

The Consumer Voice in Europe

PROPOSAL FOR A DIRECTIVE ON CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

BEUC preliminary position



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Why it matters to consumers

The fast evolution of communication technologies allowed the development of business models based on the supply of digital content and digital services. These online products widened consumer choices while bringing at the same time new challenges to consumer policy. Consumers are not sufficiently protected when they buy digital content products online such as eBooks, films and music or subscribe to digital services. **This proposal offers a unique opportunity to 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.**

Summary

BEUC welcomes the European Commission's proposal, which is a step forward in ensuring that consumers are protected when purchasing or accessing digital products.

Current European and national rules are tailored for the off-line world therefore EU intervention is justified to guarantee that consumers enjoy enforceable rights when things go wrong in the digital environment.

In the relation to the Commission's proposal BEUC supports:

- The inclusion of in-kind payments into the scope of the directive.
- The adoption of specific remedies in case the digital content is not in conformity with the contract, in particular the right to recover the data submitted to the service provider such as videos, photos, consumer reviews and other user-generated content.
- The reversal of the burden of proof on the trader, which is the party best placed to assess the causes of the problem with the digital content.

BEUC asks the EU legislator to:

- Clarify the scope of application in relation to in-kind payments and the Internet of Things.
- Incorporate into the conformity test the consumer's legitimate expectations as an additional criterion.
- Clarify that the lack of guarantee period does not allow the supplier to restrict its liability by means of terms and conditions.
- Allow consumers to quit long-term contracts after six months.
- Include a new section on unfair contract terms incorporating a specific list of presumably unfair clauses restricting legitimate consumer uses of digital content products.

1. General remarks

BEUC welcomes the Commission's proposal for a Directive on certain aspects concerning contracts for the supply of digital content.

From a consumer viewpoint the draft law is a step forward to ensure that consumers are protected when purchasing digital content products or accessing digital services involving the supply of music, films, e-books and social networks or cloud-computing based services.

This proposal has the potential to complete the harmonisation process of consumer rights in the online environment initiated by the Consumer Rights Directive by means of introducing new consumer rights that are essential to guarantee a high level of protection in digital contracts.

Currently at EU level the 1999 Consumer Sales Directive only cover "tangible" goods. Therefore "intangible" goods like films, music, e-books downloaded or streamed via the Internet are currently excluded. We welcome that the new rules seek to introduce specific consumer rights when the content cannot be accessed or is defective.

2. Specific comments

2.1. Scope of application (Article 3)

BEUC overall supports the scope of application of the proposal. In order to be future proof this directive needs to broadly cover all digital content products (e.g. video, audio, applications and software) and digital services (e.g. Cloud-computing storage services, social networks, e-learning) addressed to consumers (B2C contracts).

BEUC agrees on the exception of healthcare services, financial services, gambling and services performed with a predominant level of human intervention (e.g. translation services carried out by a professional, legal advice, etc.) due to the specificities of those sectors that require the development of sectoral legislation.

Digital **communication services** play a fundamental role in today's economy and **BEUC welcomes that they are covered by this directive.** Telecommunication services are already covered by telecom rules - hence excluded from the scope of the Directive - but new digital communication services in the form of over-the-top services (OTTs) are not sufficiently addressed by the existing framework.

It is important to highlight that services like Skype or WhatsApp are different from traditional communication services and not always substitutable. For example in order to access digital communication services it is necessary to have an internet connection, while it is not the case with mobile telephony or text messages.

The challenge for decision makers is to ensure that **consumers of communication services are protected irrespective of the technology being used.** This does not mean to apply exactly same rules to all services. On the contrary, it is important to ensure that there is in place a solid and enforceable legal framework that addresses the specificities of each sector and technology.

BEUC strongly supports that the directive applies to digital products and services accessed in exchange of a monetary payment and other in-kind payments like the provision of personal data.

However, this directive would apply only in relation to contract in which the consumer actively provides for the personal data or other type of content and not to services in which the collection of data is automatic. Additionally, paragraph 1 requires that the data is provided as a counter-performance. This means that in the contract it must be established that the consumer when uploading or submitting content is remunerating the service provider.

