proposal extended to contracts in which consumers *actively* provide personal data or other data as counter-performance, presumably to the trader. The rapporteurs would expand this definition to include data collected by the trader (i.e. provided 'passively' by the consumer), as well as that collected by a third party 'in the interest' of the trader. Furthermore, they would limit the exclusion regarding the necessary processing; under the original proposal, the provision of data by the consumer would not count as counter-performance if the processing of such data was 'strictly necessary for the performance of the contract or for meeting legal requirements', provided that the supplier did not further process it for other purposes. The rapporteurs propose to limit this exclusion to legal requirements only.

#### *Durable media and embedded digital content*

While the proposal intended to apply to durable media incorporating digital content, where such media serve only as carriers of that content, the rapporteurs would exclude them. On the other hand, they would include an explicit rule whereby the directive applies to goods in which digital content is embedded, unless the supplier proves that the lack of conformity is caused by the hardware of the good (i.e. not by its software or other digital content embedded in it).

#### *Exclusion of certain types of service*

The original proposal provided for the exclusion of services 'performed with a predominant element of **human intervention**', of which the digital format was only a carrier. The rapporteurs would modify this and exclude any services other than supply of digital content or of digital services, regardless of whether there is a 'predominant element of human intervention' involved or not.

*Contract terms infringing data protection rights*

The rapporteurs wish to include a new rule (Article 4(a)) concerning contract terms detrimental to the consumer's data protection right under the 1995 [Data Protection Directive](#), still in force, and subsequently the [GDPR](#). Such terms would not be binding on the consumer, while the remaining part of the contract would continue to bind the parties if its terms were capable of existing without that unfair term.

*Deadline for supply of digital content*

The original proposal contains a default rule whereby the trader is obliged to supply the digital content immediately after the conclusion of the contract. The rapporteurs would relax the obligation upon the trader – who would have to supply the content 'without undue delay but within no more than 30 days' of the conclusion of the contract. This rule would remain a default one.

*Objective vs subjective criteria of conformity*

The original proposal differentiates between subjective and objective criteria for conformity, giving priority to the former (i.e. what was agreed in the contract) over the latter (i.e. what consumers would normally expect as regards quality). In fact, under the original proposal, objective criteria come into play only to the extent that the contract does not provide the standards of conformity 'in a clear and comprehensive manner'. In other words, the objective criteria under the original proposal are only subsidiary. The rapporteurs propose to modify this. They would make the objective criteria of conformity applicable to all contracts, and make it possible to exclude them 'only if, at the time of the conclusion of the contract, the consumer *knew of the specific condition* of the digital content or digital service and the consumer *expressly accepted* that ...'.

*Modification of the digital content or service*

The rapporteurs seek to enhance consumer protection with regard to digital content or services provided over a period of time, introducing a rule preventing the trader from modifying the functionality, interoperability and main performance features of the digital content or services to the extent that such alterations are detrimental to the consumer. However, the contract may provide for an option of alteration of the digital content or services provided that it gives 'a valid reason for such an alteration' (under the original proposal there was no requirement for a 'valid reason').

**Opinion of the Civil Liberties, Justice and Home Affairs (LIBE) Committee**

On 21 November 2016, the LIBE Committee adopted its [opinion](#) on the proposal (rapporteur: Marju Lauristin, S&D, Estonia). It would like to broaden the scope of the directive as regards data provided by the consumer in exchange for digital services. While the original proposal encompasses only data provided by the consumer 'actively', the Committee would also include data provided by the consumer even without knowing it. The Committee would also add an explicit definition of personal data, following the [GDPR](#). As regards criteria for evaluating the quality of the digital content, the Committee would see the requirements set higher, more in favour of the consumer (i.e. objective criteria of quality, rather than relying merely on what is formally stipulated in the contract). As regards the supplier's liability for damage to the consumer, the Committee would broaden the rule allowing for liability not only in case of damage to the consumer's 'digital environment' but also in other cases.



**Discussions in the Council***Policy debate in June 2016*

In June 2016, the Council held a [policy debate](#) on the proposal. In the meantime, the Working Party on Civil Law Matters (Contract Law) completed an initial examination of the most important articles of the proposed directive. Many delegations emphasised the need for consistency and coherence: within EU contract law, among various EU instruments, especially the [GDPR](#), and between EU and national law. The delegations supported the idea of covering contracts where consumers provide data instead of paying a monetary price. They also supported the narrow definition of consumers and the exclusion of business contracts. However, the Council was not favourable to including a rule on damages in the directive. The Council also stressed the need to maintain a healthy balance between consumer-friendly and business-friendly approaches, and to ensure that the rules of the directive were technologically neutral. As regards conformity, the Council would give precedence to objective over subjective criteria (i.e. that digital content or services should live up to general expectations of quality and not only to what is written in the contract).

