Consumer Protection Rights and "Free" Digital Content

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The lack of protection for the consumer who has not paid money for digital content but has instead exchanged data (for example, a free app or music download in exchange for personal data) is being carefully considered in the light of the draft EU Digital Content Directive.[1]

As the law stands, in relation to what is often referred to as "free content" the consumer does not have the same rights available to paying customers, such as the digital content being of satisfactory quality, fit for purpose and matching any description or access to remedies such as repair, replacement and refund.

Whether there is a justification for not granting similar rights and remedies is largely dependent on two questions. First, is the provision of data a different form of payment? Secondly, are business concerns about the market implications of providing protection real and sufficient to outweigh the potential benefits?

The law and proposals for reform

The proposed Directive follows new UK legislation under the Consumer Rights Act 2015 (CRA), which regulates the supply of digital content, making it a relevant comparator for analysis and a resource frequently referred to in the wider European debate on the possible reforms.[2]

Under the CRA, consumers who buy digital content have a digital content contract, and therefore the rights[3] and remedies[4] set out in Pt 1 of the Act. These rights apply, however, only if the content was paid for with money.[5] They do not apply where there was a mere exchange of data.[6] The only exception is when the free content supplied causes damage to a device or to other digital content.[7]

The draft EU Directive takes a different approach, extending digital content contract rights and remedies to cover deals where no money was paid but the consumer did "actively" provide data (personal or other), such as a name and email address or photos, as a counter-performance.[8]

The first remedy is immediate termination of the contract for failure to supply the digital content by the business (art.11).

If the business did supply the digital content but the content does not conform to the contract, the consumer has the right to have it brought into conformity free of charge within a reasonable time, unless that would be impossible, disproportionate or unlawful (art.12). Cure is a primary remedy, which means that the consumer must allow the business a reasonable time to cure the digital content before the secondary remedy of termination for non-performance is available.[9]

When there is a termination of the contract for lack of conformity of the digital content, there is a question as to what happens to the counter-performance data the consumer has provided. In this case the business must refrain from using these data and any other information which the consumer has provided in exchange for the digital content (art.13).

There is also a right to damages, but it is restricted to cases where damage has occurred to the digital content and the hardware of the consumer (art.14).

EU research has found that the vast majority of consumers, Member States and legal professions are in favour of covering digital content supplied not only for a price but also in exchange for data provided by consumers. Business attitudes seem more divided on the issue.[10] The points raised link to the two questions set out in the introduction to this article. First, is the provision of data a different form of payment? Secondly, are

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

[2] The UK is the only Member State that has enacted rules designed specifically for contracts for supply of digital content.

[3] For example, under the CRA 2015 the digital content to be of satisfactory quality (s.34); fit for a particular purpose (s.35); and as described (s.36).

[4] For example, under the CRA 2015, the right to repair or replacement (s.43); the right to price reduction (s.44); and the right to a refund (s.45).

[5] Section 33 of the CRA 2015 states:

"(1) This Chapter applies to a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer.

(2) This Chapter also applies to a contract for a trader to supply digital content to a consumer, if—

(a) it is supplied free with goods or services or other digital content for which the consumer pays a price, and

(b) it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content."

[6] For example, when market research information is collected on shopping habits or personally identifiable information such as a person's name or address.

[7] CRA 2015 s.36.

[8] Draft EU Digital Content Directive art.3(1) states: "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." This is subject to the exception under art.3(4) applying to "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", and "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 meeting legal requirements, and the supplier does not use that data for commercial purposes".

[9] There are no current cases addressing what is considered a reasonable period of time.

[10] An EU Commission public consultation ran from 12 June to 3 September 2015, with 189 responses. A summary of responses, as well as responses from different parties, can be found at EU Commission, "Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods", *http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=36408* [Accessed 20 July 2017].

business concerns about the market implications of providing protection real and sufficient to outweigh the potential benefits?

