

Contracts for supply of digital content

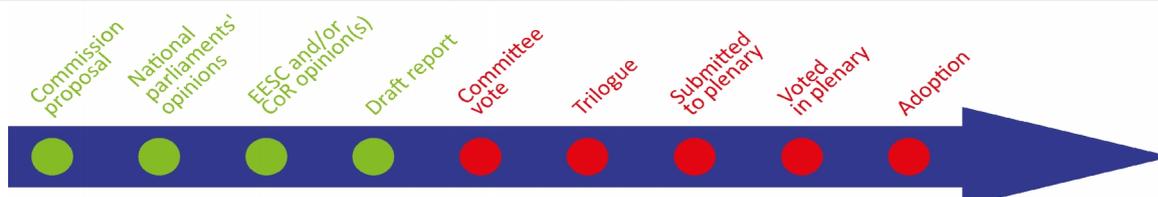
SUMMARY

In November 2016 the co-rapporteurs delivered their draft report on the Commission's proposal for a directive on contracts for supply of digital content. They propose 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.

The Digital Content Directive was proposed as part of a legislative package, alongside the Online Sales Directive. The Council has favoured a fast-track for the digital content proposal, while seeking to reflect for longer on the proposed Online Sales Directive. Nonetheless, the Commission is keen not to dismantle the legislative package, and likewise the Parliament has been working on the two texts in parallel, seeking to coordinate amendments to the two proposals.

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, DE) and Axel Voss (EPP, DE)	<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, ET); 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 are concluded on a daily basis by millions of consumers across the globe. Consumers purchase or hire digital content increasingly often, not only whenever they purchase computer programs or mobile applications, but also when they access cultural and entertainment goods in a digital form, such as music, films, e-books or games. Also, consumers often acquire digital services, for instance when they use [cloud computing services](#) (for the storage, processing and use of data on remotely located servers accessed online) or social media platforms. In this context, the Commission, as part of its [digital single market strategy](#), put forward a [proposal](#) for a directive concerning certain aspects of contracts for the supply of digital content to consumers, which would introduce total harmonisation of the applicable rules.

Existing situation

At present, the supply of digital content at EU level is regulated by the Consumer Rights Directive, the Unfair Terms Directive and the e-Commerce Directive. The [e-Commerce Directive](#), a minimum harmonisation instrument, obliges Member States to ensure that contracts can be concluded in a digital environment and sets out the detailed information rights of parties concluding electronic contracts, which are mandatory in the case of consumer contracts. The [Consumer Rights Directive](#), a maximum harmonisation instrument, contains a number of rules designed specifically for the digital environment. In principle, consumers cannot withdraw from a contract for the provision of digital content if they have already used the content. Consumers lose the right of withdrawal if they unseal digital content provided on a tangible medium. In principle, they also need to pay for downloaded digital content. The directive imposes detailed information obligations on traders, and formal requirements regarding the contract document. It also grants consumers an at-will right of withdrawal from online and other distance contracts within 14 days of their conclusion. The [Unfair Terms Directive](#) prohibits unfair terms in contracts if the terms are prepared in advance by the trader and do not concern the main subject matter of the contract (price or description of goods or services). The list contains an annex with examples of these terms.

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 on-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).

Certain contracts have been **excluded** from the proposed directive's scope: services performed 'with a predominant element of human intervention'; electronic communication services, and also healthcare, gambling and financial services. On top of that, the directive would not apply to digital content provided **purely for free**, without any kind of counterperformance, i.e. when the consumer provides data only to the extent strictly necessary to perform the contract or to meet legal requirements, but the supplier does not process that data in any other way. The preamble further clarifies that the following would be excluded from the directive: digital content provided in exchange for data collected by cookies or in exchange for the consumer accepting to view advertisements (if no price is paid).

Level of harmonisation

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. However, the proposal explicitly provides that national rules of general contract law regarding the formation, validity and effects of contracts, as well the consequences of their termination, will not be affected.

Criteria of conformity

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 with 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).

Furthermore, if the contract is silent on the requirements for the digital content or the terms are unclear or incomplete, the proposal requires that public statements made by the supplier, on their behalf, or by other persons in earlier links in the chain of transactions, be taken into account. These statements will be incorporated within the contract (a rebuttable presumption), unless suppliers show: that they were not aware of them or could not reasonably have been aware; that the statement was corrected prior to the conclusion of the contract; or that the consumer's purchasing decision was not influenced by that statement.

