

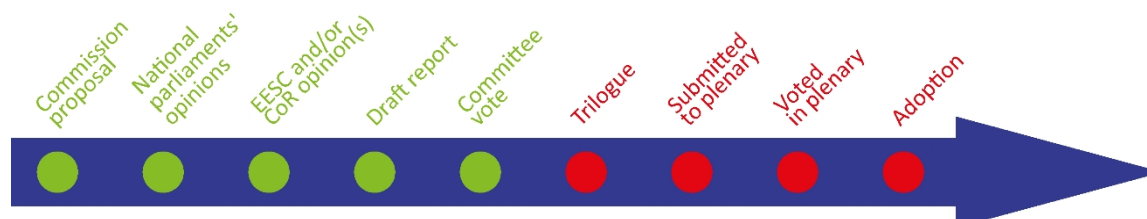
Contracts for the supply of digital content and digital services

SUMMARY

On 21 November 2017, the European Parliament's Internal Market and Consumer Committee (IMCO) and Legal Affairs Committee (JURI) adopted their joint report on the European Commission's proposal for a directive regulating the private-law aspects of contracts for the supply of digital content and digital services in the internal market. The Council of the EU agreed on a general approach in June 2017. Trilogue meetings began on 5 December 2017 and are still on-going. The main changes proposed by the joint report of the two Parliament committees are concerned with the duration of legal guarantees for digital content and services, liability for hidden defects and the short-term right to reject defective digital content. An issue which is still being discussed is the relationship between the directive and EU public-law rules on the protection of personal data.

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>	Trilogue negotiations	



Introduction

In the digital economy, contracts for the supply of both digital content and digital services are concluded on a daily basis by millions of consumers. Digital content takes the form of computer programs and mobile applications, as well as cultural and entertainment goods in digital form. Digital services include, for instance, [cloud computing services](#) or social media platforms. The supply of digital content or the provision of digital services has become commonplace. However, Member States' national private-law systems treat such contracts quite differently. In some Member States, the existing rules on sales and services, originally conceived for tangible goods and services, are applied by analogy to digital content and services. In others, only rules of general contract law apply. The United Kingdom has adopted special rules on digital-content contracts and Ireland was initially contemplating following suit. In this context, at the end of 2015 the European Commission, as part of its [digital single market strategy](#), put forward a [proposal](#) for a directive on the supply of digital content to consumers (the digital content directive, DCD), in order to grant consumers of digital content a set of uniform contractual rights applicable across the EU.

Existing situation

Currently, there is no EU legislation specifically addressing consumer contracts for the supply of digital content and digital services. Nonetheless, such contracts do fall within the scope of EU consumer private law, especially the maximum-harmonisation [Consumer Rights Directive](#) (CRD) and the minimum-harmonisation [e-Commerce Directive](#) and [Unfair Terms Directive](#). However, none of these sets out in detail the mutual rights and duties of the parties to a contract for supply of digital content or services, leaving the issue to national private law.

Private-law rules, laying down the contractual rights and duties of the parties to a contract, need to be distinguished from public-law rules (such as tax law, data protection law or rules on safety standards), which are enacted for the protection of the general interest. Specifically, the data protection aspects of consumers' activity in the digital environment are regulated in the General Data Protection Regulation ([GDPR](#)), which will become applicable in May 2018, and in the [e-Privacy Directive](#) (soon to be replaced by an [e-privacy regulation](#)).

The changes the proposal would bring

Scope of application and level of harmonisation

The scope of the [proposed directive](#) would cover all contracts between traders and consumers concerning the supply of digital content (data supplied in digital form, including software, video, audio and e-books) and the provision of digital services (including cloud computing, social media, data-sharing and online work tools). 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), treated as non-monetary counter-performance. The proposal aims at [maximum harmonisation](#), i.e., Member States would not be allowed to provide for more consumer-friendly rules in their national legal systems, in areas that fall within the directive's scope, in contrast to minimum harmonisation whereby Member States need to provide for a minimum standard as required by the directive, but are free to enact rules more favourable towards consumers.

EPRS Contracts for supply of digital content and digital services

The rules in the directive are to be mandatory (*ius cogens*), meaning that contracts may not deviate from them to the consumer's detriment.