The first question requires an assessment of whether the value of data justifies a digital content contract being formed where it is provided as consideration. The second question demands a review of the market implications and the legitimacy of restricting rights and remedies in response.

Before moving to explore those two points, it is perhaps worth noting that the Directive is not only of interest to businesses based within the EU. Any business wanting to supply digital content in the EU would have to comply with the new law, including UK businesses post-Brexit.

Do data have value?

The draft Directive Recitals explain the basis for the reform. Recital 13 recognises that:

> "In the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied, not in exchange for a price, but against counter-performance other than money, i.e. by giving access to personal data or other data. Those specific business models apply in different forms in a considerable part of the market."[11]

The commercial or economic value of data is clearly recognised by the EU in its support of a data-driven economy.[12] Vast amounts of data are produced daily, including data generated in an indirect way. The UK's Competition and Markets Authority (CMA) also identifies that the exchange of data for services is beneficial to business and also to consumers themselves.[13] Data are "monetised" by companies who may use them themselves and/or sell them on to other companies.[14] Data collected by manufacturers, wholesalers and retailers demonstrate buying trends right down to individuals' preferences, allowing for, among other things, targeted selling, irrespective of whether that is via the internet, email or phone. The benefits to consumers include better and more tailored services, as well as greater availability of free content.

As Kalimo and Majcher note, these arrangements are commercial in nature:

> "In the digital marketplace the relationships between companies processing data and digital consumers who surrender their data have certain peculiarities when compared with the more traditional contractual relations … The economic value of personal data in the digital setting is the primary incentive for companies to enter into transactions with digital users, and the conditions determining such transactions are stipulated in the privacy policies and practices that usually require users' consent. Although there is no consensus on whether the provision of services in exchange for consent regarding data processing creates in fact a contractual relationship, these digital exchanges are unquestionably commercial in nature."[15]

The commercial value of data may be the basis for finding a contractual relationship, but it is not the only relevant factor in a consumer's expectations regarding enforcement of that contract. Personal data that can be used to identify specific individuals have a value to consumers based on less tangible concepts such as privacy and choice over the purposes and destinations of their personal data. These expectations are enshrined as fundamental principles in EU law.[16] They are manifested in EU legislation, creating legal requirements relating to the fair collection and

[11] It is notable that s.33(5) of the CRA 2015 expressly reserves the right to extend protection in the future to digital content supplied in exchange for something other than money if appropriate to do so because of significant detriment caused to consumers. A static approach to responding to the challenges was therefore, arguably, never expected under the UK CRA, and the points made in Recital 13 of the draft Directive were already appreciated.

[12] The value of the EU data economy was around €257 billion in 2014, or 1.85% of EU GDP (European Data Market Study, SMART 2013/0063, IDC, 2016). This grew to €272 billion in 2015, or 1.87% of EU GDP. It is predicted that its value will increase to €643 billion by 2020, representing 3.17% of the overall EU GDP. European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and Social Committee and the Committee of the Regions: Building a European Data Economy", COM(2017) 9 final, *http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=41205* [Accessed 20 July 2017].

[13] CMA, "The Commercial Use of Consumer Data: Report on the CMA's Call for information" (June 2015), pp.50–63, *https://www.gov.uk/government/consultations/commercial-use-of-consumer-data* [Accessed 20 July 2017.

[14] CMA, ""The Commercial Use of Consumer Data" (June 2015), p.23, *https://www.gov.uk/government/consultations/commercial-use-of-consumer-data* [Accessed 20 July 2017] cites the International Data Corporation (IDO) as estimating that, in 2013, there were 4.4 trillion gigabytes of data produced globally and that this is doubling in size every two years. By 2020 this means it will reach 44 trillion gigabytes.

[15] Harri Kalimo and Klaudia Majcher, "The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace" (2017) 42(2) E.L. Rev. 210, 225–226.

