

The Consumer Voice in Europe

## DIGITAL CONTENT DIRECTIVE

Key recommendations for the triilogue negotiations



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## Why it matters to consumers

Consumers are not sufficiently protected when they buy digital content products online such as eBooks, films and music or subscribe to digital services. This Directive would develop a solid consumer protection framework for consumers of digital content products and close the existing legislative gap with the rules that currently apply to the physical world.

The European Parliament and the Council have started tripartite negotiations on the European Commission's proposal for a Directive on certain aspects concerning contracts for the supply of digital content in view of the adoption of a final text.

BEUC welcomes that the positions of both legislators lay the path for a legislation with a high-level of consumer protection. Below we provide our recommendations on how to ensure that consumers will benefit from these new rights.

### 1. Scope of application (Article 3)

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#### 1.1. Data as a counter-performance & interplay with the General Data Protection Regulation

More and more traders provide their services against data which in turn are generally used for advertising purposes. EU consumer law does not yet recognise this new economic reality. These services are usually presented as 'free' and consumers consequently do not enjoy conformity rights.

BEUC supports that this Directive should also apply to digital content which is provided against personal data as a counter-performance. BEUC also considers that there is a need to clarify that this Directive is without prejudice to the General Data Protection Regulation (GDPR) to ensure that consumers are always able to exercise their data subject rights.

In this regard, **BEUC supports the position of the Council which does not set the provision of the data as a condition for the supply of service** as this could potentially conflict with Article 7(4) of the GDPR. In this sense, the Council's amendment to Article 3(1) states that the Directive applies to all contracts where the consumer provides or undertakes to provide personal data to the supplier.

It would have been preferable not to have any reference to personal data in the Directive but instead to refer to "data" or to "any counter-performance" or "remuneration" to avoid potential frictions with the GDPR and to ensure a broader scope of application.

However, since both the European Parliament and the Council agree in their positions on the inclusion of digital content and digital services in exchange of personal data, **BEUC considers that the scope is broad enough to encompass services accessed upon the collection of personal data and not only when the consumer actively provides his or her personal data. This should be clarified in a recital.**

We would also like to highlight our concerns in relation to the European Parliament's amendment to Article 3(4) which states that the Directive shall not apply when the personal

data is provided by the consumer or collected by the trader exclusively for “improving” the digital content or service. **This addition is problematic from a consumer perspective because it gives the possibility to service providers to by-pass the rules of the Directive by simply stating in the terms of service that the data is necessary to improve its services.** Such type of loophole should be prevented.

## 1.2. Products with embedded software

BEUC supports the European Parliament’s position introducing specific rules for software that is embedded in tangible goods (smart goods). Consumers should benefit from enforceable rights concerning updates and interoperability of the digital content with hardware and software. The current rules of the Consumer Sales Directive are outdated in this regard and specific provisions are needed to protect consumers in this fast-developing market.

Since the European Parliament and the Council have taken different approaches to this question, BEUC recommends to opt for one of the following solutions:

- Option A: **Inclusion of goods with embedded software in the scope of the Digital Content Directive** (European Parliament position). This option will allow that all digital content, irrespective whether it is related to a tangible item or not, would be subject to the same rules. It must be clear for consumers what level of protection will apply to products with embedded software, digital content and digital services. The downside of this approach is that all smart products could eventually be subject to the rules of the Digital Content Directive therefore gradually emptying the scope of application of the Consumer Sales Directive due to the ever-increasing number of connected products that are placed in the European market.
- Option B: **Introduction of a targeted amendment to the Consumer Sales Directive** upgrading the conformity test to include new criteria related to embedded software. This could be done by adding in the list of Article 2(2) of the Consumer Sales Directive the new criteria related to interoperability and availability of regular updates for the functionality of the good with embedded software suggested. (Proposal of the European Parliament, amendment 99). By doing so, consumers would be entitled to a legal guarantee under the Consumer Sales Directive also for a lack of conformity of the good originated in the embedded software due to insufficient updates or lack of interoperability with other software or hardware.

## 1.3. Inclusion of online communication services (OTTs)

**It is crucial that number-independent interpersonal communications services<sup>1</sup> such as WhatsApp, Google Hangout or Skype fall within the scope of the proposed Digital Content Directive.** This Directive is the right instrument to protect consumers with the adequate contractual measures for this type of service<sup>2</sup>.

By including these services in the scope of the Digital Content Directive, consumers will have specific conformity rights, inexistent today. If consumers come across problems with

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<sup>1</sup> As defined by the proposed European Electronic Communications Code, otherwise also known as online communication services or over-the-top – OTT services.

<sup>2</sup> It is important to note that the proposed European Electronic Communications Code excludes number-independent interpersonal communications services from practically all of its consumer protection measures, and importantly provisions on contract termination, switching and transparency.

an online communication service, they should be able to rely on remedies provided by consumer law. These remedies must include the possibility to terminate the contract and, where appropriate, get a reimbursement when consumers access the service in exchange of a payment. Other remedies such as price reduction should also be available to consumers. This Directive would also ensure that providers of online communication services stop using consumers' data provided as a counter-performance for the service at the moment when consumers terminate the contract, and that consumers can recover their data upon termination.