Legal requirements concerning quality of digital content and services

The issue of the required quality of the digital content or services supplied by a trader to a consumer are regulated through the notion of 'conformity with the contract', as in the Consumer Sales Directive. The main issue is whether conformity should be evaluated according to 'subjective criteria' (i.e. as laid down in the text of the contract), or 'objective criteria' (i.e. the general expectations consumers have with regard to a given type of digital content or service). The proposal (as presented by the Commission) gives priority to subjective criteria and allows the resort to objective ones only if the text of the contract is silent or unclear in that regard. Another important aspect of the concept of conformity is the burden of proof – who (trader or consumer) must prove that the digital content or service is faulty or not. According to the proposal, the burden of proof rests in principle with the supplier, that is, if the consumer claims the content or service is faulty, it is up to the trader to prove the contrary in court.

Consumer remedies in case of non-conformity

If the digital content or service proves to be faulty (i.e. not in conformity with the contract), the consumer may resort to a number of legal remedies against the trader (ultimately enforcing them in court). The proposal divides these remedies into primary ones, which the consumer may resort to immediately upon discovering non-conformity, and secondary ones, which the consumer may use only if the trader fails to remove the fault (cure the non-conformity).

The consumer's primary remedy is to demand the trader remove the defects (bring the content or service into conformity) free of charge. The consumer may demand this, unless it would be impossible, disproportionate or unlawful. The trader must fulfil the consumer's request – not necessarily immediately, but 'within a reasonable time'.

If after the elapse of this 'reasonable' time the trader has not performed the contract, the consumer may resort to one of two secondary remedies, i.e. either to cancel (terminate) the contract altogether and demand a total refund, or to keep the defective digital content or service, but claim a partial refund. The consumer may also demand a partial or total refund, if removing the defects would be impossible, disproportionate or unlawful, if doing so would cause 'significant inconvenience' to the consumer, or if it is clear from the circumstances that the trader will not remove the defects, especially if they have informed the consumer of that.

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 and security). The burden of proof lies with the trader.

Termination in case of non-delivery of digital content or services

If the trader has not supplied the digital content or service at all, the consumer may terminate the contract immediately and should be reimbursed 'without undue delay', and no later than 14 days from receipt of the termination notice. This is a different situation from the one described above, where the trader did supply the content or provide the services, but not of the legally required quality.

Legal consequences of termination by consumer

The proposal contains detailed rules on the parties' rights and duties upon termination of the contract (whether on account of non-supply or non-conformity) by the consumer. First of all, the trader must reimburse the consumer without undue delay, but within no more than 14 days. Second, if the consumer provided personal data as a counter-performance, the trader must take any appropriate measures to refrain from using that data. Furthermore, the trader must provide the consumer with technical means to retrieve all the content the latter provided, as well as any other data produced or generated by the consumer, to the extent that this data has been retained by the trader. The consumer is entitled to retrieve the above data free of charge, within a reasonable time and in a commonly used format (e.g. a popular file format).

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 the trader's liability towards the consumer in cases where the non-conformant digital content or non-delivery of such content caused 'economic damage to the digital environment of the consumer'.

Modification of digital content by trader during time of subscription

If the consumer purchased a subscription to digital content for a period of time, the trader may modify this content only if the contract allows for it, and only if the consumer is notified reasonably in advance and is allowed to terminate the contract within no less than 30 days of the notice.

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 (including as a result of totalling renewed periods of subscription). In the case of such contracts, consumers may terminate them by giving notice to the trader 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 the summer of 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 \(BEUC\)](#) considered that 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

EPRS Contracts for supply of digital content and digital services

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 do not exist, general contract law still applies, 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 DCD rules '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. Furthermore, the ELI considered that the DCD 'is not coordinated properly with other pieces of EU law, in particular the [Consumer Sales Directive], the [proposed Online Sales Directive] and the [GDPR]'. ELI also noted that the DCD rules are full of 'contradictions, ambiguities and legal uncertainty' that need to be eliminated.