*Policy debate in December 2016*

A second [policy debate](#) was held in December 2016. On embedded digital content, a slight majority wanted to see the rules from the online sale of goods proposal applied, while a significant number of delegations were in favour of making the rules on digital content applicable by way of a rebuttable presumption. As to 'other data', i.e. non-personal data provided by consumers as counter-performance, the Council considered that more work was needed at technical level to define the scope of the notion, before deciding whether such data should be admissible as counter-performance for digital content. The ministers agreed that priority could be given to subjective criteria of conformity if consumers are made aware and expressly accepted a deviation from the objective conformity criteria.

**General approach of 8 June 2017***Data as consumer's counter-performance?*

On 8 June 2017 the Council adopted a [general approach](#) (GA) proposed by the presidency, which was accompanied by an [introductory note](#). The legal status of personal data provided by the consumer has apparently changed. It is no longer explicitly described as the consumer's counter-performance. Article 3(1) provides that the directive applies 'to any contract where the supplier supplies or undertakes to supply digital content or a digital service to the consumer, and does 'not apply to the supply of digital content or a digital service *for which the consumer does not pay or undertake to pay a price and does not provide or undertake to provide personal data to the supplier*'. This wording is ambiguous, and can be understood both as treating the provision of personal data as the consumer's *quid pro quo* of exchange (if the words 'for which' extend to the part of the sentence including personal data), but also as treating the consumer's undertaking as independent of the essential elements of the contract.

In the third subparagraph it is stated that the directive 'shall also not apply where personal data are exclusively processed by the supplier for supplying the digital content or digital service, or for the supplier to comply with legal requirements to which the supplier is subject, and the supplier does not process these data otherwise'.

If the text is to be interpreted as treating the consumer's undertaking to provide data only as a matter of determining the directive's subject matter, but not as defining the essential elements

of the contract (*essentialia negotii*) the provision of personal data will not be seen as the consumer's counter-performance (*quid pro quo* of exchange with the provider). In such a case, consumers who provide their data to businesses will still be subject to the DCD, nonetheless due to the lack of treatment of personal data as counter-performance, a withdrawal of data by the consumer will no longer be treated as a breach of contract which, arguably, could have been the case under the original text of the proposal.<sup>1</sup> A recital is to clarify that consumers remain fully free to use their [GDPR](#) right to withdraw consent 'which applies fully also in connection with contracts covered by this directive'. However, an additional clarification as to the exact legal status of the consumer's provision of data would help to remove remaining ambiguities in this respect.

#### *Coordination with data protection law*

The GA aligns the proposal with the EU data protection rules. First of all, the definition of 'personal data' provides for a direct reference to the [GDPR](#) (article 1(6a)). Secondly, article 3(8) explicitly provides that 'Union law on the protection of personal data applies to any personal data processed in connection with contracts' covered by the DCD and that 'in case of conflict between the provisions of [DCD] and Union law on the protection of personal data, the latter prevails'.

This modification is significant, as under the original proposal the contract law rules and data protection rules were, arguably, viewed as parallel legal regimes.<sup>2</sup> Whilst, a contractual term violating the public-law rules on data protection would have been invalid in the light of contract law,<sup>3</sup> nonetheless the hierarchical relation between the public-law rules on data protection and private-law rules on digital contracts was not spelled out. Furthermore, it may not be that obvious owing to the somewhat blurred distinction between public and private law in the EU.<sup>4</sup>

#### *Relation to copyright law*

The GA includes a rule explicitly stating that the directive 'is without prejudice to national and Union laws on copyright and related rights' (article 3(8a)).

#### *Relation to national law*

The GA reformulates the rule concerning the relationship to national private law. A recital is intended to clarify that the directive does not pre-determine the legal nature of the contracts, leaving it to the Member States to decide whether they should be classified as a sales, services, rental or *sui generis* contract. Furthermore, with the rule on the right to damages being deleted, the issue of damages is entirely left to national law (article 3(9)). Furthermore, a recital would clarify that 'it is left to national law to regulate any consequences of the lack of supply or a lack of conformity ... that is due to any impediment outside the supplier's control...'

#### *Bundle contracts*

The GA provides that 'bundle' contracts (which contain elements of supply of digital content/services but also elements of tangible goods/services) should be subject to the DCD only as regards the digital content/services aspects. The remaining part will be outside the scope of the DCD. Moreover, traditional telecommunications contracts (provision of a number-based service) would be entirely excluded from the DCD.

#### *Embedded digital content*

The GA excludes tangible goods with embedded digital content (e.g. software) entirely from the scope of the DCD.

