

# ██████████ input regarding Directive on certain aspects concerning contracts for the supply of digital content

April 2016

## Summary

Trust in the data-driven economy must continue to be built through the future initiatives and proposals announced in the Digital Single Market package and through self-regulation and industry best practices. Since the General Data Protection Regulation will soon be adopted, ██████████ is looking beyond this cornerstone of the Digital Single Market to identify next steps to drive trust in the DSM.

██████████ considers this proposal for consumer rules for the supply of digital content as a next step to drive trust online. For these reasons, ██████████ calls on EU institutions to maintain an EU holistic approach aiming at fostering trust in the data-driven economy. Data is crucial for our economy, boosting sales online and in stores. A balanced approach between consumer and business interests must be met across all proposals in the Digital Single Market.

██████████ considers that it is premature to include in the scope of this proposal digital content which is exchanged for a counterpart other than money, i.e. personal and other data. Nevertheless, we wish to provide you with our understanding of the key issues raised in this proposal and possible solutions.

## Driving trust online is essential and the industry is building trust from the bottom to the top.

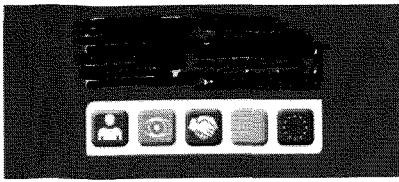
██████████ appreciates the Commission's efforts in this proposal to harmonise contractual rules in Europe. ██████████ is fully supportive of the ambitious goals set out by the President Juncker for the new 2015 Commission to drive a true Digital Single Market.

The Data-Driven Marketing industry has worked for decades and still works to sustain customer trust through ethical data processing. Building trust is central to the future success of brands in all environments and essential to being able to maximise the word of mouth in the online networked world.

Trust in the data-driven economy must continue to be built through the future initiatives and proposals announced in the Digital Single Market package and through self-regulation and industry best practices.

Since the General Data Protection Regulation will soon be adopted, ██████████ is looking beyond this cornerstone of the Digital Single Market to identify next steps to drive trust in the DSM. ██████████ considers this proposal for consumer rules for the supply of digital content as also a next step to drive trust online. For these reasons, ██████████ calls on EU institutions to maintain a balanced





approach between consumer and business interests all proposals in the Digital Single Market. Data is crucial for our economy, boosting sales online and in stores.

██████ calls on the European Institutions to maintain an open mind regarding the benefits of Big Data so as to reach the right balance between consumer and industry needs, as this was the case for legitimate interest under the GDPR.

Many non-legislative actions can contribute to foster trust online. Consumers need to be informed about their rights under the GDPR e.g. through an awareness campaign. Consumers can be further empowered through best practices and self-regulation.

Furthermore, transparency can be improved from bottom to top. Indeed, organisations are improving their privacy notices and data collection notices to raise consumer awareness on the collection and use of data and to inform them better about the benefits of their data. ██████ would also like to highlight that ██████ is currently working to update its codes of conduct regarding the collection and processing of personal data for marketing purposes. For further information, please click [here](#).

██████ calls for proposals or initiatives under the Digital Single Market which touch upon privacy and data protection to be aligned with the General Data Protection Regulation as much as possible.

### **Inclusion of “free contracts” is premature**

**It is crucial for the digital economy to reach the right balance.**

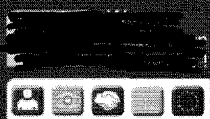
██████ considers the inclusion of ‘free contracts’ as premature because more research is needed to understand the significant impact of this concept on markets. ██████ believes that including such contracts could have significant impacts on contractual law, markets, prices and consumer benefits.

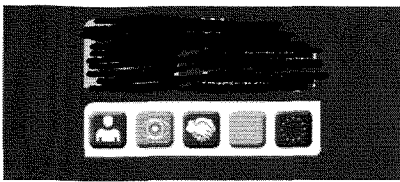
██████ considers the inclusion of “free contracts” as premature also because some market solutions already exist. Some industry players provide protection and remedies in case of faulty free digital content based on best practices, for further information and examples ██████ recommends to contact [EDUMA](#), the European Association representing Online Platforms. ██████ asks for further research to identify better the legislative gaps. Competition in these markets is very high and so suppliers have a clear interest in maintaining their customer’s satisfaction.

Finally, ██████ considers the inclusion of “free contracts” as premature because some of the concepts included in the proposal are new concepts under the GDPR, which require interpretation and implementation (e.g. data portability).

### **A step by step approach is recommended**

██████ recommends, at EU level, a similar step-by-step approach as in the UK approach. The law provides for a flexibility clause to extend, if necessary, its provisions to other forms of contracts (e.g. contracts with counter performance other than money). Also, consumers have in all circumstances a limited right to damages to the device or digital content. We believe this approach would be inline with the [OECD ecommerce recommendations](#).