This narrow scope could significantly limit the application of this directive to online services in which the data is collected upon agreement of the Terms and Conditions or when the provision of the data by the consumer is not considered as an essential element of the contract. For example, popular social networks or sharing platforms do not stipulate in the terms and conditions that the consumer's data are supplied as counter-performance: does it mean that these contracts would not fall under the scope of the directive?

The rights granted under this directive will also apply to digital content that is provided on a durable medium (e.g. CD or DVD). Thus, consumers will have the same rights irrespective whether they download a movie over the Internet or if they purchase it embedded in a tangible medium. BEUC supports this approach.

What rules for connected products and the Internet of Things?

The Commission's proposal is not clear enough as what rules would apply to physical products that include a digital content element e.g. software. In case of a lack of conformity: will the rules for tangible goods apply or those of the proposal?

In recital 11 the proposal states that "*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*" are not covered by this Directive and consequently the rules for tangible goods shall apply.

However, in the future it will become more difficult to differentiate what would be the predominant element of the product between the digital content and the tangible good. Therefore, it should be clarified in the text of the directive (and not by means of a recital) what are the criteria to follow for the application of the rules of the directive to connected devices and the Internet of Things.

BEUC considers that irrespective of the legal regime applicable, consumers should be able to reach an equivalent result no matter whether the rules of tangible goods or digital content apply.

Interplay with the General Data Protection Regulation

As mentioned above the proposal applies also to contracts in which the consumer provides his or her personal data as a counter-performance.

Although this acknowledgment is a positive development since current models are based on the monetisation of the consumer's personal data, it must be guaranteed that **by no means the fundamental right to privacy is undermined by the inclusion of personal data in the scope of the directive.**

The reference in article 3(8) is insufficient and **it must be made clear that the rights granted to the consumer by the General Data Protection Regulation (GDPR) remain intact** and that the consumer can exercise them within the conditions established in the GDPR.

2.2. What level of harmonisation? (Article 4)

The proposal provides for full harmonisation. This means that member states cannot maintain or adopt different 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 to guarantee that they will not become obsolete in this fast developing area which would justify the adoption of additional national measures to protect consumers accessing digital content products.

2.3. Conformity of the digital content with the contracts (Article 6)

This provision contains the criteria to assess whether the digital content conforms to the contract. Overall it reproduces the criteria established in the 1999 Consumer Sales Directive.

BEUC regrets that the consumer legitimate expectations are not amongst the conformity criteria. This means that the conformity is mainly based on the information provided by the trader without taking into account what the consumer could have expected from the digital content. The Commission's proposal weakens the position of the consumer in relation to the trader because this information is often included in contract terms and the consumer is rarely aware of the impact of such clauses in the use of the digital content.

Consumers have different expectations depending on the type of product (e.g. videogame, software, APP) or whether it is paid or for free. These expectations should be taken into account in the conformity assessment.

2.4. Burden of proof (Article 9)

BEUC strongly supports that the burden of proof is on the supplier. The consumer has an obligation to cooperate with the supplier but he or she does not have to prove at any time that the defect existed at the time of performance or delivery. This is explained by the fact that digital content are highly technical and complex products and that the consumer does not have the expertise to assess and prove that the defect existed at the time the digital content was supplied (see recital 32).

2.5. Lack of a defined guarantee period

There is no guarantee or limitation period foreseen in the proposed directive. According to the Commission this is because given the diversity of digital content, it is not appropriate to set fixed deadlines for the exercise of rights or the fulfilling of obligations related to that specific digital content (see recital 36).

This is a loophole in the directive that could be used to restrict the exercise of the rights granted to the consumer if the liability period could be established in the terms and conditions.

This problem becomes more prominent for products that are downloaded on a permanent basis on the consumer's hardware and which do not depend on updates for their correct functioning e.g. music or video files.

BEUC suggests to clarify in the text of the proposal that in absence of a guarantee period national rules on prescription apply provided that the following conditions are met:

- First, that in case of business-to-consumer contracts these period cannot be limited by contractual clauses.
- Secondly, that the national prescription period is not shorter than the guarantee period granted to consumers in sales contracts.

