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The "passive" provision of data: summary of informal consultations and further reflections

Note by the Secretariat

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I. Introduction

1. At its seventieth session (New York, 23–27 March 2026), the Working Group considered a new provision on the "passive" provision of data (A/CN.9/1242, paras. 59–73), which was set out in article 13 of the fifth revision of the default rules (A/CN.9/WG.IV/WP.192). There was broad agreement to retain the provision (A/CN.9/1242, para. 59). For the seventy-first session, the provision, revised to reflect deliberations at the seventieth session, is set out in article 13 of A/CN.9/WG.IV/WP.195.

2. During the deliberations at the seventieth session, it was noted that identifying the transactions that were typical of the "passive" provision of data was crucial to the further development of the provision (A/CN.9/1242, para. 60). Different views were expressed as to the relevant types of transactions, and it was suggested that the issue could benefit from informal intersessional consultations (ibid., para. 71). Accordingly, the secretariat hosted an online meeting on 17–18 June 2026, which was open to all delegates to the seventieth session.

3. Chapter II of this note presents a summary of the meeting. Chapter III identifies issues arising from the consultations that the Working Group may wish to consider in finalizing the text of the default rules.

II. Summary of consultations

A. Background

4. The meeting was informed about earlier deliberations within the Working Group on the "passive" provision of data:

(a) The topic was first addressed at the sixty-seventh session (Vienna, 18–22 November 2024), as reported in A/CN.9/1197 (paras. 33, 46–48, 54, 57, 61 and 72). A summary of those deliberations is contained in the cover note to the third revision of the default rules (A/CN.9/WG.IV/WP.188, paras. 11–12);

(b) The topic was discussed at the sixty-eighth session (New York, 24–28 March 2025), as reported in A/CN.9/1202 (paras. 21–23 and 78–79). A summary of those deliberations is contained in the cover note to the fourth revision of the default rules (A/CN.9/WG.IV/WP.190, para. 10);

(c) At the sixty-ninth session (Vienna, 20–24 October 2025), the Working Group developed a working definition of the "passive" provision of data by reference to a list of factors that characterize such transactions, as well as a working draft for a special default rule that would apply exclusively to contracts for such transactions, which would form the basis of the new provision. The deliberations are reported in A/CN.9/1241 (paras. 10–21, 33–36, 42–43, 46–48, 50–53 and 69).

5. The basic operation of article 13 was recalled:

(a) Article 13(1) defines the "passive" provision of data by reference to a list of features of the transaction;

(b) Article 13(2) establishes a special default rule for contracts for the "passive" provision of data which obliges the data provider to allow access to the data and not to impede that access;

(c) Article 13(3) supplements article 13(2) by disapplying other default rules.

6. It was pointed out that deliberations had been informed by Principle 10 of the "Principles for a Data Economy" jointly developed by the American Law Institute and the European Law Institute ("ALI/ELI Principles") (A/CN.9/1202, paras. 22, 78–79; A/CN.9/1241, para. 17; A/CN.9/1242, para. 72). Principle 10 establishes a special set of default terms for "contracts for authorization to access data" which are less onerous for the party in the role of data provider than those established for other types of

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contracts covered by the ALI/ELI Principles. Those contract include “contracts for the transfer of data” (Principle 7), “contracts for simple access to data” (Principle 8), and “contracts for exploitation of a data source” (Principle 9). The reporters for the ALI/ELI Principles, Neil Cohen and Christiane Wendehorst, participated in the meeting.

B. Scenarios

7. The meeting focused on the scenarios presented in table 1 below. These scenarios were compiled by the secretariat based on (i) scenarios presented within the Working Group as examples of transactions involving the “passive” provision of data, (ii) scenarios presented within the Working Group or brought to the attention of the secretariat to explore the range of transactions to be covered (or not covered) by the default rules, and (iii) scenarios provided in the commentary on the ALI/ELI Principles.

Table 1
Scenarios

Scenario	*Description*
1	A shopping centre operator generates data on shopper traffic using Wi-Fi “tracking”. A data analytics company gains access to the data, which will process the data to create a product that it offers to other parties (e.g. shopping centre tenants). In this scenario, the transaction involves the provision of data by the shopping centre operator to the data analytics company.
2	A farming corporation operates a fleet of “smart” tractors. Data is generated by sensors embedded in the tractors, which covers a range of data points, including soil condition, tractor location and crop condition. (a) The farming corporation provides the data to a fertilizer producer, which uses the data to develop its products. (b) The farming corporation provides the data to the provider of a service that supports the operation of the tractors. Such a service could include weather forecasts, soil analyses, targeted recommendations concerning the use of fertilizers and insecticides, predictive maintenance, or an extended warranty. (c) The farming corporation provides the data to the manufacturer of the tractors.
3	A user of a digital service provides data to the provider of the digital service. (a) The data is generated from the user’s interaction with the service. (b) The data is stored on the device that is used to access the service but is not data generated from the user’s interaction with the service.
4	A user of a website provides browsing data to the website operator. The data is generated by cookies that are installed on the device that is used to access the website.

