



21.11.2016

OPINION

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on the Internal Market and Consumer Protection and the
Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council
on certain aspects concerning contracts for the supply of digital content
(COM(2015)0634 – C8-0394/2015 – 2015/0287(COD))

Rapporteur: Marju Lauristin

PA_Legam

SHORT JUSTIFICATION

The digital revolution is profoundly impacting our society. As our reliance on IT-products and -services grows, it is becoming increasingly important to ensure that our rights are upheld in the digital world. Currently, while on a daily basis millions of European consumers access, purchase or use digital content in the broad sense of the word (e.g. video streaming, apps, games, cloud services or social networks), their rights online are not protected as they are in the offline world. This situation erodes consumer confidence and endangers online privacy since faulty or insecure digital products and services will not properly protect the vast amount of our personal data that is available online.

Your Rapporteur aims to increasing consumer confidence and online privacy by ensuring adequate protection for the purchase of digital content. Scope and definition of digital content have to be further clarified to ensure that all consumers - also those that are less tech-savvy or less technically intimate with the online environment - have their rights guaranteed. The online world - and thus the use of digital content - has become much more than simply a way for us to perform specific tasks. Our personal photos, address books and medical information are usually in the cloud. Many of our intimate conversations take place and are often stored online. And in our online activities we leave so many digital traces behind that companies can draw a surprisingly intimate portrait of us. It is therefore clear that in the online environment the protection of our personal data is even more pressing than in the offline world. This proposal, while focussing on the relation between supplier and consumer of digital content, is therefore inextricably linked to the issue of the protection of our personal data online. It is therefore important to ensure that this Directive should comply with the general rules of the new General Data Protection Regulation (2016/679) in order to ensure consistency in citizens' fundamental right to privacy and strengthen the trust of consumers in the supply of safe and secure digital content.

Your rapporteur would like to further strengthen and clarify the proposal on the following points. For these points it is important to keep in mind that this proposal aims at full harmonization, which prohibits Member States from maintaining or introducing national rules that will go further than this Directive in terms of consumer protection:

- Active provision by consumer of personal data: the proposal only covers types of contracts whereby the consumer either pays or "actively provides" personal data as counter-performance. This seems to be too limited, as often nowadays consumers' personal data (such as location data, personal contacts, shopping history etc) are being used in a form of counter-performance while consumers are unaware of it. Furthermore, this limitation could create a perverse incentive for suppliers to not ask for the consumer's consent. It might therefore be advisable to broaden this provision in such a way as to include all contracts for the supply of digital content involving the use of the consumer's personal data.
- A definition of personal data, based on Regulation 2016/679 has to be added, to ensure a clear differentiating line between personal data and any other data mentioned throughout the text.
- Conformity of digital content: the proposal stipulates that digital content should be in conformity with what was stipulated in the contract and only if nothing has been

stipulated in the contract more objective criteria (like technical standards or industry codes of conducts) could be used to assess its conformity. However, one could wonder if, in the light of the complexity of digital content products, the consumer is really able to fully grasp the terms and conditions of the contract and to make an informed decision. It might therefore be advisable to use more often objective and subjective criteria (such as technical standards or legitimate expectations) to ascertain conformity;

- Suppliers' liability for damages: the proposal limits the supplier's liability to only the damages done to the hardware and software of the consumer. However, there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment (for example if software contains a bug that allows hackers to gain access to a consumer's computer and steal his password for his bank account). It might therefore be advisable to broaden the scope for damages to include all damage done to the consumer. Furthermore, it might be interesting to allow Member States, in setting the detailed rules on damages, to make a differentiation between those suppliers that did everything in their power to limit the possibility of damages (e.g. by compliance to a certain IT security baseline or standards) and those that did not have "their house in order" (e.g. did not fix security vulnerabilities in their products/services that were known or reported to them) in order to encourage a stronger sense of responsibility and accountability among suppliers.
- Termination of the contract: the proposal should be clear what exact data have to be given back to the consumer when the contract is terminated.