Legal scholars

In 2017, a collective volume, entitled '[Contracts for the supply of digital content: regulatory challenges and gaps](#)', came out, with contributions from 12 leading scholars in the field of European private law. The proposal has also recently been [analysed](#) by Thalia Prastitou Merdi, who compared the DCD with the withdrawn Common European Sales Law (CESL). She considered that 'the idea of ... full harmonisation ... is not as unproblematic as it seems ... as it opens up the possibility of fragmentation of EU law, as well as the reduction of consumer protection at national level.'¹ Merdi also highlighted the discrepancies between the DCD and the proposal for an [online sales directive](#), which, in her view, could lead to difficulties in their smooth application in the long run.

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. However, if maximum harmonisation were to be pursued, the legal form of the instrument should be a regulation and not a directive.

National parliaments

National parliaments had the possibility to express their opinion under the [subsidiarity check procedure](#) by 8 March 2016. Only the French [Senate](#) submitted a reasoned opinion.

Opinion of the European Data Protection Supervisor

On the Council's request, in April 2017 the European Data Protection Supervisor (EDPS) issued an [opinion](#) on the proposal. The EDPS was particularly critical of the idea laid out in the proposal 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 definition of 'services' under Article 57 TFEU and the e-Commerce Directive, with the purpose of including, within the directive's scope, services provided for free, or to expand the scope of the proposal to cover all cases involving the free provision of services (regardless of whether consumers provide their data or not). The EDPS was also very critical of the idea of granting consumers contractual

EPRS Contracts for supply of digital content and digital services

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. The EDPS also stressed that, as the legal requirements for processing personal data are laid down in the GDPR, this issue should not be addressed by legislation in the field of contract law. In the EDPS' view, the proposal overlaps with the GDPR and adopting it in its original form would lead to inconsistencies.

Parliamentary analysis

The Members' Research Service of EPRS has published four research papers addressing the subject matter 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 Prof. Marco Loos. Finally, in March 2017 a third in-depth analysis on the subject, 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 Tereszkievicz. 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 EP Policy Department for Citizens' Rights and Constitutional Affairs organised a [workshop on 'New rules for contracts in the digital environment'](#) for the Parliament's 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 European Parliament committees

Within the Parliament, the proposal was referred jointly (under Rule 55) to the Internal Market and Consumer Protection (IMCO) and the Legal Affairs (JURI) Committees (rapporteurs: Evelyne Gebhardt, S&D, Germany and Axel Voss, EPP, Germany).

Draft report of the co-rapporteurs

The co-rapporteurs presented their [draft report](#) in November 2016. They addressed a number of issues, including the definition of digital content and digital services, the issue of embedded digital content or service, the problem of personal data treated as counter-performance, the relationship between the directive and data protection laws, as well as the issue of conformity and consumer remedies in case of non-conformity. Following the presentation of the draft report, MEPs tabled a total of 988 amendments, which were worked upon during the following year.

Opinion of the LIBE committee

In November 2016, the LIBE committee adopted its [opinion](#) on the proposal (rapporteur: Marju Lauristin, S&D, Estonia), focusing especially on data protection and on the criteria for evaluating the quality of digital content and services.

Joint IMCO and JURI report

On 21 November 2017, the IMCO and JURI committees adopted a [joint report](#) on the proposal, with 55 votes for, four against and two abstentions by the joint committee established under [Rule 55](#). Support was gained from the majority of political groups in Parliament through the drawing up of a total of 86 compromise amendments, following the large number of amendments tabled. The joint committee also voted to open trilogue negotiations, a decision confirmed at the November II plenary session.

Title and preamble

Although the title and preamble of an EU act do not contain binding legal norms, they are nonetheless authoritative interpretive guidelines, and therefore have an impact upon the way the rules of a directive will be interpreted by the Court of Justice of the EU and national courts. The report modifies the title of the directive to explicitly include 'digital services'. Within the preamble, new recitals refer directly to primary EU law. Recital 1a mentions Article 169 of the Treaty on the Functioning of the EU (TFEU), requiring a high level of consumer protection, which is to be achieved through harmonisation in the internal market on the basis of Article 114 TFEU. Recital 1b refers to three articles of the Charter of Fundamental Rights of the EU: on consumer protection (Article 38), on the right to effective remedy (Article 47), and on the freedom of business activity (Article 16). This idea is further developed in the amended recital 5, which highlights that the directive has the aim to 'strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity'. The changed relationship to national law is further visible in the amended recital 6, where a sentence on the advantages of full harmonisation has been deleted.