C. Discussions

8. The meeting focused on (i) the concept of the “passive” provision of data, which article 13(1) sought to define, (ii) the link between article 13 and article 2, which defined the scope of application of the default rules, and (iii) the treatment of contracts involving the exploitation of a data source. Participants also shared feedback on the scenarios presented (table 1 above).

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1. The concept of the "passive" provision of data

9. The importance of transactions involving the "passive" provision of data to the data economy was emphasized, echoing similar views expressed within the Working Group (A/CN.9/1241, para. 10; A/CN.9/1242, paras. 60 and 62).

10. The view was also reiterated that references to the "passive" provision of data are confusing and should be avoided (A/CN.9/1202, para. 78; A/CN.9/1242, para. 72). What distinguishes transactions to which the special default rule would apply is not the mode by which the data was provided (e.g. the data provider giving access to the data as opposed to delivering the data) but the role played by the data provider with respect to the provision of data.

11. The view was expressed that the objective of article 13 was to identify those transactions where, owing to the minimal role that the data provider played in the provision of the data, it was inappropriate to impose on that party the full suite of obligations under the default rules, an objective which it shared with Principle 10 of the ALI/ELI Principles (A/CN.9/1242, para. 72). It was added that a similar objective could be seen at work in domestic sale of goods laws insofar as they imposed less onerous obligations on non-professional sellers.[1] In a similar vein, it was suggested that further consideration could be given to distinguishing transactions by reference to whether the data was provided in the "ordinary course of business" of the data provider.[2] In any event, the need for legal certainty in identifying the transactions to which the special default rule would apply was stressed by several participants.

12. It was recalled that paragraph 1 of Principle 10 of the ALI/ELI Principles defines a "contract for authorization to access data" in the following terms:

> A contract for authorization to access data is one under which the supplier (referred to in this Principle as the 'authorizing party') authorizes the access to data or a data source by the recipient, including usually processing or porting of the data, but where, in the light of the passive nature of the authorizing party's anticipated conduct under the contract and the authorizing party's lack of meaningful influence on the transaction, the authorizing party cannot reasonably be expected to undertake any responsibilities of the sort described in Principles 7 to 9.[3]

13. It was observed that Principle 10 would typically apply where the data provider had little or no control over the data or the technical means by which it was accessed, or had little or no interest in those matters.

2. The link between article 13 and article 2

14. It was acknowledged that the "passive" provision of data can involve consumer data, which in turn engages article 2(3).

15. It was emphasized that article 13 must be read in the context of article 2(1). Article 2(1) defines in positive terms the scope of application of the default rules and

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[1] It is worth noting that the default rules, like the United Nations Convention on Contracts for the International Sale of Goods (CISG), do not expressly require the data provider or seller to be a "professional", to be acting in the course of a business, or to be in the business of providing data or selling goods, respectively.

[2] A similar suggestion was put forward in the third revision (A/CN.9/WG.IV/WP.188, para. 17), drawing on an observation within the Working Group that the data provider will not always be "in the business" of providing data (A/CN.9/1132, para. 45).

[3] It is worth noting that, while focused on "authorization" of access, Principle 10 presupposes that the transaction involves a "supply" of data, which is encompassed by the concept of "providing" data under the default rules (A/CN.9/1162, para. 61). This follows from the reference in Principle 10 to "supplier", which is defined in the ALI/ELI Principles as "a party who supplies data to another party, or undertakes to do so".

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has essentially remained unchanged since it was introduced in the first revision (A/CN.9/WG.IV/WP.183). It provides as follows:

> "These provisions apply to contracts for the provision of data under which one party (the "data provider") provides data to another party (the "data recipient"), whether or not with the involvement of a third party."

16. It was pointed out that, if a contract for the provision of data did not involve the "passive" provision of data as defined in article 13(1), the special default rule in article 13(2) would not apply but rather the full set of default rules would apply, including those that are disapplied by article 13(3). It was therefore suggested that, if the scope of application of the default rules was broadly defined in article 2, the Working Group should be careful not to limit article 13 to a narrow range of transactions. Conversely, it was observed that limiting article 13 to a narrow range of transactions was possible if enacting jurisdictions were invited to broaden its application as appropriate to the existing situation under their respective domestic law.

17. The meeting heard an exchange of views on certain "threshold" questions raised by article 2(1) that were engaged by transactions involving the "passive" provision of data, namely (i) whether there is a "provision" of data, (ii) whether there is a "contract", and (iii) whether the contract is "for the provision of data".