## 2. Level of harmonisation (Article 4)

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The proposal provides for full harmonisation. This means that Member States cannot maintain or adopt higher levels of consumer protection than those provided in the Directive. Although this approach would make sense from a digital single market perspective, it is important to ensure that these rules do not preclude existing national standards of protection and are future and technology proof. In this fast-developing market Member States might decide to adopt additional measures to continue protecting consumers when they access digital content products. In this regard, BEUC considers that key provisions such as the limitation period and the reversal of the burden of proof should allow Member States to maintain or adopt higher standards.

## 3. Supply of the digital content or digital service (Article 5)

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This provision provides for the general conditions for the fulfilment of the obligation to supply the digital content or digital service to the consumer. **BEUC agrees with the positions of the Council and the European Parliament that the digital content or service must be provided without undue delay after the conclusion of the contract**, unless otherwise agreed by the parties. This reference is important because it will set the moment in which the remedies of Article 11 (failure to supply) will apply.

## 4. Conformity criteria (Article 6)

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The provisions on conformity are of key importance since they establish the grounds to assess whether a product is in conformity with the contract or not and therefore trigger the application of consumer law remedies. Thus, **from a consumer perspective it is essential that both subjective and objective criteria are at the same level**. Additionally, it is important to ensure that the consumer's legitimate expectations are included among the conformity criteria of this Directive as is the case for the Consumer Sales Directive (applicable to tangible goods).

Concerning the list of conformity criteria, we would like to highlight the importance of the provision of software updates to ensure that the product remains in conformity. While in the Commission's proposal this is subject to the contractual agreement between the parties, **BEUC supports the position of the Council which includes the provision of software updates as an objective conformity criterion**. However, BEUC considers that this obligation should not be limited to the guarantee period – which is likely to be set as a minimum of 2 years. In this regard, the European Parliament suggested that updates shall be made available within a reasonable period of time. While this solution is better than the Council approach we would recommend clarifying that the reasonable period of time shall be established in relation to justified consumer's expectations. This is because consumers when purchasing digital content or smart goods would not expect updates to

be provided only for a period of two years but rather during the whole life expectancy of the product.

Additionally, we would recommend that the European Parliament's amendment 36 – stating that the restrictions of exceptions and limitations authorised under copyright law shall constitute a lack of conformity – is incorporated in the article on objective conformity criteria.

## 5. Integration of the digital content or digital service (Article 7)

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BEUC agrees with the Commission's proposal, which has not been changed substantially by the European Parliament and Council's positions.

## 6. Third-party rights (Article 8)

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This article aims at ensuring that the digital content or digital service must be free of any claims from third parties preventing the use of the digital content or digital service by the consumer. **BEUC considers that the Council's position clarifying that the breach of this obligation leads to a lack of conformity is the right approach.** Additionally, we would recommend mentioning in paragraph 1 that the digital content and digital service must also allow the exercise of exceptions and limitations granted under intellectual property rights.

## 7. Burden of proof (Article 9)

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Due to the complexity of digital content and digital services, the supplier is best placed to prove that the defect existed at the time of the supply of the digital content or the delivery of the good with embedded digital content. This is because it is almost impossible for the consumer to assess such technical products and determine the cause of the defect. Therefore, the reversal of the burden of proof should apply throughout the liability period.

**BEUC is concerned by the European Parliament's position suggesting that for goods with embedded digital content the burden of proof passes to the consumer after one year.** This solution would preclude consumer rights in Portugal and France where the 2-year reversal of burden of proof already apply to smart goods. If adopted, consumers will lose essential protection in such countries.

In what concerns the reversal of the burden of proof for digital content and digital services (not embedded in tangible goods) the European Parliament suggested 2 years while the Council only suggested 1 year.

**In order to allow consumers to benefit from and exercise their rights under this Directive, it is a pre-condition that the burden of proof is always on the supplier.** It is impossible for the consumer to assess whether the defect existed at the time of the delivery / supply of the digital content or digital service. Furthermore, even if the consumer could ask an expert to look at the digital content or digital service, despite the high costs of such an endeavour, he or she would probably have to by-pass intellectual property right (IP) protections in order to identify the defect, which would probably lead to a breach of IP laws. Therefore, the most appropriate solution is to match the reversal of the burden of proof with the guarantee period.

## 8. Liability (Article 10)

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BEUC considers that there is no specific need to harmonise the guarantee period for digital content and digital services. Unlike tangible goods, digital content is not subject to tear and use. Furthermore, in absence of such harmonisation, national prescription periods would always apply.

Since both the European Parliament and Council have suggested to harmonise this point, **BEUC considers that the position of the Council is preferable to the one of the European Parliament. While the European Parliament introduces a two-year limitation period, the Council clarifies that if the national law provides for a time limit to bring a claim for lack of conformity, it cannot be less than two years.** This solution allows Member States to maintain or introduce longer periods applicable to digital content and digital services without being limited by a fixed period that does not correspond with the expectations of consumers on the durability of such products.