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs, as the committees responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) For the achievement of a genuine digital single market, the harmonisation of certain aspects concerning contracts for supply of digital content, taking as a base a high level of consumer protection, is necessary.

Amendment

(2) For the achievement of a genuine digital single market, the harmonisation of certain aspects concerning contracts for supply of digital content, taking as a base a high level of consumer protection **and the need to improve accessibility**, is necessary.

Amendment 2

Proposal for a directive
Recital 7

Text proposed by the Commission

(7) Consumers will benefit from fully harmonised rights for digital content at a high level of protection. They will have clear rights when they receive or access digital content from anywhere in the EU. This will increase their confidence in buying digital content. This will also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content.

Amendment

(7) Consumers will benefit from fully harmonised rights for digital content at a high level of protection. They will have clear rights when they receive or access digital content from anywhere in the EU. This will increase their confidence in buying digital content. This will also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content *and its accessibility*.

Amendment 3

Proposal for a directive
Recital 11

Text proposed by the Commission

(11) *The* Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council¹. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically

Amendment

(11) *This* Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council¹. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically

fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers. A level-playing field between suppliers of different categories of digital content should be ensured. ***However this Directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods.***

¹. OJ L 304, 22.11.2011, p.64.

fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers. A level-playing field between suppliers of different categories of digital content should be ensured.

¹. OJ L 304, 22.11.2011, p.64.

Justification

Given the expected increase in the near future of the Internet of Things with all types of "smart devices" with embedded software incorporated, it is important to clarify under what rules such "smart devices" and its embedded software fall. In the future it will probably become rather difficult to differentiate what would be the predominant element of the product between the digital content and the tangible good. Therefore, the chosen exemption seems unworkable in practice and a separate Commission proposal on this issue would be preferable.

Amendment 4

Proposal for a directive Recital 14

Text proposed by the Commission

(14) As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive should apply ***only*** to contracts where the ***supplier requests and the consumer actively provides*** data, ***such as name and e-mail address or photos***, directly or indirectly ***to*** the supplier ***for example through individual registration or on the basis of a contract which allows access to consumers' photos***. This Directive should not apply to situations where the supplier collects data ***necessary*** for the digital content to function in

Amendment

(14) As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive should ***also*** apply to contracts where the ***consumer provides personal data or any other data that may be used*** directly or indirectly ***by*** the supplier. ***This should also include contracts in which the consumer allows access to, and processing of his or her personal data by the supplier***. This Directive should not apply to situations where the supplier collects data ***that are exclusively used by the supplier in order***

conformity with the contract, for example geographical location where necessary for a mobile application to function properly, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws. ***This Directive should also not apply to situations where the supplier collects information, including personal data, such as the IP address, or other automatically generated information such as information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie. It should also not apply to situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content.***

for the digital content to function, ***including software updating,*** in conformity with the contract, for example geographical location where necessary for a mobile application to function properly, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws.

Amendment 5

Proposal for a directive Recital 17

Text proposed by the Commission

(17) Digital content is highly relevant in the context of the Internet of Things. However it is opportune to address specific issues of liability related to the Internet of Things, including the liability for data and machine-to-machine contracts, in a separate way.

Amendment

deleted

Amendment 6

Proposal for a directive Recital 18

Text proposed by the Commission

(18) Contracts may include general terms and conditions of the supplier that need to be accepted by the consumer. For some digital content, suppliers often describe the service and measurable service

Amendment

(18) Contracts may include general terms and conditions of the supplier that need to be accepted by the consumer. For some digital content, suppliers often describe the service and measurable service

targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the supplier and the consumer. They should be covered by the definition of a contract under this Directive, and should thus comply with the rules laid down therein.

targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the supplier and the consumer. They should be covered by the definition of a contract under this Directive, and should thus comply with the rules laid down therein. ***In cases where consent to the processing of personal data is given as a counter-performance other than money, the contract should contain the information about the processing prescribed by Regulation (EU) 2016/679 of the European Parliament and of the Council¹, but that information should be clearly distinguishable from other elements of the contract. In addition, easily understandable icons should illustrate the main elements of the processing of personal data.***

