



*Address to Socialists and Democrats Group workshop on the Proposed Digital Content Directive*

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This is an important initiative and discussion.

I would like to focus these brief remarks on three points:

First, the need for coherence between consumer and data protection law and between the efforts of enforcement bodies.

Second, the need to avoid unintended consequences of this proposal which could undermine the implementation of the GDPR

Third, some preliminary indications of how the current text might be improved.

Consumer law just like data protection law is about the interests of the individual.

And just like data protection law, consumer law needs to address the challenges and imbalances that face the individual in contemporary markets.

So both areas of law are in the process of modernisation.

My independent institution has worked intensely for the last years on how to make these two areas of law work together more effectively, in the interests of the individual.

We use different language – consumers or data subjects – but these are real men and women who are trying to navigate modern life usually at a severe disadvantage in terms of the information available to them.

We apply in each area the notion of fairness.

So, part of the answer is effective, non-bureaucratic laws which inculcate genuine accountability in those organisations which are subject to the laws.

But a bigger part of the answer, in my view, is coherent enforcement, moving out of silos.

Because digital markets are characterised by the collection and monetisation of personal data, there are more and more cases of behaviour which may be in violation of both data protection and consumer rules.

That is why we, at the EDPS, have launched the Digital Clearing House, including willing enforcement agencies from the competition, consumer and data protection sectors. The Clearing House will enable sharing of information and discussion on how to ensure the best outcomes for individuals in specific cases.

We also want to encourage market solutions which redress the imbalance between individual and tech monoliths.

And we have long argued that lawmakers and enforcement bodies need to recognise how online services are only provided because they (often) secretly collect and monetise personal data – that is the dominant revenue model for web based services.

This proposal therefore has important ramifications for competition investigations and consumer law enforcement.

And that brings me to my second point.

We have to ensure that this proposal is fully compatible with the new framework for data protection.

It should reinforce the new framework, not undermine it.

So, we are all committed to avoid re-opening Pandora's Box of.

The EU law has long recognised, in the 2000 eCommerce Directive, that “remuneration” provided in exchange of a service does not necessarily have to be of monetary nature.

But I urge caution with the notion (contained in Article 3.1) of “personal data as a counter performance.”

To our knowledge, the digital content proposal is the first legislative proposal from the Commission which explicitly acknowledges that personal data can in practice function as a sort of a digital currency.

It does so in order to ensure (Article 3) that ostensibly “free” contracts can also benefit from certain protections of the proposed directive.

The 2016 General Data Protection Regulation contains specific safeguards that could help remedy market imbalances in the digital sector: for instance:

- Data protection authorities need to enforce data minimisation, which requires personal information only to be processed where ‘adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed’,
- Individuals now have the right to receive information regarding the logic involved in the automated decision-making and profiling.

We share the Commission's concern that traders offering “free” goods in exchange for customer information should not escape obligations to respect the rights and interests of the individual.

But the current wording will not, in my view, achieve that goal.

Let's go back a little.

We are all agreed that personal data has a value.

According to EU primary law, each of us has a right to the protection of data concerning each of us individuals. Though not an absolute right, it is a fundamental one.

It is related to our right to develop our personality. It derives from our fundamental right to dignity and it is closely related to the right to freedom of expression.

So, even if some people treat personal data as commodity, under EU law it cannot be a commodity.

There might well be market for personal data, just like there is, tragically, a market for live human organs.

But that does not mean that we can or should give that market the blessing of legislation. EU primary law does not allow it.

You cannot monetise and subject a fundamental right to a simple commercial transaction, even if it is the individual concerned by the data who is a party to the transaction.

For instance, might a solution be contained in Article 3(2)(a) of the GDPR, which states that the regulation applies to the offering of goods and services irrespective of whether a payment is required from the data subject?

So on to my third and final point.

My institution is ready to support Honourable Members of this House, the Council and the Commission in improving the text of the proposal.

This Parliament has invested over four years of work into negotiating the General Data Protection Regulation, and it will become fully applicable in May 2018.

Efforts by companies, regulators and Member States to prepare for this must not be undermined by confusing or contradictory provisions.

Let me just mention four specific areas for further work.

First, on the question of the rights of the consumer.

The draft proposal provides for the right to access data – which may or may not be personal data - and to restitution.

However, the Regulation 2016/679 (article 15) already provides for the right to access one's personal data, to data portability, and for the obligation to delete the personal data when they are no longer necessary for the purpose of the processing is already enshrined in the GDPR (articles 5.1.e and 17).

I am afraid this is a recipe for confusion.

Second, Article 3.4 of the Proposal provides that the provisions “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 process them in a way incompatible with this purpose.” This creates a potential conflict with the GDPR even before it applies. It suggests that individuals will in effect cease to be able to exercise their right to withdraw consent to data processing at anytime

Third, perhaps we need to be even more ambitious. Why limit these protections to consumers of digital goods only? Tangible goods may well be offered more ‘cheaply’ on condition that personal data is disclosed and used for commercial purposes. Rights should apply equally in the online and offline world.

And fourth, we need to consider the wide territorial scope of the GDPR (Article 3), to ensure there is no conflict with any new rules on digital content.

We have been consulted on this proposal at a late stage, but we are pleased to be able to offer our advice.

We have to deepen dialogue in this area, as has been demonstrated by the Commission’s package of proposals this week for ‘building a data economy’, which we will study very carefully in the coming weeks.

The Digital Content Directive proposal is well-intentioned but still requires a lot of work to ensure that it contributes to synergies between data protection and consumer law in the EU. Recital 4 of the GDPR says that the processing of data should be designed to serve mankind. We encourage the EU legislator to continue its efforts to make this ambition a reality.