

Experts from EU member states are continuing their examination of a proposed [directive](#) dealing with contracts for the supply of digital content under which consumers would benefit from harmonized contractual rights. Some 19 meetings are being held on the issue by the Council Working Group on Justice and Civil Liberties. The Netherlands presidency of the EU is keen to get an agreement on digital content by June.

Digital content covers items such as music, movies, apps, games, films, cloud storage services, broadcasts of sport events, social media and visual modelling files for 3D printing. According to the EU Commission, consumers suffer from a lack of clear contractual rights for faulty digital content. Time spent over the last 12 months trying to resolve problems with digital content is estimated to cost between €9 and €11 billion, according to the EU. Consumers are also not confident when buying online across borders due to uncertainty about their key contractual rights.

Member state experts note that attention has been focused on an entirely new concept of the contractual value of paying with personal data rather than the traditional way of paying for goods with money which carries certain rights. The UK and some other member states have questioned the notion that personal data such as name, address, email, age, photos, etc., be given equal value or rights as for payments. However, the EU Commission argues that in the digital economy, information about individuals is often and increasingly seen by market participants as having a comparable value to money. In fact, digital content is often supplied not in exchange for a price, but rather by giving access to personal data. The draft directive proposes that the same rights and obligations should apply to contracts where the consumer actively provides data. For example, when a contract is terminated, the supplier should reimburse the price paid by the consumer. When digital content is supplied against access to data provided by the consumer, the supplier would be required to refrain from further using the data or transferring it to third parties after termination of the contract. Officials say that more talks will be needed to resolve the issue and that a likely compromise may be that personal data carries some rights, but not the same as financial payments.

Another issue that is being debated revolves around what is termed a reversal of burden of proof for defective digital content. The draft directive imposes the burden of proof on the supplier in the event that a digital good is defective. There would be no time limit on the supplier's liability, as digital content is not subject to wear and tear.

This would also extend to contracts that have been established in exchange for data. The reversal of burden of proof would work as follows: If a consumer discovers that a product he or she purchased online more than six months ago is defective and asks the seller to repair or replace it, he or she may be asked to prove that this defect existed at time of delivery. Under the proposed new rules, throughout the guarantee period, the consumer would be able to ask for a remedy without having to prove that the defect existed at time of delivery. Member state experts so far are generally supportive of this novel burden of proof proposal.

The Council has put on hold its consideration of another proposed directive dealing with contracts for online and distance sales or goods until work is completed on the digital content directive.

Next Steps

The Council is wading into new legal territory with certain provisions of the digital content directive, which explains why so many meetings are being held. Despite some reservations on certain elements of the proposal, officials expect that a general agreement will be reached by June.

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