



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



LEGAL AFFAIRS

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Workshop on New rules for contracts in the digital environment

**The new proposal for harmonised rules on
certain aspects concerning contracts for the
supply of digital content**

The Digital Content Proposal (COM(2016) 634 final)

- Introduction
- Five specific issues:
 1. The scope of the proposed Directive (Artt. 2 and 3)
 2. The rules concerning contracts for a counter-performance other than the payment of a price, e.g. by providing personal data (Art. 3(1) and recital 14, Art. 6(2)(a))
 3. The criteria for non-conformity (Artt. 6-8)
 4. The reversal of the burden of proof, and the absence of a time limit for liability (Artt. 9 and 10)
 5. The damages rule (Art. 14)

1. The scope of the proposed DCD

- Art. 2(1), definition of ‘digital content’:
 - data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,
 - a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and
 - a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.
- Demarcation problems:
the Internet of Things...

2. Counter-performance other than a price

- Art. 3(1) of the proposed DCD:

This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides **counter-performance other than money in the form of personal data or any other data**.

- Art. 6(2)(a), conformity criteria:

... taking into account:

(a) whether the digital content is supplied in exchange for a price or other counter- performance than money;

- Contractual response to data protection, e.g. withdrawal of consent?

3. Criteria for non-conformity

- Art. 6(1): subjective criteria
- Art. 6(2): objective criteria

To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1, the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, ...

4. Reversal of the burden of proof, time limit

- Art. 9: reversal of the burden of proof
- Art. 10: unlimited time for liability of the supplier
since digital content is not subject to wear and tear (recital 43)

5. The damages rule

- Art. 14 of the proposed DCD:
 1. The supplier shall be liable to the consumer for **any economic damage to the digital environment** of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.
 2. The Member States shall lay down detailed rules for the exercise of the right to damages.

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