¹ ***Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation))OJ L 119, 4.5.2016, p. 1).***

Amendment 7

Proposal for a directive Recital 22

Text proposed by the Commission

(22) ***The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council¹ and by Directive 2002/58/EC of the European Parliament and of the Council² which are fully applicable in the context of***

Amendment

(22) ***The pursuit of activities falling within the scope of this Directive involves the processing of personal data. This Directive is without prejudice to the rules of Union law applicable to the processing of personal data within the Union, in particular Regulation (EU) 2016/679 and***

contracts for the supply of digital content. *Those Directives* already establish a legal framework in the field of personal data in the Union. The implementation and application of this Directive should be made in full compliance with that legal framework.

Directive 2002/58/EC of the European Parliament and of the Council², *which govern the processing of personal data carried out in the Member States under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States. Those legal acts* already establish a legal framework in the field of personal data in the Union *and are fully applicable in the context of contracts for the supply of digital content*. The implementation and application of this Directive should be made in full compliance with that legal framework.

¹. OJ L 281, 23/11/1995, p. 31 - 50) [to be replaced by the General Data Protection Regulation, once adopted].

². OJ L 201, 31.7.2002, p. 37–47.

². OJ L 201, 31.7.2002, p. 37–47.

Justification

It is important to ensure that the processing of personal data which is conducted for the provision of digital content fully complies with EU data protection legislation, including the new General Data Protection Regulation, which is of a horizontal nature.

Amendment 8

Proposal for a directive Recital 25

Text proposed by the Commission

(25) In cases where the contract does not stipulate sufficiently clear and comprehensive benchmarks to ascertain the conformity of the digital content with the contract, it is necessary to set **objective** conformity criteria to ensure that consumers are not deprived of their rights. In such cases the conformity with the contract should be assessed considering the purpose for which digital content of the same description would normally be used.

Amendment

(25) In cases where the contract does not stipulate sufficiently clear and comprehensive benchmarks, **adjusted to the consumers at whom it is targeted**, to ascertain the conformity of the digital content with the contract, it is necessary to set conformity criteria to ensure that consumers **sufficiently comprehend, and** are not deprived of their rights. In such cases, the conformity with the contract should be assessed considering the purpose for which digital content of the same

description would normally be used, *available technical standards, and consumers' reasonable expectations.*

Amendment 9

Proposal for a directive Recital 27

Text proposed by the Commission

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. As recognised by the Digital Single Market Strategy a high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed, *to the extent that is proportionate to the role and function those technologies play.* In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Amendment

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. As recognised by the Digital Single Market Strategy, a high level of network and information security is essential across the European Union to ensure respect of fundamental rights, such as the right to *the protection of online* privacy and personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed *to the greatest possible extent.* In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Amendment 10

Proposal for a directive Recital 37

Text proposed by the Commission

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a

Amendment

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a

consumer to have the contract terminated should be limited to those cases where for instance bringing the digital content to conformity is not possible and the non-conformity impairs the main performance features of the digital content. Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer or, where the digital content is supplied not in exchange for a price but against access to data provided by the consumer, the supplier should refrain from using it, from transferring that data to third parties or allowing third parties to access it after termination of the contract. Fulfilling the obligation to refrain from using data should mean in the case when the counter-performance consists of personal data, that the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used either by the supplier or by any other person. Without prejudice to obligations of a controller under **Directive 95/46/EC** the supplier should not be obliged to undertake any further steps in relation to data which the supplier has lawfully provided to third parties in the course of the duration of the contract for the supply of the digital content.

consumer to have the contract terminated should be limited to those cases where, for instance, bringing the digital content *into* conformity is not possible and the non-conformity impairs the main performance features of the digital content. Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer or, where the digital content is supplied not in exchange for a price but against access to data provided by the consumer ***as a counter-performance for the digital content supplied or data produced by the consumer during the duration of the contract***, the supplier should refrain from using it, from transferring that data to third parties or allowing third parties to access it after termination of the contract. Fulfilling the obligation to refrain from using data should mean, in the case when the counter-performance consists of personal data, that the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used either by the supplier or by any other person. ***If personal data protection techniques, such as pseudonimisation, as prescribed in Regulation (EU) 2016/679, are used by the supplier, only after the request made by the consumer, the supplier should refrain from using these data.*** Without prejudice to obligations of a controller under **Regulation (EU) 2016/679**, the supplier should not be obliged to undertake any further steps in relation to data which the supplier has lawfully provided to third parties in the course of the duration of the contract for the supply of the digital content.