2.6. Liability of the supplier (Article 10)

According to the Commission's proposal the supplier of digital content is liable to the consumer in three situations:

- a. the supplier fails to provide / supply the content (e.g. the digital content cannot be downloaded or streamed after payment)
- b. Any lack of conformity which exists at the time the digital content is supplied (e.g. the digital file is corrupted causing the film or music to be of poor quality)
- c. When the contract provides that the digital content shall be provided over a period of time and the lack of conformity occurs during the duration of that period (e.g. if the supplier fails to send updates to the operational system that the consumer legally bought and this cause a malfunctioning of the hardware or software)

BEUC agrees with the liability grounds but under some circumstances the rights of the consumer could be difficult to enforce against the supplier, who may not necessarily have the technical expertise to address the consumer complain. Therefore, **BEUC suggests that the European Parliament and the Council considers the introduction of a joint producer-supplier/trader liability that will address potential loopholes in the liability chain.**

2.7. Remedies (Articles 11-13)

The proposal provides for different remedies according to the type of lack of conformity, namely:

1. If the supplier fails to supply the digital content in accordance to the criteria of Article 5, the consumer can immediately terminate the contract.
2. If the digital content is supplied but in a way that is not in conformity with the contract (e.g. the file is corrupted or the service of poor quality), the consumer is entitled to have the digital content brought into conformity e.g. by sending an update.

This must be carried out within a reasonable time and without any significant inconvenience to the consumer. If that is not possible, then the consumer is entitled to:

- a. Price reduction (if the digital content is provided in exchange of a monetary payment), or
- b. Terminate the contract provided that the lack of conformity impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security. The burden of proof is always on the supplier.

In case of termination, the supplier shall reimburse to the consumer the full price paid without undue delay and in any event no later than 14 days. If it is a long-term contract, the amount to be reimbursed is calculated in relation to the period in which the digital content was not in conformity with the contract.

In case of digital content supplied in exchanged of in-kind payment, upon termination the supplier must provide the consumer with the means to retrieve all data provided including personal data or user-generated content, free of charge, without significant inconvenience, in a reasonable time and in a commonly used data format.

BEUC strongly supports these rules, particularly those provisions related to termination of contracts for the supply of digital content in exchange of in-kind payments.

Consumers should be able to retain the ownership of their personal data and also of any user-generated content that are often transferred to the supplier as a consequence of unfair licensing clauses commonly found in general terms and conditions of companies like Facebook, YouTube, Twitter, and other social networks.

In relation to the two set of remedies that apply to each type of lack of conformity, sometimes it is difficult to distinguish in the online environment whether the lack of conformity is caused by non-supply or by a defect in the digital content (e.g. corrupted file) or service. Therefore, it would be useful to consider whether the grounds of lack of conformity should be merged for the application of remedies.

Finally, **BEUC supports that consumers cannot be asked to pay for the use of the defective digital content prior to termination of the contract.** This solution is consistent with the jurisprudence of the CJEU (*Quelle*), which should be upheld by the EU legislator as a general principle.

2.8. Right to damages (Article 14)

The proposal establishes that member states shall adopt national rules enabling consumer to recover any economic damage to the digital environment of the consumer (e.g. hardware or software) caused by a lack of conformity or failure to supply the digital content.

The objective of this right is to put the consumer “as nearly as possible” into the position in which the consumer would have been if the digital content had been supplied in conformity with the contract.

National laws on damages differ from country to country and across different legal traditions (e.g. common Law vs continental/civil law) so it would be difficult to adopt a one-fit-all solution. The directive impose an obligation on member states to adopt such rules so consumers in each country will be able to request damages if the digital content caused a damage to the consumers hardware (e.g. Computer, smart TV) or software (e.g. Operating System).

BEUC overall supports this approach but it should be clarified in the text of the Directive that other national rules on damages are not affected by this proposal.

The right to claim damages should not be limited to the harm caused to the digital environment of the consumer. National rules on contractual and extra-contractual liability (tort) should remain applicable.