The proposal includes a default rule whereby the digital content must be in conformity with the most recent version of that content, as available when a contract is concluded. However, there is no default rule on the consumer's right to updates. If the digital content is to be supplied over a period of time, the requirement of conformity is applicable throughout that period.

Integration of digital content

Digital content usually needs to interact with existing software and hardware. For this reason, the notion of conformity also covers the integration of digital content. Incorrect integration amounts to non-conformity if it was integrated by the supplier (or under their responsibility), as well as if the intention was for the consumer to integrate the digital content but their incorrect integration was the result of shortcomings in the instructions provided by the supplier.

Digital content free from third-party rights

The proposal provides that the digital content must, at the time it is supplied, be free of any rights held by a third party (especially intellectual property rights) so that it can be

used in accordance with the contract. If the digital content is supplied over a period of time, it must be free of third-party rights throughout that period.

Burden of proof as to conformity

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). The reversal of the burden of proof of conformity (in favour of consumers) can be undone by suppliers if they show that the 'digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content, and where they had informed the consumer about such requirements' prior to the contract's conclusion. Furthermore, the burden of proof of defectiveness returns to the consumer if the latter fails to cooperate with the supplier 'to the extent possible and necessary to determine the consumer's digital environment', e.g. to check the version of the consumer's operating system or the type of hardware (e.g. printer, camera, etc.).

Consumer remedies

Remedy of immediate termination

A consumer may terminate the contract immediately if the supplier has **failed to supply** the digital content. Termination occurs by giving the supplier notice by any means. The consumer must be reimbursed 'without undue delay' and no later than 14 days from receipt of the termination notice.

Right to have the non-conformity cured

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' from the moment when the consumer informed them of the non-conformity.

Subsidiary remedy of termination or reduction of price

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 of price) only if:

- cure of non-conformity is impossible, disproportionate or unlawful;
- cure of non-conformity was not completed within a 'reasonable' time (but such time is not defined in the proposal, leaving legal uncertainty);
- cure of non-conformity would cause 'significant inconvenience' to the consumer (which is also an open-ended notion, not defined in the proposal);
- 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.

Exclusion of the right to terminate when non-conformity is minor

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.

Termination pro rata temporis

If the consumer subscribed to digital content for a certain period of time in exchange for a fee, and the digital content was defective for part of that time (but was in conformity with the contract during the remaining part of the subscription period), the consumer

may terminate only with regard to the period of time when there was non-conformity. In that case, the refund due from the supplier will also be proportionate.

Subsidiary remedy – reduction of price

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 (e.g. an application, film or e-book) 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.

If the digital content was supplied on a digital medium (e.g. a DVD or CD-ROM), the consumer must – if the supplier so requests – return it to the supplier at the supplier's expense, without undue delay (but within no more than 14 days of the request). The duty to delete digital content, if it was copied from the durable medium, also applies.

Consumer's right to damages from supplier

Apart from remedies for non-conformity (cure, price reduction, termination) the proposal also provides for the supplier's liability in damages towards the consumer. This is possible whenever the non-conforming digital content caused 'economic damage to the digital environment of the consumer'. The same applies if such 'economic damage' was caused by the non-delivery of the digital content by the supplier. The rule on damages provides that they are intended to 'put the consumer as nearly as possible into the position' in which they would have been had the digital content been duly supplied in conformity with the contract. The concept of 'economic damage' is not defined and the preamble merely explains that the harm suffered by the consumer can extend to both software and hardware. The proposal provides that detailed rules on the 'exercise of the right to damages' are to be laid down by the Member States.

Modification of digital content by supplier during time of subscription

If the consumer purchased a subscription of 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. The proposal contains detailed rules on the effects of termination of long-term digital contracts with regard to the further use of the content and the retrieval of the consumer's content.

Supplier's right of redress to persons earlier in the chain of transactions

Whenever suppliers are liable to the consumer because of non-supply or non-conformity of the digital content, they may pursue remedies against persons earlier in the chain of transactions. Details are left to national law.

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. The Member State may choose whether to grant standing to one or more of the following entities: public bodies, consumer organisations, or professional organisations.

Mandatory nature of rules

The rules in the directive are to be unilaterally mandatory (*jus cogens*), meaning that contractual terms may not deviate from them to the detriment of the consumer. However, consumers may agree to worse conditions once the non-conformity of the digital content is brought to their attention.

