

Data As Counter-Performance: A New Way Forward Or A Step Back For The Fundamental Right Of Data Protection?

A data protection analysis of the proposed Directive on certain aspects for the supply of digital content

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Table of content

1. Introduction: the Digital Content Proposal
2. Key areas of criticism and their treatment in the legislative negotiations
 1. Incompatibility with the GDPR
 2. Conflict with the fundamental rights nature of data protection
 3. Legitimation of the business model of free services
3. Arguments for reconciliation
 1. Parallel application to the GDPR
 2. The obligation of the EU legislator to protect personal data
 3. Pragmatic approach
4. Conclusions

The Digital Content Proposal

Proposal for a Directive of the European Parliament and of the Council on certain aspects for the supply of digital content [2015] COM(2015) 634 final.

Art. 3 (1) Digital Content Proposal:

"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."

Scope of application of original Commission proposal=

CONTRACT + CONSUMER + ACTIVE PROVISION OF PERSONAL OR OTHER DATA

Incompatibility with the GDPR

Differentiation between ACTIVELY and PASSIVELY provided data

- **EC Rec. 14:** *"This Directive should (...) 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."*
- **EP Rec. 14:** *"(...) this Directive should apply to contracts where the trader requests and the consumer provides personal data, as well as where the trader collects personal data. It would include, for example, the name and e-mail address or photos, (...) or personal data collected by the trader, such as the IP address."*
- **Council Rec. 14:** *"(...) This Directive should not apply to situations where the supplier only collects metadata (...), the IP address, or other automatically generated information such as information collected and transmitted by cookies, (...)."*

Incompatibility with the GDPR

Interplay with the LEGAL GROUNDS for processing of the GDPR

GDPR, Art. 6 (1) (b) (c) & (4):

(b) “(...) *necessary for the performance of a contract* (...)”

(c) “(...) *necessary for compliance with a legal obligation to which the controller is subject*”

(4) “Where the processing for a purpose other than that for which the personal data have been collected (...), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account (...)”

Council General Approach, Art. 3 (1):

“(...) exclusively processed (...) for supplying the digital content or digital service, or for the supplier to comply with legal requirements (...), and the supplier does not process these data otherwise (...)”

EC Proposal, Art. 3 (4):

“This Directive shall not apply (...) 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 supplier does not further process them in a way incompatible with this purpose.”

EP Report, Art. 3 (4):

“exclusively processed by the trader for supplying, maintaining the conformity of or improving the digital content or service or for the trader to comply with legal requirements (...)”

Conflict with the fundamental rights nature of data protection

Can personal data be a mere commodity?

Problem with human dignity?

Problem with the right to withdraw consent?

Legitimation of the business model of free services

EDPS, **Opinion 4/2017** on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (14 March 2017):

"There might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we should give that market the blessing of legislation."

ARGUMENTS for reconciliation: Parallel application with the GDPR

Application of the GDPR

- GDPR will apply in all situations covered by the Digital Content Proposal
- Compliance of processing with EU data protection law to be solved solely by GDPR
- Legitimate basis for processing solely regulated by GDPR.

Application of the Digital Content Proposal

- Digital Content Proposal applies in addition to GDPR
- Offers contractual consumer remedies in addition to the GDPR remedies
- Up to Member States whether contracts non-complying with the GDPR are still contracts for the purpose of letting the Digital Content Directive apply.

Remaining issue: Distinction actively and passively provided data

ARGUMENTS for reconciliation: the obligation of the EU legislator to protect personal data

Art. 16 (2) TFEU:

„The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.“

ARGUMENTS for reconciliation

Pragmatic approach

- **Rec. 23 GDPR:** *"In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller (...) not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment (...)."*
- **Art. 6a (5) EP Report:** *"In order to be in conformity with the contract, the digital content or digital service must also **meet the requirements of (...) Regulation (EU) 2016/679 (GDPR)**"*

CONCLUSIONS

Thank you for your attention!

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