Scope

The report suggests explicitly providing that the DCD applies to embedded digital content and embedded digital services (modified Article 3(3)), defined as 'digital content or a digital service pre-installed in a good' (new Article 2(1)1b). However, the rules of the directive only apply to the digital content or digital service, while the non-conformity of the 'non-digital' parts of the good are subject to the regime of the [Consumer Sales Directive](#). Therefore, one and the same good will be governed by two distinct legal regimes, depending on whether the defect is 'digital' or 'non-digital'. Hence the importance of their alignment, stressed by the co-rapporteurs (p. 90 of the joint report).

For instance, if a car breaks down, the liability for defects caused by the software (e.g. running the car's computer) will be subject to the Digital Content Directive (and national implementing provisions), whereas defects caused by mechanical factors (e.g. a damaged piston or shaft) will be subject to the Consumer Sales Directive (and national implementing provisions).

Exclusion of electronic communication services

Under the original proposal, all 'electronic communication services', as defined in Directive 2002/21, would be excluded from the DCD. The report suggests excluding 'interpersonal communication services as defined in the [European Electronic Communications Code](#)', currently being considered by the [Parliament and Council](#) (recast procedure), but still to include 'number-independent interpersonal communication services, if they are not covered by that Code (modified Article 3(5)b), which would otherwise be excluded as 'electronic communication services'.

Exclusion of free and open licences as well as public electronic registers

The report suggests excluding the provision of digital content or digital services under a free or open licence from the directive, provided that there is no contract between the

parties other than the licence itself (added Article 3(5)ea). The report also suggests excluding services and content provided by public registers in electronic form from the scope of the directive (added Article 3(5a)).

Data as counter-performance

The report rewords the text on the rule concerning data as counter-performance provided by the consumer. However, in the explanatory memorandum the co-rapporteurs explain that 'Overall ... [they] reluctantly agree with the notion of data as a counter-performance', and 'believe that this Directive should, in no way, exacerbate the already existing phenomenon of commercialisation or monetisation of personality rights' (p. 90).

The report deletes the term 'counter-performance', criticised by the EDPS, and replaces it with the term 'condition'. According to Article 3(1) of the directive, as the report suggests modifying it, the directive is to be applicable to contracts where the consumer pays a price, and to contracts where the digital content or service is supplied 'under the condition that personal data is provided by the consumer or collected by the trader or a third party in the interest of the trader'. Hence, the scope of the data that the consumer can provide in exchange for the digital content or service is limited to 'personal data' (no longer 'any other data'). Furthermore, data collection by third parties on behalf of the trader is now explicitly included. Otherwise, the scope of the directive seems to remain the same as in the original proposal. Nonetheless, the change of terminology (from 'counter-performance' to 'condition') could lead to a different interpretation of the legal consequences resulting from consumers withdrawing their consent to having their data processed. However, this would largely depend on the general contract-law rules on performance and breach of contract, which are not harmonised by the proposal but remain part of national law.

The report also amends the rule on data that are not considered as counter-performance (Article 3(4)). Apart from changes in terminology (deletion of the term 'counter-performance'), the notion of data being '*strictly necessary* for the performance of the contract or for meeting legal requirements' is replaced by data being '*exclusively processed* by the trader for supplying, maintaining the conformity of or improving' the digital content or service, or 'for the trader to comply with legal requirements'. This change will affect the scope of the directive. Whereas under the original proposal it was necessary to prove that data are '*strictly necessary*' (i.e. objectively necessary) for certain purposes, now it will be necessary to show that data are *actually* being 'exclusively processed' for those purposes. 'Exclusively processed' data are not objectively 'strictly necessary' for the stated purposes: it is also possible to process 'unnecessary' data, if they are provided by the consumer.

For instance, a consumer's photographic image (which falls within the notion of 'personal data') is not 'strictly necessary' for the supply of a digital service (e.g. an online platform). However, it is possible that the trader will use that image 'exclusively' for the purposes of supplying the digital service in question (e.g. as the user's avatar icon). Under the original wording, the supply of the picture by the consumer would count as their counter-performance (because the picture is not 'strictly necessary' – it is possible to use the service without an avatar), so the contract *would fall* within the directive's scope. Under the text as modified by the report, such a contract *will not fall within* the directive's scope, provided that the consumer does not pay a price and the picture – although required by the trader (as a 'condition' for supplying the digital service) – is not used beyond the scope of performing the contract.