Amendment 11

Proposal for a directive Recital 38

Text proposed by the Commission

(38) Upon termination the supplier should also refrain from using the content **generated** by the consumer. However, in those cases where more than one consumer **generated** particular content, the supplier is entitled to continue to use the content **generated** by the consumer where those other consumers make use of it.

Amendment

(38) Upon termination, the supplier should also refrain from using the content **produced** by the consumer. However, in those cases where more than one consumer **produced** particular content, the supplier is entitled to continue to use the content **produced** by the consumer where those other consumers make use of it.

Amendment 12

**Proposal for a directive
Recital 39**

Text proposed by the Commission

(39) In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the supplier should allow the consumer to retrieve all data uploaded by the consumer, produced by the consumer with the use of the digital content **or generated through the consumer's use of the digital content**. This obligation should extend to data which the supplier is obliged to retain under the contract for the supply of the digital content as well as to data which the supplier has effectively retained in relation to the contract.

Amendment

(39) In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the supplier, **upon request by the consumer**, should allow the consumer to retrieve all data uploaded by the consumer **or** produced by the consumer with the use of the digital content. This obligation should extend to data which the supplier is obliged to retain under the contract for the supply of the digital content as well as to data which the supplier has effectively retained in relation to the contract.

Amendment 13

**Proposal for a directive
Recital 44**

Text proposed by the Commission

(44) The principle of the supplier's liability for damages is an essential element of the contracts for supply of digital content. In order to increase consumers' trust in digital content this principle should thus be regulated at Union

Amendment

(44) The principle of the supplier's liability for damages is an essential element of contracts for supply of digital content. In order to increase consumers' trust in digital content, this principle should thus be regulated at Union level to ensure

level to ensure that consumers do not suffer a detriment if ***their hardware or software is damaged*** by digital content which is not in conformity with the contract. Therefore, consumers should be entitled to a compensation for damages caused to the ***consumer's digital environment*** by a lack of conformity with the contract or a failure to supply the digital content. However, it should be for Member States to lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily 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.

that consumers do not suffer a detriment if ***they sustain damage*** by digital content which is not in conformity with the contract. Therefore, consumers should be entitled to a compensation for damages caused to the ***consumer*** by a lack of conformity with the contract or a failure to supply the digital content. However, it should be for Member States to lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily 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. ***It should be possible for Member States, when laying down the rules in that regard, to provide for a reduced or increased degree of liability for damages in order to differentiate between suppliers that have done everything in their power to limit the possibility of damage, for example by observing industry codes of best practice, security baselines or international standards, and those that have been negligent in this respect.***

Justification

The proposal limits the supplier's liability to economic damages suffered by the hardware and software of the consumer. This is too limited since there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment. Furthermore, in order to encourage a stronger sense of responsibility and accountability among suppliers, Member States should be allowed, in setting the detailed rules on damages, to make a differentiation between those suppliers that did everything in their power to limit the possibility of damages and those that did not.

Amendment 14

Proposal for a directive Recital 55

Text proposed by the Commission

(55) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically **Article 16, 38 and 47** thereof.

Amendment

(55) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically **Articles 7, 8, 16, 38 and 47** thereof.