As noted by Professor H. Beale in his [Briefing Paper](#), the UK's Consumer Rights Act 2015 currently applies only to digital content for which the consumer directly or indirectly pays a monetary price. However, the Secretary of State may extend the provisions to other contracts for a trader to supply digital content to a consumer, if the Secretary of State is satisfied that it is appropriate to do so because of significant detriment caused to consumers under contracts of the kind to which the order relates. [ref s 33]). Such a flexibility clause could be provided in this European proposal for contracts where there is a counterperformance in data.

Moreover, ██████ understands that the consumer always benefits from a right to claim damages to his device or other digital content, even if there was no payment in money. According to the guidance of the Consumer Rights Act, all of the statutory rights for the supply or intended supply of digital content apply only if the consumer has to pay a monetary price as part of the contract. If digital content is given away (for example, free computer system software) the statutory rights do not apply. This does not mean that the trader is not liable if the digital content causes damage.

██████ summarised the law in the UK as such:

	Full statutory rights	Damages to device or other digital content
Digital content paid for in money	*	*
Digital content for free (no money paid)		*
Digital content for free but in parallel to a paid contract <sup>1</sup>	*	*
Digital content in exchange of data		*

## Clarifications to consider for inclusion of free contracts

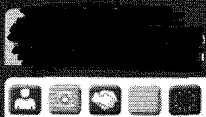
As previously explained, ██████ considers the inclusion of “free contracts” as premature. We recommend the UK step-by-step approach. However, we wish to provide you with our understanding of the key issues and their possible solutions.

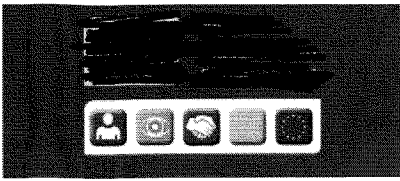
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<sup>1</sup> Some digital content may be described as 'free' but the way it is supplied means that the statutory rights will still apply to it. This is to cover situations where, for example, a £500 computer is supplied that contains free anti-virus software of poor quality. If a trader supplies digital content to a consumer and both of the following conditions are met then the digital content is not 'free' and is part of the contract:

- the free digital content is supplied with goods or services or other digital content for which the consumer pays a price
- the free digital content is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content

In the example given regarding the £500 computer with free anti-virus software included, the software (digital content) is supplied with the computer (goods). To obtain the software separately you would generally have to either buy it or buy other goods or services or other software with which it came 'free'. For the purposes of the Act it is supplied as part of a contract costing £500.





- **Data protection framework applies**

**██████** supports the reference to the Data Protection Framework. The data relationship between data subject/data controller is governed currently by the Data Protection Directive and in the future by the GDPR.

However, as previously mentioned, a lot of interpretation is required under the GDPR. It would be better to wait at least till the end of the two year implementation period before creating the notion of contracts with counter performance in data.

- **The scope of application of this proposal must be simplified and better clarified.**

**Most actions over the internet imply exchange of personal data. Therefore, it is important to clearly establish the scope of the proposal.** Currently, this is based on the active provision of personal data or any other data by the consumer to the supplier and **██████** considers this proposal still unclear.

The notion of “any other data” is unclear. Recital 23 of the GDPR provides for a broad interpretation on of personal data which aims to be future proof. Including in this proposal “any other data” is confusing because there is no clear definition of this notion. This would also be contradictory with article 10 of the GDPR<sup>2</sup>. Moreover, from a technical perspective, it is nearly impossible for a supplier to un-aggregate the data and to link it to the original data subject. **██████ recommends to follow the definition of personal data in the GDPR and calls for deletion of the mention “any other data”.**

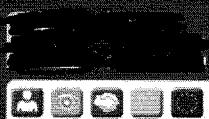
However, **██████** supports the exclusion of advertising and non-actively shared data by the consumer such as cookies and IP address from the scope of this proposal. **██████** equally supports the exclusion of necessary data for the performance of the contract or for meeting legal requirements.

For further clarification, **the scope of this proposal could be further determined on the basis of article 14.1 g of the GDPR** which provides for the supplier to inform the data subject (here the consumer) whether the provision of the data is a contractual requirement or a requirement necessary to enter into the contract.

**Although recital 14 does exclude advertisements, ██████ calls for additional exceptions for commercial practices and communications which aim at promoting goods and services.** Personal data may be collected for the provision of digital commercial communication (e.g. video, audio, apps) which is promotional by nature, aiming at attracting prospect consumers. For example, apps which provide you advice or insight into an item you have not yet purchased. This is the case for informative commercial practices, through which the consumer can discover some tips. This digital commercial communication should not fall within the scope of this proposal because it cannot be

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<sup>2</sup> Article 10 GDPR “if the purposes for which a controller processes the personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire, or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation”.