[16] Article 7 of the Charter of Fundamental Rights of the EU provides that: "Everyone has the right to respect for his or her private and family life, home and communications". Article 8(1) provides that: "Everyone has the right to the protection of personal data concerning him or her."

processing of data.[17] Case law has also emphasised that the harm caused by unauthorised use is not limited to the pecuniary.[18]

Despite the public increasingly voluntarily sharing details through online activity,[19] surveys and research consistently reveal expectations of information rights.[20] The Information Commissioner's Office identifies a number of common themes in terms of the public demand from data protection, including control over personal data and better information relating to the use of such data in terms of transparency and what organisations will do with them.[21]

This is clearly reflected in the obligation to gain express consent for the use of personal data from the consumer.[22] That the expectation remains firmly in place despite online activities is demonstrated by the actions of people in practice attempting to avoid the disclosure of personal details.[23] While the ever-burgeoning desire to access goods and services online may outweigh the risks for individuals, it is clear that the decision to provide personal data is not always made lightly. Private sector use of data in order to increase profits is a particularly sensitive issue.[24] For informed consent to be given, the consumer expects to know the purpose of the data collection and, crucially for the purposes of this article, what benefit they will receive from sharing it, such as access to digital content.

Arguably, when consent was tied in with an expectation of receiving digital content in return, it should not be purely a question of the commercial worth of the personal data given in exchange that determines what is an effective remedy where that promise is not fulfilled.[25] Such a stance would not be consistent with wider EU policy.

Given that data have a value commercially, it follows that consumers are "trading" when they exchange data on the basis of a promise of digital content. In principle, this gives rise to some expectation of reciprocity. However, there are concerns about the feasibility and practicalities of requiring conformity with that expectation.

Market implications

The proposed Directive has at its heart the general objective of contributing to faster growth of the EU Digital Single Market by providing uniform rules and clear consumer rights. It aims to do so by reducing the uncertainty faced by businesses and consumers, which hinders cross-border trade.

Concerns have, however, been raised about the perceived risks to the digital industry, an essential element of any modern economy.[26] In its response paper to the draft Directive, techUK made three key points[27]:

Consumers simply do not have the same expectations for free content as paid-for content

This article accepts that a reasonable consumer may expect lower-quality digital content where he has not paid for it. However, in light of what has been considered about the commercial value of data and the non-pecuniary value of personal data, that is not to say that a consumer should have no enforceable expectations.

A possible issue in terms of those expectations is that the concept of proportionality does not apply to expected quality. Under the proposed Directive, digital content would have to conform to what was promised in the

[17] Notably, new EU rules will apply from May 2018:
- Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).
- Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

[18] A recent example comes from the UK Court of Appeal decision in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] Q.B. 1003. In settling the meaning of damage in s.13 of the Data Protection Act 1998 (in accordance with Directive 95/46 (the Data Protection Directive), the court noted that the Directive was concerned with protecting the right to privacy with respect to the processing of personal data, and reasoned that damage thus extended to non-pecuniary loss such as distress or what is in some jurisdictions called "moral damage".

[19] Eurobarometer research found that 74% of people accept disclosure of personal data as part of modern life: "Special Eurobarometer 359 — Attitudes on Data Protection and Electronic Identity in the European Union" (June 2011), *http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_359_en.pdf* [Accessed 20 July 2017].

[20] The ICO found that the 63% of people agreed that they felt they had lost control over the way their information is collected and processed, and 85% were concerned about organisations passing or selling their personal details on to other organisations: ICO, "Annual Track Individuals" (September 2014), *https://ico.org.uk/media/about-the-ico/documents/1043485/annual-track-september-2014-individuals.pdf* [Accessed 20 June 2017].

[21] ICO, "Data Protection Rights: What the public want and what the public want from Data Protection Authorities" (May 2015), *https://ico.org.uk/media/about-the-ico/documents/1431717/data-protection-rights-what-the-public-want-and-what-the-public-want-from-data-protection-authorities.pdf* [Accessed 20 June 2017].