Amendment 15

**Proposal for a directive
Article 2 – point 1 – point a**

Text proposed by the Commission

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

Amendment

(a) data which **are** produced and supplied in digital form, **including** video, audio, applications, digital games and any other software,

Amendment 16

**Proposal for a directive
Article 2 – point 1 a (new)**

Text proposed by the Commission

Amendment

1a. 'personal data' means personal data as defined by point (1) of Article 4 of Regulation (EU) 2016/679;

Amendment 17

**Proposal for a directive
Article 2 – point 5**

Text proposed by the Commission

5. 'damages' means a sum of money to which consumers may be entitled as compensation for **economic damage to their digital environment**;

Amendment

5. 'damages' means a sum of money to which consumers may be entitled as compensation for **material and non-material damage**;

Justification

The proposal limits the supplier's liability to economic damages suffered by the hardware and software of the consumer. This is too limited since there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment, for example if a software contains a bug that allows hackers to gain access to a consumer's computer and steal his identity in order to perform identity fraud. A similar provision is also included in the new General Data Protection Regulation

Amendment 18

Proposal for a directive Article 3 – paragraph 1

Text proposed by the Commission

1. 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.***

Amendment

1. This Directive shall apply to any contract where the supplier supplies digital content ***or a digital service*** to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer ***makes available his or her personal data or any other data instead of a payment in money, insofar this is possible in line with Regulation (EU) 2016/679. The contract shall explicitly indicate which personal data are exchanged for the content supplied.***

Amendment 19

Proposal for a directive Article 3 – paragraph 4

Text proposed by the Commission

4. This Directive shall not apply to ***digital content provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the***

Amendment

4. This Directive shall not apply ***where personal data or other data made available by the consumer are exclusively used by the supplier to supply the digital content or to meet legal requirements, and the supplier does not process those data for any other purpose.***

supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.

Amendment 20

Proposal for a directive Article 3 – paragraph 7

Text proposed by the Commission

7. If any provision of this Directive conflicts with a provision of another Union act ***governing a specific sector or subject matter***, the provision of that other Union act shall take precedence over this Directive.

Amendment

7. If any provision of this Directive conflicts with a provision of another Union act, the provision of that other Union act shall take precedence over this Directive.

Amendment 21

Proposal for a directive Article 3 – paragraph 8

Text proposed by the Commission

8. This Directive ***is without prejudice to*** the protection of individuals with regard to the processing of personal data.

Amendment

8. ***No provision of this Directive or of any act transposing it into national law shall in any way reduce or undermine*** the protection of individuals with regard to the processing of personal data ***as provided for in Regulation (EU) 2016/679 and in Directive 2002/58/EC.***

Amendment 22

Proposal for a directive Article 3 – paragraph 9 a (new)

9 a. *Where, in the context of supplying digital content within the scope of this Directive, the law of Member State other than that of the consumer's permanent residence applies, the supplier shall inform the consumer accordingly before entering into the contract.*

Amendment 23

Proposal for a directive Article 5 – paragraph 2

Text proposed by the Commission

2. The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise. The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier.

Amendment

2. The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise, **and without prejudice to point (m) of Article 16 of Directive 2011/83/EU.** The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 **of this Article** applies, to the third party chosen by the consumer, whichever is the earlier.

Amendment 24

Proposal for a directive Article 6 – paragraph 1 – introductory part

Text proposed by the Commission

1. In order to conform with the contract, the digital content shall, where relevant:

Amendment

1. The contract shall include all relevant characteristics for the assessment of the conformity of the digital content, as well as all relevant information regarding the processing of personal data in compliance with the obligation under Regulation (EU) 2016/679. In order to

conform with the contract, the digital content shall, where relevant:

Amendment 25

Proposal for a directive Article 6 – paragraph 1 – point d

Text proposed by the Commission

(d) be updated as stipulated by the contract.

Amendment

(d) be updated as stipulated by the contract ***or as necessary to guarantee the characteristics provided for in points (a) and (b), in particular continuity and security.***

Amendment 26

Proposal for a directive Article 6 – paragraph 2 – introductory part

Text proposed by the Commission

2. ***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, taking into account:

Amendment

2. ***In addition to complying with any conformity requirements included in the contract as provided for by paragraph 1,*** the digital content shall be fit for the purposes for which digital content of the same description would normally be used ***and shall possess the qualities,*** including its functionality, interoperability and other performance features such as accessibility, continuity and security, ***which consumers may reasonably expect,*** taking into account:

Amendment 27

Proposal for a directive Article 6 – paragraph 2 – point a

Text proposed by the Commission

(a) whether the digital content is

Amendment

(a) whether the digital content is

supplied in exchange for a price or other counter-performance than money;

supplied in exchange for a price or counter-performance **other** than money **by the provision of personal data or any other data pursuant to Article 3(1)**;

Amendment 28

Proposal for a directive Article 6 – paragraph 2 – point a a (new)

Text proposed by the Commission

Amendment

(aa) consumers' legitimate expectations;

Justification

In the proposal, digital content has to be in conformity with what was stipulated in the contract and only if nothing has been stipulated in the contract more objective criteria (like technical standards or codes of conducts) could be used to assess its conformity. However, digital content products are often so complex that the consumer cannot be expected to fully grasp the terms and conditions of the contract and to make an informed decision. It would therefore be advisable to use more often criteria such as technical standards or legitimate expectations to ascertain conformity.

Amendment 29

Proposal for a directive Article 6 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) **where relevant**, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

(b) any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

Amendment 30

Proposal for a directive Article 6 – paragraph 2 – point b a (new)

Text proposed by the Commission

Amendment

(b a) any existing best practices relating to the security of information systems and digital environments;

Amendment 31

Proposal for a directive Article 6 – paragraph 3

Text proposed by the Commission

3. Where the contract stipulates that the digital content shall be supplied over a period of time, the digital content shall be in conformity with the contract throughout the duration of that period.

Amendment

3. Where the contract stipulates that the digital content *is to* be supplied over a period of time, the digital content, ***including, where necessary, security updates to be provided by the supplier,*** shall be in conformity with the contract throughout the duration of that period.

Amendment 32

Proposal for a directive Article 6 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5 a. In order to be in conformity with the contract, the digital content or digital service shall respect the principles of “privacy by design” and “privacy by default” set out in Article 25 of Regulation (EU) 2016/679.

Amendment 33

Proposal for a directive Article 9 – paragraph 3

Text proposed by the Commission

3. The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least

Amendment

3. The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least

intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer.

intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer. ***The consumer shall not have to cooperate where the supplier requests access to private or personal information and communications.***

Amendment 34

Proposal for a directive Article 10 – paragraph 1 – point b

Text proposed by the Commission

(b) any lack of conformity which exists at the time the digital content is supplied;
and

Amendment

(b) any lack of conformity which exists at the time the digital content is supplied;

Amendment 35

Proposal for a directive Article 10 – paragraph 1 – point b a (new)

Text proposed by the Commission

(b a) any lack of security which was known to the supplier or could reasonably have been known to it according to best practices relating to the security of information systems and digital environments; and

Amendment

Amendment 36

Proposal for a directive Article 12 – paragraph 2

Text proposed by the Commission

2. The supplier shall bring the digital content ***in*** conformity with the contract pursuant to paragraph 1 ***within a reasonable time*** from the time the supplier has been informed by the consumer about

Amendment

2. The supplier shall bring the digital content ***into*** conformity with the contract pursuant to paragraph 1 ***without undue delay*** from the time the supplier has been informed by the consumer about the lack of

the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required this digital content.

conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required *that* digital content.

Amendment 37

Proposal for a directive Article 12 – paragraph 5

Text proposed by the Commission

5. The consumer may terminate the contract *only* if the lack of conformity with the contract impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security where required by Article 6 *paragraphs* (1) and (2). The burden of proof that the lack of conformity with the contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the supplier.

Amendment

5. ***Without prejudice to other legal grounds for terminating the contract***, the consumer may terminate the contract if the lack of conformity with the contract impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security where required by Article 6 (1) and (2). The burden of proof that the lack of conformity with the contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the supplier.