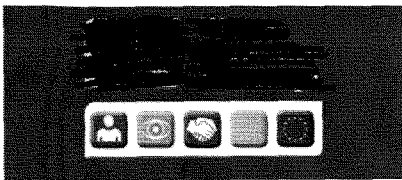


in itself the object of a contract. Prize draws, advertising and marketing are commercial practices and communication already covered by the Unfair Commercial Practices Directive. **We therefore recommend adding the exception of commercial practices and communications to article 3.1.**

Finally, exceptions to rules should not be written in recitals but in the articles. Recitals provide contextual information such as examples. However, exceptions to rules should be provided for in the articles. Recital 14 provides for exceptions and restricts the scope of article 3.1. **██████████** supports these exceptions and in the name of legal clarity and security, we strongly recommend that recital 14 be introduced into article 3.1.

**██████████** understanding of the scope of the proposal (**██████████** indicates the problematic aspects in *italics*):

	Example	Scope	Exclusions	<b>██████████</b> suggestions
<b>Personal data</b>	Name, email, address, photos (Recital 14)	Data actively provided by the consumer, directly or indirectly, for example through individual registration or on the basis of a contract. (recital 14 and article 3.1)	<p>Exclusion of information or other automatically generated information without the consumer actively supplying it (e.g. cookies, IP address).</p> <p>Exclusion of situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content.</p> <p>Exclusion of personal data <i>strictly</i> necessary for the performance of the contract or for meeting legal requirements and the supplier does not process them in a way incompatible with this purpose (article 3.4)</p>	<ul style="list-style-type: none"> <li>- To delete "strictly" to align on GDPR</li> <li>- To connect with article 14 1 (g) GDPR: if the personal data is collected as counterperformance, than the rights and obligation of the DCP apply. It would be for the supplier to confirm this.</li> </ul>
<b>Any other data</b>	<i>No definition</i>		<i>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</i>	<i>To be deleted from this proposal</i>



			<i>meeting legal requirements, and the supplier does not use that data for commercial purposes.</i>	
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#### - Clarifications regarding use of data

Articles 13.2b and article 16 provide for the termination of contracts and oblige the supplier to “refrain from using the counter performance” other than money which the consumer has provided in exchange for the digital content.

In case of termination, the supplier must “refrain from the use of the counter-performance other than money”. [REDACTED] considers that the terminology of the obligation for the supplier to refrain from using the counter performance is unclear. Under the GDPR, the consumer has the right to ask the supplier to restrict processing of his/her personal data. **We therefore recommend replacing the term “refrain from the use” to “restrict the processing of data or make the data anonymous”.** The supplier should be able to either restrict the processing of the data or make it anonymous.

Moreover, jointly generated data benefits from an exception under article 13 but not article 16. This exception should also be extended to article 16.

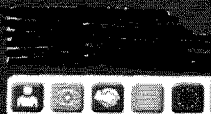
According to professor Beale, **it should be clearly provided that termination does not affect the lawfulness of the prior data processing.**

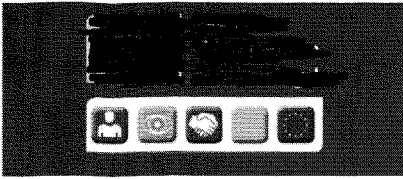
#### - Clarifications regarding the right to portability

As provided, the right to data portability would apply to all user generated content, whether personal data or not. The GDPR only applies to personal data provided by the data subject to the controller. This proposal provides portability for all content provided by the consumer, produced or generated through the use of the digital content. Therefore, this proposal broadens the scope of the right to portability as provided for under article 18 of the GDPR. We remind the Commission that portability should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. Moreover, this proposal aims more at ensuring harmonious contractual rules across the EU, less at fostering competition. These competition aspects can be further discussed in another context for example, the discussion on online platforms. **We therefore recommend suppression of this article or at the very least, alignment on the GDPR.**

#### - Clarifications regarding the right to object

What happens if the consumer accepts digital content in exchange of personal data but then uses his/her right under the GDPR to object to the processing of his/her personal data for marketing purposes? **We recommend clearly either providing for an exception to this right to object or providing for termination of the contract by the supplier if the consumer decides to object to the processing of his/her personal data.** Alternatively, the seller could have the right to ask the consumer for a monetary payment.





- **Coherence of remedies across purchase channels**

**RECOMMENDATION 1** calls for legislators to bear in mind coherence among guarantees and remedies. The remedies and guarantees should be the most aligned possible whichever the purchase channel used (online or in store) and whether the item is a digital content or a tangible good. Multichannel reality must be taken into consideration and EU solutions must provide, as much as possible, for principle based consumer rules with exceptions where necessary relating to the nature of a specific service.