EPRS Contracts for supply of digital content and digital services

Relation to data-protection law

The relation of the proposal to data-protection law has been emphasised in the newly added opening article, which repeats the content of the original Article 3(8) (now deleted) that the directive is 'without prejudice to' the rules on data protection, adding a specific reference to the GDPR (added Article-1).

Relation to national private law

The rule concerning the relationship of the directive to national private law has been expanded. Although the principle of maximum harmonisation is retained, a newly added provision states that the directive 'shall not affect national rules on remedies for "hidden defects" or the short-term right to reject' (amended Article3(9)). The report suggests allowing Member States to maintain or introduce national remedies for hidden defects (*vice cachée, verdeckter Mangel*), and to maintain (but not introduce) rules on the short-term right to reject faulty digital content or services, provided that such rules exist in their legal orders on the day the directive enters into force.

While the report does not propose to define the notion of 'hidden defects', it seems to assume that this notion applies to any defects of the digital content or service that were latent ('hidden') at the time of supply, i.e. that they could not be discovered at the moment of supply but became visible later on. Seemingly, it would be for the national legislator to set the exact standard of prudence for the consumer with regard to discovering defects (how detailed and diligent should the examination of the digital content or service be), and to deal with the consequences of the trader's possible fraudulent conduct (concealment of defects on purpose). In practice, this means that the regime of consumer remedies for non-conformity of the digital content or service would exist side-by-side with the national regime of consumer remedies for latent (hidden) defects. Presumably, consumers would be able to choose which remedies to rely on upon discovering a defect in the digital content or service.

Conformity with the contract

The report sets the requirement (new Article 5a) that the digital content or service be in conformity both with the subjective requirements for conformity (Article 6) and the objective ones (new Article 6a). This raises the level of consumer protection in comparison to the original proposal, where objective criteria for conformity come into play only as subsidiary ones (to the extent that the contract does not stipulate the subjective requirements in a clear and comprehensive manner).

Subjective requirements for conformity are those that are laid down in the contract or promised in the pre-contractual information. **Objective requirements** are those that are based on what consumers can reasonably expect from a given type of digital content or service, or that follows from existing technical standards.

Consumers will be able to opt out of objective requirements for conformity only if the deviation is made known to them explicitly beforehand (new Article 8a).

Commercial guarantees

A new rule on commercial guarantees, analogous to the one found in the Consumer Sales Directive, has been inserted (new Article 8b).

Time limits for reversed burden of proof

The rules on the reversal of the burden of proof (as to defects at the time of supply) have been modified (Article 10). Whereas the original proposal provides that such a reversal is not bound by any time limit, the report proposes to limit it to two years from the supply of the digital content or service, and, with regard to embedded digital content or service,

to only one year from the supply. However, this limitation needs to be seen in the context of the rule allowing Member States to introduce national remedies for latent defects, in parallel to the remedies offered to consumers by the directive.

Time limits for trader's liability

Under the original proposal, the trader remains liable for defects existing at the time of supply without any time limits. The report provides that the trader's liability is limited to non-conformity that becomes apparent within two years from the supply of the content or service (modified Article 9(1)i). If the digital content or service is supplied on a continuous basis, the liability extends over the time of supply. With regard to embedded digital content, the time limit is also set at two years from supply. Nonetheless, Member States may maintain more consumer-friendly rules with regard to embedded digital content, provided that they were in force on the day when the directive enters into force. Once again, these new rules need to be seen in the context of the rule allowing Member States to introduce national remedies for latent defects.

Consumer remedy in case of non-performance

If the trader fails to supply the digital service or content, the consumer must now call upon them to supply it (modified Article 11(1)). Only then, if the trader still fails to supply, may the consumer terminate. Nonetheless, the consumer will be entitled to terminate upfront if the trader had refused to perform and if the time of supply is of the essence (and the trader had been informed thereof).