## 9. Failure to supply (Article 11)

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**BEUC regrets that the European Parliament and Council have deviated from the Commission's proposal by not allowing the consumer to terminate the contract as a first option in case of failure to supply the digital content.** The co-legislators have introduced an obligation on the consumer to call upon the trader to supply the digital content or digital service. This is an additional burden on the consumer who is already frustrated for not being able to access the digital content or digital service in the first place. The cases provided for in paragraph 2 of the European Parliament and Council's positions are not enough to mitigate this deviation because they condition the termination to a unilateral declaration from the trader that he won't supply the digital content or to the agreement of the parties. **A solution could be to indicate that in case the trader fails to supply the digital content in accordance with articles 5, the supplier must seek the consumer's agreement for late performance. Otherwise the consumer shall be entitled to terminate the contract immediately.**

## 10. Remedies for lack of conformity (Article 12)

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In order to reflect that the lack of conformity does not need to be established only in relation of what has been agreed in the contract (due to the need for the digital content or digital service to comply with objective conformity criteria), **BEUC recommends following the Council approach and deleting in the title "with the contract" therefore naming it "Remedies for lack of conformity".**

BEUC consider that the hierarchy of remedies proposed by the European Commission and upheld by the European Parliament and Council's positions could be maintained provided that:

- Consumers have a right to terminate the contract in case of failure to supply (Article 11).
- It is clarified in the text that the remedies shall always be free of charge in addition to not causing any significant inconvenience to the consumer (Article 12.2).
- The consumer is allowed to withhold any due payments until the digital content or digital service is brought into conformity (European Parliament Amendment 107)

- There is an easy switch to termination or price reduction at the consumer's choice if the trader / supplier has failed to bring the digital content or digital service after the first attempt (European Parliament, amendment 107)

## **11. Obligations of the trader / supplier in case of termination (Article 13A)**

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In relation to the effect of termination in contracts for the supply of digital content in exchange of data, BEUC agrees with the position of the European Parliament ( Amendment 110) to make a distinction between personal data and user-generated content.

Concerning personal data, both the European Parliament and Council have aligned this provision with the GDPR.

On user-generated content that does not constitute personal data, BEUC welcomes the suggestions of the European Parliament imposing an obligation to refrain from the use of such data provided that certain conditions apply (Amendment 110). This reference is important because the personal character of data is established only in relation to the GDPR and provided that it fulfils the conditions laid down in the definition of personal data (GDPR Article 2.1)<sup>3</sup>. This means that as soon as the data cannot identify a natural person, they would fall outside the scope of the GDPR and consequently of the Digital Content Directive too even if such data could be considered as the counter-performance for accessing or continuing using the digital content or the digital service. From the viewpoint of contractual justice, this exclusion does not make any sense.

## **12. Modification of the digital content of digital service (Article 15)**

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According to the Commission's proposal when the performance take place over a period of time, the supplier can unilaterally change features of the service e.g. functionality, interoperability, accessibility, continuity and security that affect access or use of the digital content by the consumer only if certain conditions apply. We welcome the suggestions from the European Parliament and Council to ensure that consumers are not worse off by those changes and that appropriate measures are in place if that is the case. In particular, BEUC supports:

- a. The inclusion in the contract of valid reasons which re conditional for the modification (European Parliament and Council);
- b. That the modification can be reasonably expected by the consumer (European Parliament Amendment 114)
- c. That the modification is provided without additional costs (European Parliament and Council);
- d. The possibility, where appropriate, to maintain the digital content or digital service without the modification (Council)

Although the objective of this article is positive from a consumer perspective, it should not be used as door to legitimise the unilateral modification of contract at the consumer's expense. Therefore, BEUC asks for a clarification that the termination rights should be

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<sup>3</sup> 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

granted not only when the impact of the contract modification is not linked to “adverse effects” or negative impact but in any circumstances affecting the functionality, interoperability, accessibility, continuity and security of the digital content or the consumers digital environment.

### **13. Right to terminate long-term contracts (Article 16)**

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BEUC supports that there should be a right to terminate long-term contracts, particularly in case of open-ended contracts. BEUC welcomes the clarification of the European Parliament and Council that this rule applies to fixed contracts of 12 months and contracts exceeding 12 months. **We are however concerned about the European Parliament’s position to allow the trader to obtain compensation from the consumer of those advantages given to the consumer because the contract duration exceeds 12 months (Amendment 115).** This rule would discourage consumers from switching services. 12 months is already a considerable period to allow the trader / supply to recover any advantages given to the consumer therefore such right of compensation would not be justified.

### **14. Unfair contract terms (Article 20)**

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The proposal should also tackle specific measures to protect consumers against unfair contract terms in digital services. This is especially relevant for consumers when agreeing to end-user licenses agreements (EULA), which very often contain a number of unfair copyright and restriction clauses. **Thus, BEUC supports the suggestion of the European Parliament (Amendment 120) to include in the annex of the Unfair Contract Terms Directive a list of specific terms presumed to be unfair** that related to restrictions of consumers uses of digital content products and additional unfair obligations imposed by contract to consumers in the form of tying (e.g. requiring consumers to purchase additional software or hardware to be able to use or access the digital content or service).

END





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