Amendment 38

Proposal for a directive Article 13 – paragraph 2 – point b

Text proposed by the Commission

(b) the supplier shall ***take all measures which could be expected in order to*** refrain from the use of ***the counter-performance other than money*** which the consumer ***has provided*** in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content

Amendment

(b) the supplier shall refrain from the use of ***personal data or any other data*** which the consumer has ***made available instead of a payment in money*** in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the

provided by the consumer with the exception of the content which has been **generated** jointly by the consumer and others who continue to make use of the content;

consumer with the exception of the content which has been **produced** jointly by the consumer and others who continue to make use of the content. ***The supplier shall refrain from processing personal data for the mere purpose of allowing non-personal data and content to be linked to the consumer in order to be able to allow the consumer to retrieve it under point (c). The supplier shall comply with the obligations applicable under Regulation (EU) 2016/679;***

Amendment 39

Proposal for a directive Article 13 – paragraph 2 – point c

Text proposed by the Commission

(c) the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced **or generated** through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without **significant** inconvenience, in reasonable time and in a commonly used data format;

Amendment

(c) the supplier, ***on request by the consumer***, shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced through the consumer's use of the digital content to the extent that data ***have*** been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without inconvenience, in reasonable time and in a ***structured***, commonly used ***and machine-readable*** data format ***and to transmit that content to another supplier without hindrance from the initial supplier;***

Amendment 40

Proposal for a directive Article 14 – paragraph 1

Text proposed by the Commission

1. The supplier shall be liable to the consumer for any economic damage to the ***digital environment of the*** consumer

Amendment

1. The supplier shall be liable to the consumer for any economic damage to the consumer caused by a lack of conformity

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.

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.

Amendment 41

Proposal for a directive Article 14 – paragraph 2

Text proposed by the Commission

2. The Member States shall lay down detailed rules for the exercise of the right to damages.

Amendment

2. The Member States shall lay down detailed rules for the exercise of the right to damages. ***When laying down those rules, Member States may provide for a reduced or increased degree of liability for damages based on objective criteria for assessing the efforts made by the supplier to avoid non-conformity of the digital content and the occurrence of the damage, such as best practices in relation to security or state-of-the-art technology.***

Amendment 42

Proposal for a directive Article 15 – paragraph 1 – introductory part

Text proposed by the Commission

1. Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract, the supplier may alter functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity ***and security, to the extent those alternations adversely affect access to or use of the digital content by the consumer,*** only if:

Amendment

1. Where the contract provides that the digital content ***is to*** be supplied over the period of time stipulated in the contract, the supplier may alter functionality, interoperability and other main performance features of the digital content such as its accessibility ***and*** continuity, only if:

Amendment 43

Proposal for a directive Article 15 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(a a) such alteration is necessary for the security of the content in line with best practices;

Amendment 44

Proposal for a directive Article 15 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) the consumer is notified reasonably in advance of the modification by an explicit notice *on a durable medium*;

(b) the consumer is notified reasonably in advance of the modification by an explicit notice;

Amendment 45

Proposal for a directive Article 15 – paragraph 1 – point d

Text proposed by the Commission

Amendment

(d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Article 13(2)(c).

(d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with *point (c) of Article 13(2) or point (b) of Article 16(4)*.

Amendment 46

Proposal for a directive Article 16 – paragraph 4 – point a

Text proposed by the Commission

Amendment

(a) the supplier shall *take all measures*

(a) the supplier shall refrain from the

*which could be expected in order to refrain from the use of **other counter-performance than money** which the consumer has **provided** in exchange for the digital content and any other data **collected** by the **supplier** in relation to the **supply** of the digital content including any content provided by the consumer;*

use of *personal data or any other data* which the consumer has *made available instead of a payment in money* in exchange for the digital content and any other data *provided* by the *consumer* in relation to the *use* of the digital content including any content provided by the consumer, *with the exception of content which has been produced jointly by the consumer and others who continue to make use of it. The supplier shall refrain from processing personal data for the mere purpose of allowing non-personal data and content to be linked to the consumer in order to be able to allow the consumer to retrieve it under point (b). The supplier shall comply with the obligations applicable under Regulation (EU) 2016/679;*

Amendment 47

Proposal for a directive Article 16 – paragraph 4 – point b

Text proposed by the Commission

(b) the supplier shall provide the consumer with technical means to retrieve all **any** content **provided** by the consumer and any other data produced **or generated** through the consumer's use of the digital content to the extent **this** data **has** been retained by the supplier. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format; and