Consumer remedies in case of defective performance

The regime regarding consumer remedies in case of non-conformity remains essentially the same, i.e. both the typology and hierarchy of remedies remain unchanged. A new rule (inserted Article 12(2) second subparagraph) provides that the consumer may withhold payment of any outstanding part of the price, while waiting for the trader to cure the non-conformity. A new rule (new Article 12a) provides explicitly that the consumer will have a remedy against the trader 'in the case of a lack of security'. It should be noted that 'security' already appears in the text as an element of conformity amongst the subjective (Article 6(1)a) and objective requirements (Article 6a(1)a).

Trader's duties upon termination

Upon termination of the contract, the trader will be obliged to comply with the duties provided by the GDPR (new Article 13a(2)) and will have to 'make every effort that he could be expected to make to refrain from the use of any user-generated content to the extent that it does not constitute personal data', with certain exceptions. The trader will also have to make such user-generated content, not constituting personal data, available to the consumer (also with exceptions).

Right to damages

The report expands the right to damages (Article 14) to cover compensation for any 'detriment' caused by the trader's non-performance or defective performance, and not only for detriment to the consumer's 'digital environment', as the original proposal says.

Position of the Council

Policy debates in June and December 2016

A first [policy debate](#) on the proposal was held in Council in June 2016. The Council 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

EPRS Contracts for supply of digital content and digital services

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). A second [policy debate](#) was held in December 2016. The issues discussed included embedded digital content, personal data as counter-performance, and conformity criteria.

General approach of 8 June 2017

Following the policy debates, on 8 June 2017 the Council adopted a [general approach](#) (GA) proposed by the presidency, which was accompanied by an [introductory note](#). The following main changes were introduced:

- **Personal data as counter-performance** – a rewording of the text removes references to personal data being treated as counter-performance, in order to comply with the EDPS opinion; the scope of the directive is extended '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*'.
- **References to data protection law** – concerning a definition of 'personal data', the GA provides for a direct reference to the GDPR, and explicitly provides that EU data-protection law applies to contracts for supply of digital content and services, and that in case of a conflict between the rules of the directive and the rules on data protection, the latter prevail.
- **Copyright law** – a new rule provides explicitly that the directive 'is without prejudice' to copyright law, both at EU and national level.
- **National law** – a new recital clarifies that the directive does not pre-determine the legal nature of a contract, leaving it to the Member States to decide whether it should be classified as a sales, services, rental or a *sui generis* contract.
- **Right to damages** – the rule on the right to damages has been deleted, and the issue of damages has been left entirely to national law, as clarified in a recital.
- **Bundle contracts** – contracts containing elements of supply of digital content/services and also elements of tangible goods/services should be subject to the directive 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.
- **Conformity** – objective criteria of conformity would not prevail, in principle, over subjective criteria, unless the parties decide otherwise 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.
- **Reversed burden of proof** – to be limited to one year only.
- **Hierarchy of remedies** – it will be slightly easier for the consumer to demand a price reduction or to terminate the contract; apart from the situations already included in the original proposal, this will also be possible if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination.
- **Time limits** – due to the discrepancies between national laws, time limits will be subject only to minimum harmonisation, and not a maximum one (they will be set at

EPRS Contracts for supply of digital content and digital services

a minimum of two years, but Member States will have the option of extending them).

Next steps

On 5 December 2017, the first trilogue meeting took place, followed by subsequent meetings on 12 December and on 30 January 2018. Once a compromise text is agreed, it will be submitted to the plenary for approval.

References

[Contracts for the supply of digital content](#), Legislative Observatory (OEIL), European Parliament.

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.

Merdi T.P., 'The Proposed New Digital Single Market Contract Law Directives: A New Start for Digital European Contract Law?', in: *EU Internet Law*, ed. Y.E. Synodinou (Springer 2017).

Remáč M., [Contract rules for online purchase of digital content and tangible goods](#), EPRS implementation appraisal, PE 573.293, 2016

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

¹ T.P. Merdi, [The Proposed New Digital Single Market Contract Law Directives: A New Start for Digital European Contract Law?](#), in: *EU Internet Law*, ed. Y.E. Synodinou (Springer 2017), pp. 157-158.

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, 2018.

eprs@ep.europa.eu

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

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

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



Fourth 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 608.748](#) (October 2017).