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**

The [European Consumer Organisation \(BEUC\)](#) welcomed the Commission's proposal, considering that most Member States do not have specific rules on the supply of digital content, which makes the directive 'a missing piece of the consumer law *acquis*'. The application to digital content of rules regarding tangible goods, in some Member States, was not a sufficient solution. In BEUC's view, 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. BEUC recommended addressing the issue of unfair terms in the directive and considered that remedies available under contracts for the sale of tangible goods should be made available also for digital content.

Businesses

The European Association of Craft, Small and Medium-sized Enterprises ([UEAPME](#)) pointed out that there were currently no sufficient legal rules concerning the supply of digital content, in particular with regard to streaming and downloading. However, UEAPME considered that the rules applicable to digital products should be the same as for tangible products. Furthermore, it argued 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, stressed the need to preserve the 'fast developing nature of digital content markets' and 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. They also acknowledged the risk of legal fragmentation if individual Member States enacted domestic legislation on the supply of digital content.

Legal practitioners

The [Council of Bars and Law Societies of Europe](#) pointed out that contracts for the supply of digital content were classified differently in different Member States, leading to discrepancies between legal regimes and legal uncertainty for businesses. They recommended urgent legislative action, arguing that the 'existing rules are not sufficient to protect the interests of users of digital content'. The UK [General Council of the Bar](#) took a sceptical view on the need for new legislation. English barristers would rather extend the existing Consumer Sales Directive to cover the sale of digital content to consumers, than devise a new instrument.

Legal scholars

[Vanessa Mak](#) proposed requiring Member States to create a special type of contract (supply of digital content), distinct from sale and services to avoid discrepancies between national laws. She also considered that the definition of 'digital content' in the proposal was unclear and must be revised. [Christiane Wendehorst](#) criticised the idea of splitting the sale of tangible goods and supply of digital content into two separate directives, pointing to the 'merger of the tangible and digital world'. [Benedicte Fauvarque-Cosson](#) criticised the proposal for a lack of clarity regarding the various types of termination and suggested that consumers who received completely defective digital content should have the right of immediate termination. [Hugh Beale](#) pointed out that owing to the maximum harmonisation clause, the proposed directive would lead to a significant reduction in consumer protection in some Member States. [Gerald Spindler](#) considered the proposal to be 'a bold step in the right direction, which broke away from traditional legal categories imposed upon the supply of digital content. He noted that the scope of application regarding digital content provided in exchange for data was not defined in a precise way and could lead to practical problems in interpretation. He further noted that cookie-based services collected a huge amount of data but would not be covered by the directive since the consumer did not provide data actively but merely passively. He criticised the rule whereby conformity expectations should vary depending whether digital content was provided for money or for data, arguing that this would discriminate between traders depending on their business model. He concluded that the rules on conformity would not actually improve the level of consumer protection. Spindler noted that the absence of time limits for remedies would actually lead to discrepancies between Member States, as national prescription periods would apply.

Advisory committees

In April 2016, the European Economic and Social Committee delivered its [opinion](#) on the proposal (rapporteur: Jorge Pegado Liz, Portugal). It argued that the directive should, in principle, be a minimum harmonisation instrument, allowing Member States to provide for a higher level of consumer protection. Nevertheless, for 'pragmatic reasons' it accepted the Commission's approach of maximum harmonisation. If that is the path to be taken, the EESC would actually prefer a directly applicable regulation as opposed to a directive that needs to be implemented. As regards the directive's scope *ratione personae*, the EESC would extend protection to individual professionals by including them in the definition of 'consumer'. The EESC also called for clarity regarding the legal status under the directive of data centre services, especially cloud computing and combinations of digital content services with communication services.

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, which [considered](#) that by imposing a maximum level of consumer protection the directive would actually force some Member States, including France, to lower the existing protection standards. Other national parliaments did not issue reasoned opinions, but nevertheless expressed views on the proposal.

Parliamentary analysis

In September 2015, the **Members' Research Service** of EPRS 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. Following this publication, the Members' Research Service held a [policy hub](#) with Dirk Staudenmayer (Commission) and Professor Martijn Hesselink (University of Amsterdam). 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 **Policy Department C** organised a [workshop on 'New rules for contracts in the digital environment'](#) for the Legal Affairs Committee with the participation of Professors Hugh Beale, Vanessa Mak, Jan Smits, Bénédicte Fauvarque-Cosson and Christiane Wendehorst. The workshop was accompanied by the publication of four in-depth analyses written by academics on supply of digital content. 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 initially (February 2016) referred only to the Internal Market and Consumer Protection Committee (rapporteur: Evelyne Gebhardt, S&D, Germany), with opinions to be delivered by the JURI Committee (rapporteur: Axel Voss, EPP, Germany) and the Civil Liberties, Justice and Home Affairs (LIBE) Committee (rapporteur: Marju Lauristin, S&D, Estonia). However, in April 2016 it was decided that the IMCO and JURI committees would be jointly responsible, with Evelyne Gebhardt and Axel Voss as co-rapporteurs.