2.9. Unilateral modification of the digital content (Article 15)

BEUC welcomes a rule on termination of the contract upon unilateral modification of the terms and conditions.

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:

- a. The contract stipulates the ground for modification;
- b. The consumer is notified reasonably in advance of the modification by an explicit notice on durable medium;
- c. The consumer is allowed to terminate the contract free of charge within no less than 30 days from the receipt of the notice and,
- d. Upon termination the consumer can recover all his/her data.

If the consumer decides to terminate the contract, the supplier must reimburse to the consumer the part of the price paid corresponding to the remaining period of time after termination. In case of digital content accessed in exchange of personal data, the supplier must stop processing the consumer's data and allow the consumer to get his/her data back.

Although the objective of this rule 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 to clarify in the text that **the termination rights should be granted not only when the impact of the contract modification is not linked only to "adverse effects" or negative impact (first paragraph) but in any of the circumstances affecting the functionality, interoperability, accessibility, continuity and security of the digital content or the consumers digital environment.**

2.10. Right to terminate long-term contracts (Article 16)

BEUC supports that there should be a right to terminate long-term contracts, particularly in case of open-ended contracts.

The European Commission proposes that the right to terminate should apply when the contract providers renewals that exceed 12 months. BEUC considers that for these types of products a one-year period for termination is too long and therefore **BEUC calls for rule allowing consumers to terminate the contract free of charge after six month.**

The European Commission claims that the 12-month period is necessary to secure the recover of investments by developers/suppliers. Digital content products do not require significant infrastructure investments that could justify locking-in consumers for a longer period than 6 months. Additionally, a flexible termination period in a dynamic market like online services would encourage competition and with it the development of more competitive offers for consumers.

BEUC welcomes that there are no formal requirements applicable to the notice that can be given “by any means” and that the termination shall be effective within 14 days.

Additionally, it should be clarified in a recital that **“the right to terminate” should not preclude consumers to claim other reasons to terminate the contract under national law.**

2.11. Effects of termination

The Commission’s proposal also regulates the effect of termination of the contract. After termination:

- The supplier shall stop using the consumers’ data and allow the consumer to recover his/her data including personal data and user generated content.
- Where applicable, the consumer shall delete any usable copy of the digital content e.g. movie downloaded as a part of a subscription which did not include permanent downloading.
- Upon termination, the supplier may prevent the consumer to access the service by disabling the users account or by means of Technical Protection Measures.

BEUC supports these effects, particularly on the possibility for the consumer to recover all data and user-generated content. It is important to highlight that the consumer should be entitled to recover in a usable format the data that has a value for him or her such as photos, videos, consumer reviews and messages. **This right is without prejudice to the rights granted under the General Data protection Regulation** which are not affected by this directive.

It must be clarified in the text of the proposal that the measures to prevent the consumer to access the service or continue using the content must be proportionate and reasonable.

2.12. Enforcement (Article 18) and mandatory nature (Article 19)

BEUC supports that the Directive requires member states to guarantee that there are effective means in place to ensure compliance with these rules, including administrative and judicial actions brought by consumer associations.

Finally, the provisions of the directive have mandatory nature so contract terms restricting the rights granted under the Directive shall not be binding on the consumer. **BEUC fully supports these rules.**

2.13. What is missing in the proposal? - unfair contract terms in digital content contracts

An aspect that should be also tackled in the proposal is specific measures to protect consumers against unfair contract terms in digital services. This last aspect is particularly problematic for consumers when agreeing to End-User Licenses Agreements (EULA), which very often contain a number of unfair copyright and liability clauses.

BEUC suggests the inclusion of a non-exhaustive list of specific terms presumed to be unfair that related to restrictions of consumers uses of digital content products. These should include:

- Contractual restrictions to the exercise of an exception or limitation granted under copyright law.
- Contractual restrictions to the possibility to make private copies for non-commercial purposes such as format shifting and back-ups.
- Limitations to transfer legally acquired digital content for non-commercial purposes. For example, by restricting the possibility to share e-books between members of the family and friends.
- Contractual clauses requiring the consumer to conclude an additional digital content contract or a contract pertaining to hardware with the business or a third party.



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