[22] See art.7 of the new General Data Protection Regulation, which will apply from 25 May 2018. The current requirements for consent under Directive 95/46 are also under art.7.

[23] Eurobarometer research found that 89% of people agreed that they avoid disclosing their personal information online: "Special Eurobarometer 423 — Cyber Security" (February 2015), *http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_423_en.pdf* [Accessed 20 July 2017].

[24] Symantec research found that 81% of people thought that personal data had value, and 74% considered it unfair that business makes money from their personal data: "Symantec — State of Privacy Report 2015" (February 2015), *http://www.symantec.com/content/en/us/about/presskits/b-state-of-privacy-report-2015.pdf* [Accessed 20 July 2017].

[25] Article 47 of the Charter of Fundamental Rights of the EU provides: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."

[26] According to Innovate UK, the global digital services market will be worth as much as the entire UK economy by 2020. Software, IT and telecoms services together generated 4.2% of UK gross value added (£59 billion) in 2011 and provided 885,000 jobs. The UK has 107,000 software businesses, and is the world's number two exporter of telecoms services (£5.4 billion) and number three in computer services (£7.1 billion) and information services (£2 billion): Innovate UK, "Digital Economy Strategy 2015–2018" (February 2015), *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404743/Digital_Economy_Strategy_2015-18_Web_Final2.pdf* [Accessed 20 June 2017].

[27] techUK represents the technology industry in the UK and has more than 850 member companies.
See techUK, "*techUK Position on the Draft Directive on Contracts for the Supply of Digital Content*' (August 2016), p.9, *https://www.techuk.org/index.php?option=com_techuksecurity&task=security.download&file=techUK_position_on_the_Digital_Content_Draft_Directive.pdf&id=9029&Itemid=181&return=aHR0cHM6Ly93d3cudGVjaHVrLm9yZy9pbnNpZ2h0cy9yZXBvcnRzL2l0ZW0vOTAyOS01LXByb3Bvc2Fscy10by1lbmRlcnBpbi10aGUtZXUtZHJhZnQtZGlnaXRhbC1jb250ZW50LWRpcmVjdGl2ZQ* [Accessed 20 July 2017].

contract. Hence, irrespective of the volume, value and sensitivity of data exchanged, the same expectations apply of compliance with key information provided to buyers.

Only if nothing has been stipulated in the contract would more criteria be applied (such as technical standards or industry codes of conducts) and consideration given as to whether it was supplied for a price or for data (art.6). The European Parliament has raised concerns:

> "[O]ne could wonder if, in the light of the complexity of digital content products, the consumer is really able to fully grasp the terms and conditions of the contract and to make an informed decision."[28]

It concludes that it might be advisable to make more frequent use of objective and subjective criteria (such as technical standards or legitimate expectations) to ascertain conformity.[29]

This concept of legitimate expectations could tie in with the CMA's suggestion that an approach similar to that of the UK in the CRA 2015 could in theory be applied to provide a solution.[30] Under the CRA, a consumer may reasonably expect higher-priced goods to be of a higher quality (and vice versa). This principle could be equally applied to the purchase of digital content.

This could, however, prove more challenging, given that the commercial value of the data may be difficult to assess. As the CMA points out, the value of data is "fluid", depending on timing and the particular circumstances. Additionally, there are the non-pecuniary factors that this article suggests should also be relevant in assessing reasonable expectations. This is particularly the case given that even a minimal level of data may, if aggregated with data from other sources, have the potential to become personal.[31]

This article would suggest that the focus upon what was promised to the consumer as the agreed compensation is the appropriate starting point for consumer expectations relating to digital content. Objective and subjective criteria should be used only to increase the quality of that content where the key information in the contract leaves ambiguity or where the promises made fall below normal minimum expectations and the consumer was not made reasonably aware.