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 be easily 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 (in case of doubt as to whether it counts as digital content or not).

Data as counter-performance

The original proposal extended to contracts in which consumers *actively* provide personal data or other data as counterperformance, presumably to the trader (Article 3 (paragraph 1)). 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 counterperformance if the processing of such data was 'strictly necessary for the performance of the contract or for meeting legal requirements', provided that the supplier would not further process it for other purposes. The rapporteurs propose to limit this exclusion to legal requirements only (Article 3 (paragraph 4)). Therefore, if the trader needs the data to perform the contract, but is not under a legal requirement to collect that data, the provision of that data – active or passive – will be treated as counterperformance and bring the contract within the directive's scope.

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 (deletion of Article 3 (paragraph 3)). 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 service, regardless 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 the 2016 [General Data Protection Regulation](#), which will become applicable as of May 2018. 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. This rule follows the model of the 1993 [Unfair Terms Directive](#), which also requires Member States to make unfair terms non-binding upon the consumer, while leaving – in principle – the rest of the contract intact (the *utile per inutile non vitiatur* principle).

Deadline for supply of digital content

The original proposal (Article 5 (paragraph. 2)) contains a default rule (*jus dispositivum*) 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. The rule would remain a default one.

Objective v 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 (proposed Article 6(a)), 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 (...)' (proposed Article 6 (paragraph 1, point a)). This modification undoubtedly strengthens the extent of consumer protection, bringing it into line with what is provided for in the rules on sale of goods.

Modification of the digital content or service

The rapporteurs seek to enhance consumer protection with regard to digital content or service 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 service 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 service 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). The report drew particular attention to the need to increase personal data protection in the online environment, stressing that citizens' personal photos, address books, medical information and intimate conversations took place and were often stored online. This allowed companies to draw a surprisingly 'intimate portrait' of the citizen on the basis of online digital traces. Stronger protection of privacy was needed in the digital environment than offline.

In line with that, the LIBE Committee 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 existing General Data Protection Regulation. As regards criteria for evaluating the quality of the digital contract, 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

On 2 June 2016 the Council held a [policy debate](#) on the Digital Content Directive. In the meantime, the Working Party on Civil Law Matters (Contract Law) managed to finalise an initial examination of the most important articles of the proposed directive. Many delegations emphasised that the overall consistency of EU consumer contract law must be maintained. It was also underlined that it is important that Digital Content Directive fit well with national contract laws. Likewise, the delegations stressed the need for coherence between the future Digital Content Directive and the existing Consumer Sales Directive, which is now subject to the REFIT exercise at the Commission and is expected to be amended in the near future. Similar concerns were raised with regard to coherence with the Consumer Rights Directive, and the recently adopted General Data Protection Regulation.

As regards the content of the directive, the delegations agreed with the idea of covering digital content supplied to consumers in exchange for counterperformance other than money. They also supported the current scope of the proposal being limited to consumer contracts only, and not applicable to commercial contracts between businesses. However, the Council was not favourable to including a rule on damages in the directive, arguing that it was not necessary to reach its objectives. 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 genuinely technologically neutral. Another aspect analysed was the conformity test. The Council would prefer to give precedence to objective, rather than subjective criteria of conformity meaning that digital content should live up to general expectations of quality and not only to what is stipulated in the contract. This would be in order to avoid a situation in which the business lays down very low quality requirements in the contract to the detriment of the consumer. Discussions regarding the remedies available to consumers and their possible hierarchy are still on-going.

Policy debate in December 2016

A second [policy debate](#) held on 9 December to provide further guidelines for the work to continue at technical level focused on three issues: embedded digital content, 'other data', and the relationship between objective and subjective criteria of conformity. 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 counterperformance, the Council considered that more work was needed on a technical level to define the scope of the notion, before deciding whether such data should be admissible as counterperformance for digital content. On the balance between objective and subjective criteria of conformity, the ministers agreed that priority could be given to

subjective (contractual) criteria if consumers were made aware and expressly accepted a deviation from the objective conformity criteria in the contract.

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Second edition. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. To view the previous edition of this briefing, please see: [PE 581.980](#), April 2016.