Amendment

(b) the supplier, **on request by the consumer**, shall provide the consumer with technical means to retrieve all content **made available** by the consumer and any other data produced through the consumer's use of the digital content to the extent **that those** data **have** been retained by the supplier. The consumer shall be entitled to retrieve the content **and data** without significant inconvenience, in reasonable time and in a **structured**, commonly used **and machine-readable** data format **and shall have the right to transmit the content and data in question to another supplier without hindrance from the initial supplier**; and

Amendment 48

Proposal for a directive Article 18 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that **adequate and** effective means exist to ensure compliance with this Directive.

Amendment

1. Member States shall ensure that effective **and dissuasive** means exist to ensure compliance with this Directive.

Justification

Real enforcement of these new consumers' rights will only take place if truly effective and dissuasive sanctions are put in place by the Member States, given also the important commercial advantages that providers of digital content could gain by aggressively increasing their market share at the detriment of consumers' rights.

Amendment 49

Proposal for a directive Article 18 – paragraph 2 – point c a (new)

Text proposed by the Commission

Amendment

(ca) organisations which are active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data.

Justification

based on Art. 80 GDPR

Amendment 50

Proposal for a directive Article 19 a (new)

Text proposed by the Commission

Amendment

Article 19 a

Data protection

Processing of personal data carried out in

the context of activities conducted pursuant to this Directive shall comply with the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC.

Amendment 51

Proposal for a directive Article 22 – paragraph 1

Text proposed by the Commission

1. The Commission shall, not later than on [the date of **five** years after entry into force] review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against counter-performance other than that covered by this Directive, in particular supplied against advertisement or indirect collection of data.

Amendment

1. The Commission shall, not later than on [the date of **three** years after entry into force] review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the **interaction and compliance with Regulation (EU) 2016/679, and the** case for harmonisation of rules applicable to contracts for the supply of digital content against counter-performance other than that covered by this Directive, in particular supplied against advertisement or indirect collection of data.

PROCEDURE – COMMITTEE ASKED FOR OPINION

Title	Contracts for the supply of digital content	
References	COM(2015)0634 – C8-0394/2015 – 2015/0287(COD)	
Committees responsible Date announced in plenary	IMCO 21.1.2016	JURI 21.1.2016
Opinion by Date announced in plenary	LIBE 21.1.2016	
Rapporteur Date appointed	Marju Lauristin 16.3.2016	
Rule 55 – joint committee meetings Date announced in plenary	28.4.2016	
Discussed in committee	12.7.2016	8.11.2016
Date adopted	8.11.2016	
Result of final vote	+: 41 –: 4 0: 2	
Members present for the final vote	Martina Anderson, Gerard Batten, Malin Björk, Michał Boni, Caterina Chinnici, Rachida Dati, Agustín Díaz de Mera García Consuegra, Cornelia Ernst, Tanja Fajon, Mariya Gabriel, Kinga Gál, Ana Gomes, Nathalie Griesbeck, Jussi Halla-aho, Sophia in 't Veld, Barbara Kudrycka, Marju Lauristin, Juan Fernando López Aguilar, Roberta Metsola, Claude Moraes, Péter Niedermüller, Judith Sargentini, Birgit Sippel, Csaba Sógor, Helga Stevens, Bodil Valero, Udo Voigt, Beatrix von Storch, Josef Weidenholzer, Cecilia Wikström, Kristina Winberg, Tomáš Zdechovský	
Substitutes present for the final vote	Kostas Chrysogonos, Carlos Coelho, Anna Maria Corazza Bildt, Pál Csáky, Miriam Dalli, Daniel Dalton, Teresa Jiménez-Becerril Barrio, Ska Keller, Miltiadis Kyrkos, Jeroen Lenaers, Ulrike Lunacek, Andrejs Mamikins	
Substitutes under Rule 200(2) present for the final vote	Vilija Blinkevičiūtė, Agnieszka Kozłowska-Rajewicz, Maria Noichl	