There are problems comparing financial payment to provision of data, given that data are processed in many different ways

There are clear challenges, given that data cannot be valued in the same way as a set price. There is the question of when the consumer should be viewed as having given counter-performance by providing data. Also, how easy is it to "refund" data if the contract is terminated because the digital content has not been provided or brought into conformity with the contract?

As the draft Directive stands, only contracts with "active" provision of data by the consumer are covered.

The UK Government has stated that the concept of the consumer "actively providing" access to data by way of payment for free content is not clear.[32] For example, would it require a positive action, or would it suffice if a consumer simply agreed to make his data available? The CMA also asks for clarification of the meaning of the phrase "actively provides".[33] It stresses that an overly mechanistic approach should not be adopted, and states that in this context consumers must do more than simply "click" a button.

Yet, this article notes that this type of quick agreement is common practice. Well-known examples relate to the use of cookies on websites storing information about a user's preferences and past actions, and the terms and conditions on social media sites that allow data-sharing. Another common scenario is the price comparison website, requiring a range of personal information to be entered which may be widely shared.[34] It is perhaps fair to speculate that a consumer will be unaware that he will be agreeing to share data when he ticks the box to say that he had read and understood the terms of use. Should this mean, however, that the consideration provided by the consumer is of any less value and creates lesser expectations about the digital content thereby accessed?

The European Parliament suggests that the requirement for a more proactive role for the consumer may be too restrictive. It notes that personal data (such as location, contacts, shopping history, etc.) are often used while consumers are unaware of it. It concludes that it might be advisable to broaden the provision to include all contracts for the supply of digital content involving the use of the consumer's personal data. To do otherwise could create a perverse incentive for suppliers to not ask

[28] European Parliament, "Opinion of the Committee on Civil Liberties, Justice and Home Affairs", PE582.370v03-00 4/29 AD\1110213EN.docx EN, pp.3 and 4, *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-582.370%2b03%2bDOC%2bPDF%2bV0%2f%2fEN* [Accessed 20 July 2017].

[29] European Parliament, "Opinion of the Committee on Civil Liberties, Justice and Home Affairs", PE582.370v03-00 4/29 AD\1110213EN.docx EN, pp.3–4, *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-582.370%2b03%2bDOC%2bPDF%2bV0%2f%2fEN* [Accessed 20 July 2017].

[30] CMA, "The CMA's Response to the UK Government's Call for Views on the Draft Directives on the Online Sales of Digital Content and Tangible Goods" (February 2016), p.2, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502610/Response_to_UK_government_on_draft_online_contract_directives.pdf* [Accessed 20 July 2017].

[31] See *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47; [2008] 1 W.L.R. 1550.

[32] BIS, "Draft Directives on the Online Sale of Digital Content and Tangible Goods: UK Government Call for Views" (January 2016), p.5, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496345/bis-16-73-online-sales-call-for-evidence.pdf* [Accessed 20 June 2017].

[33] CMA, "The CMA's Response to the UK Government's Call for Views on the Draft Directives on the Online Sales of Digital Content and Tangible Goods" (February 2016), p.2, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502610/Response_to_UK_government_on_draft_online_contract_directives.pdf* [Accessed 20 July 2017].

[34] For example, in the insurance industry it is common to trade information as a form of fraud prevention. Note the Claims and Underwriting Exchange, the Motor Insurance Antifraud and Theft Register, the No Claims Discount database, and the Driver Vehicle Licencing Agency.

for the consumer's consent.[35] As the European Law Institute also argues, limiting protection to cases in which the consumer actively provides data does not go far enough, commenting that "there is no reason why the consumer should have lesser rights where data are collected by unilateral activity on the part of the trader".[36]

With regard to the challenges of remedies, given the difficulty of quantifying the commercial value of data, the lack of financial remedies in relation to free content upon termination of the contract reduces possible issues. Instead, the supplier is required to take all measures "which could be expected" and refrain from the use of the data provided as counter-performance (arts 13(2)(b) and 16(4)(a)). Recital 37 further states:

> "Fulfilling the obligation to refrain from using data should mean in the case when the counter-performance consists of personal data, that the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used either by the supplier or by any other person."