#### *Supplier's duty to supply*

The rule concerning the supplier's duty to supply is modified. In place of a duty to supply 'immediately', the supplier must now do so 'without undue delay' after the

conclusion of the contract. Supply of digital content can take place either by way of 'any means suitable for accessing or downloading' or 'by the physical or virtual facility chosen by the consumer', whilst a digital service must be 'made accessible to the physical or virtual facility chosen by the consumer'.

#### *Conformity*

The proposal's rules on conformity have been considerably remodelled. Article 6 now regulates 'subjective requirements for conformity', whilst a new article 6a – 'objective requirements for conformity'. Digital content or a digital service must now conform both to subjective *and* objective criteria, which considerably improves the rights of consumers in comparison to the original text. Parties may contract out of the objective criteria, provided that this is done at the time of conclusion of the contract, and the consumer is specifically informed about any deviations from the objective conformity requirements, and expressly and separately agrees to those deviations.

#### *Burden of proof*

As regards burden of proof, the text upholds the reversed burden of proof (without time limit) only with regard to the fact of supply. As regards non-conformity, the reversed burden of proof would be limited to one year only.

#### *Hierarchy of remedies*

Whilst the hierarchy of remedies approach has been, in principle, retained, it has been modified in favour of the consumer. In particular, the consumer will be able to demand a price reduction or may terminate the contract if bringing the digital content or services into conformity:

- was not done in a reasonable time
- was not done without any significant inconvenience to the consumer
- was not done free of charge
- if the lack of conformity remains despite the supplier's attempt to bring the digital content or services into conformity
- if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination
- if the supplier has declared, or it is clear from the circumstances, that they will not bring the digital content or service into conformity within a reasonable time or without significant inconvenience for the consumer.

#### *Time limits*

The Presidency believes that due to the 'very different concepts in the ... national laws on guarantee periods and limitation periods', it will not be possible to provide for maximum harmonisation of time limits within which consumers can bring remedies. Therefore, minimum harmonisation is followed, whereby the time limit under national law may not be shorter than two years.

#### *Statements of certain delegations*

In a [joint statement](#) the delegations of **Portugal, France, Italy, Romania and Cyprus** expect that the trilogues will lead to a 'more ambitious directive in favour of consumer protection ... notably in the provisions concerning the reversal of burden of proof on the supplier'. The delegations would rather align the period of reversal of burden of proof with the period of the supplier's liability (legal guarantee). In an opposite direction, the **Austrian** delegation [argues](#) that the one-year period of reversed burden of proof should be limited to six months only. The **Latvian, Lithuanian and Luxembourg** delegations

[consider](#) that maximum harmonisation of the rules on digital content is necessary and criticise the general approach text for 'watering down' the Commission's original proposal and allowing the Member States to decide on a number of issues, especially on the legal guarantee periods, the termination of indefinite-period contracts and the consequences of the termination of bundle contracts. Finally, the [Czech](#) delegation was also dissatisfied with the modification of the rules on time limits, which now, instead of maximum harmonisation, refer to national law. On the other hand, the Czech delegation would prefer a two-year period of reversed burden of proof, fully aligned with the time limit for the supplier's liability for non-conformity.

## References

[Contracts for Supply of Digital Content](#), European Parliament, Legislative Observatory (OEIL).

Mańko, R. & Monteleone, S. [Contracts for the supply of digital content and personal data protection](#), EPRS briefing, PE 603.929 (2017).

Mańko, R. [Towards new rules on sales and digital content: Analysis of the key issues](#), EPRS in-depth analysis, PE 599.359 (2017).

Mańko, R. [Contracts for supply of digital content: A legal analysis of the Commission's proposal for a new directive](#), EPRS in-depth analysis, PE 582.048 (2016).

Schulze, R. et al. (eds.), [Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps](#) (Nomos 2017).

Spindler, G. [Contracts For the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content](#), *European Review of Contract Law* 12.3 (2016): 183-217.

<sup>1</sup> Cfr. R. Mańko & S. Monteleone, [Contracts for the supply of digital content and personal data protection](#), EPRS briefing, PE 603.929 (2017), p. 10.

<sup>2</sup> Cfr. Mańko & Monteleone, op.cit., p. 5.

<sup>3</sup> R. Mańko, [Contracts for supply of digital content: A legal analysis of the Commission's proposal for a new directive](#), EPRS in-depth analysis, PE 582.048 (2016), p. 6.

<sup>4</sup> R. Mańko, [EU competence in private law: The Treaty framework for a European private law and challenges for coherence](#), EPRS in-depth analysis, PE 545.711 (2015), p. 3. Cfr. C. Semmelmann, 'The Public-Private Divide in European Union Law or an Overkill of Functionalism', *Maastricht Faculty of Law Working Paper* 12/2012.

## Disclaimer and Copyright

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2017.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu)

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)



*Third edition. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. To view previous editions of this briefing, please see: [PE 599.310](#) (March 2017).*