How feasible this version of a "refund" is may, however, be questioned.

The UK Government has noted that an extension to free content and services may mean that the obligations and remedies proposed in the event of failure to comply with the contract are not proportionate and could inhibit businesses.[37] The CMA also comments on the importance for business that the remedy for non-conformance is fair and proportionate.[38] What, then, are the possible issues in preventing the use of and the deletion of personal data? The CMA notes that data, once collected, may be shared or sold to third parties, or used by the supplier for other purposes, and that in many cases this may be instantaneous. This leads the CMA to question how effective this provision may be in practice.[39]

The consumer is also entitled upon termination of the contract to the retrieval of all the content which they have provided, as well as any other data produced or generated by the consumer (arts 13(2)(c) and 16(4)(b)). This must be provided to the consumer free of charge, in reasonable time and in a commonly used format. This places another burden on businesses which may be operating on low profit-margins.[40] There may be difficulty in returning data that are not personal (which would already fall under data protection rules), given that large amounts of such data are generated, for aggregate use, to modify services. Furthermore, there are also calls for a distinction between user-generated digital content that is only usable with a specific application, such as a game, and data that can be stored independently in a portable document format. UK Interactive Entertainment (Ukie)[41] explains, for example, that there is no technologically feasible manner in which a fully three-dimensional castle designed by a player in Minecraft can be retrieved should they terminate their contract to play.[42]

Placing the same obligations on free services as paid-for services would stifle business innovation and the emergence of new online content, application and services

The argument of techUK is that many start-ups and small companies are reliant on free digital content for their business model, for example to test the performance of content before its formal release or to generate income through advertisements or, indeed, the sale of data. Such companies may struggle to handle customer complaints relating to the new rights and remedies.

This is an important concern, and the market implications will need to be carefully weighed. It is, however, debatable whether a complete denial of rights for consumers is the best solution. Indeed, as the CMA notes, the granting of rights may indeed have a beneficial impact on a business by providing a greater incentive to improve its services and compete.[43] Furthermore, if consumers do not trust suppliers to comply with their end

[35] European Parliament, European Parliament, "Opinion of the Committee on Civil Liberties, Justice and Home Affairs", PE582.370v03-00 4/29 AD\1110213EN.docx EN, p.3, *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-582.370%2b03%2bDOC%2bPDF%2bV0%2f%2fEN* [Accessed 20 July 2017].

[36] European Law Institute, "Statement of the European Law Institute on the European's Proposed Directive on the Supply of Digital Content to Consumers", ISBN: 978-3-9503458-6-5 (2015), p.3, *https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Statement_of_the_European_Law_Institute_on_the_European_Commission_s_Proposed_Directive_on_the_Supply_of_Digital_Content_to_Consumers.pdf* [Accessed 20 July 2017].

[37] BIS, "UK Government Call for Views" (January 2016), pp.5 and 6, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496345/bis-16-73-online-sales-call-for-evidence.pdf* [Accessed 20 June 2017].

[38] CMA, "The CMA's Response to the UK Government's Call for Views on the Draft Directives on the Online Sales of Digital Content and Tangible Goods" (February 2016), p.1, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502610/Response_to_UK_government_on_draft_online_contract_directives.pdf* [Accessed 20 July 2017].

[39] CMA, "The CMA's Response to the UK Government's Call for Views on the Draft Directives on the Online Sales of Digital Content and Tangible Goods" (February 2016), p.4, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502610/Response_to_UK_government_on_draft_online_contract_directives.pdf* [Accessed 20 July 2017].

[40] Interestingly, the European Law Institute suggests that the right to retrieve user-generated content should also apply in cases where products are supplied entirely for free, i.e. even without in-kind payment. European Law Institute, "Statement of the European Law Institute on the European's Proposed Directive on the Supply of Digital Content to Consumers" (2015), p.16, *https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Statement_of_the_European_Law_Institute_on_the_European_Commission_s_Proposed_Directive_on_the_Supply_of_Digital_Content_to_Consumers.pdf* [Accessed 20 July 2017].

[41] The trade body that represents over 250 businesses and organisations involved in the games and interactive entertainment industry in the UK.

[42] Ukie, "Ukie Response to BIS Call for Evidence on Draft Directive on the Online Sale of Digital Content", p.9, *http://ukie.org.uk/sites/default/files/cms/docs/Ukie%20response%20to%20BIS%20call%20for%20views%20on%20draft%20EU%20directive%20on%20the%20online%20sale%20of%20digital%20content.pdf* [Accessed 20 July 2017].

[43] CMA, "The CMA's Response to the UK Government's Call for Views on the Draft Directives on the Online Sales of Digital Content and Tangible Goods" (February 2016), p.2, *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502610/Response_to_UK_government_on_draft_online_contract_directives.pdf* [Accessed 20 July 2017].

of the bargain, they may cease to engage with digital content that is not paid for, and thereby undermine what has the potential to be a mutually beneficial sharing exercise.

By focusing on what was promised in the contract rather than assessments of the value of data, key information provided by business can appropriately manage consumer expectations and limit the potential for dissatisfaction and complaints. Encouraging transparent dealings would support improvements and fair competition between suppliers.

There are, however, some areas that do need more clarity: as already considered, the limitations upon when counter-performance can be claimed by a consumer, and fairly balanced remedies in the event that a business does not comply.

Another issue that would also help to support business is greater clarification of the meaning of the exception under art.3(4) relating to data which are necessary for the performance of the contract, provided that the supplier does not further process personal data in a way that is incompatible with this purpose or other data for commercial purposes. Given that most businesses analyse data at the general level of usage if this were considered to be commercial, then the exception under art.3(4) may not apply widely. As Ukie points out, depending on the interpretation, it could mean that:

- The Directive is intended to cover almost any digital content, service or website.
- The Directive is only intended to narrowly cover content provided for personal data, unrelated to the nature of the content, that the supplier will then sell on to a third party for direct commercial gain.[44]

On this issue, the article suggests that the difficulties with calculating the commercial gain and the non-pecuniary factors in assessing the significance to the consumer are once more relevant. Where a business has agreed to exchange digital content in return for data, any use of those data, even if the commercial gain is possibly minimal, must be presumed to have a potential economic value to them. Furthermore, it is not clear why it should be relevant whether the gain is internal to improving the supplier's own systems or from the sale of data to other businesses to enhance theirs. In both cases, there has been the benefit of securing and processing data via consent which might not otherwise have been forthcoming, and argument for a contract for digital content which should be performed or a "refund" be given.

Conclusions

A consumer who has provided data (personal or other) as consideration should have rights and remedies in relation to the digital content they were contractually promised. This is both a matter of fairness to the consumer and also a means for driving up standards and competitiveness in the market.

It is, however, essential that both businesses and consumers are provided with greater certainty in relation to those rights. The position in relation to actively providing data requires clarification as to its meaning, as does the exception for data necessary for the performance of the contract. Furthermore, careful consideration must be given to how the remedies could operate in practice to produce a proportionate response.

[44] Ukie, "Ukie Response to BIS Call for Evidence on Draft Directive on the Online Sale of Digital Content", p.5, *http://ukie.org.uk/sites/default/files/cms/docs/Ukie%20response%20to%20BIS%20call%20for%20views%20on%20draft%20EU%20directive%20on%20the%20online%20sale%20of%20digital%20content.pdf* [Accessed 20 July 2017].