18. With regard to question (i), it was observed, with reference to the wording of Principle 10 of the ALI/ELI Principles, that some scenarios involving "authorization to access data" might not actually involve the "provision" of data. The "provision" of data presupposed that the data provider "has" the data (e.g. on its device or in an information system under its control). Referring to the synthesis of the Working Group's deliberations on the concept of "providing" data in the draft explanatory note (A/CN.9/WG.IV/WP.193, para. 10), it was recalled that the Working Group had not taken up a suggestion to include a requirement that the data provider "hold" the data (A/CN.9/1241, para. 26). It was cautioned that the exercise of data rights afforded to data subjects under data privacy and protection laws with respect to personal data controlled by another party should not be conflated with the provision of data.[4]

19. With regard to question (ii), the point was made that, although consent for a person to access data does not equate with consent to be bound by contract (A/CN.9/1242, para 63), allowing a person to access data in exchange for receiving goods or services of value could constitute a legitimate contractual bargain. At the same time, it was questioned whether there was sufficient justification for the default rules to address a transaction when the only undertaking of the data provider was allowing another person to access data. In any event, the point was made that the default rules were not concerned with contract validity.

20. With regard to question (iii), attention was drawn to commentary on article 2(1) in the draft explanatory note (A/CN.9/WG.IV/WP.193, para. 13) and to different views expressed at the seventieth session of the Working Group as to whether "contracts for the provision of data" should be treated as a term of limitation (A/CN.9/1242, paras. 62 and 67). It was suggested that further discussion was needed on whether the application of the default rules should depend on a determination that the provision of data was the subject-matter of the contract. Two different views were expressed in that regard:

(a) On one view, such a determination was needed to ensure that the default rules did not apply to contracts where the provision of data between the parties in one direction was necessary or incidental to the supply of something else in the other direction, such as the supply of a digital service by the data recipient;

(b) On another view, it was not advisable for the default rules to focus on the characterization of the contract as this detracted from the more important issue of

[4] For a discussion on "data rights", see A/CN.9/1117, para. 27.

whether it was appropriate to impose on the data provider the full suite of obligations under the default rules.

21. Support was reiterated for the scope of application of the default rules to be broadly defined. It was cautioned that the relevance and utility of the final text would be significantly reduced if a significant number of transactions that were important to the data economy were excluded from scope. It was added that, if the scope of application of the default rules was defined to cover a wide range of contracts involving the flow of data from one party to another, it might be desirable to revisit article 11(1) to consider whether the duty to cooperate should apply only to obligations regarding the provision of data under the default rules (i.e. not to obligations "under the contract" generally).

3. The treatment of contracts involving the exploitation of a data source

22. The meeting heard that the data economy was concerned not only with the data products (e.g. data sets) but with raw data generated as a by-product of economic activity. It was thus queried whether the passive provision of data was essentially concerned with contracts for the exploitation of a data source, which echoed a similar query made at the sixty-ninth session (A/CN.9/1241, para. 13) and reflected the "typical" scenario described at the seventieth session (A/CN.9/1242, para. 61). It was observed that the ALI/ELI Principles dealt separately with contracts for the exploitation of a data source. Specifically, Principle 9 deals with contracts:

> "under which the supplier undertakes to provide to the recipient access to data by providing access to a particular device or facility by which data is collected or otherwise generated (the 'data source') enabling the recipient to read the data, process or port data from the data source."

23. It was observed that such contracts were already contemplated in the default rules. Attention was drawn to the draft explanatory report, which recalled the intention of the Working Group to apply the rules to data generated by a connected device during a period of time following the conclusion of the contract (A/CN.9/WG.IV/WP.193, para. 45).

24. In response to the query, it was noted that sensors embedded in connected devices were only one of a variety of potential "data sources". Moreover, a data provider could still be said to play a "passive" role in a transaction that did not involve access to a data source (e.g. where the data was already in existence).

25. It was explained that, in transactions to which Principle 9 of the ALI/ELI Principles applied rather than Principle 10, the data provider typically exercised some control over accessing the data generated by the data source and sought out opportunities to monetize that data.

4. Feedback on the scenarios

26. The meeting heard that the scenarios provided a useful basis for discussion. It was acknowledged at the outset that the scenarios were not exhaustive of the transactions to which the special default rule should apply, or even indicative of transactions to which the default rules applied in the first place. Discussions focused on scenarios 1 and 2. An additional scenario was presented during the discussions of a news publisher allowing a software vendor to access its published content to develop an AI model.

27. The view was widely shared that the transaction described in scenario 1 did not generally warrant special treatment in the default rules. It was clarified that the scenario was concerned with the provision of data by the shopping centre operator to the data analytics company (not with the collection of the data by the shopping centre). It was observed that such a transaction could nevertheless display features of the "passive" provision of data if the shopping centre operator (i) did not proactively commercialize the data and was instead approached by the data analytics company with a proposition to access the data, or (ii) gave minimal undertakings, including

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with regard to the technical means by which the data was accessed or data conformity. It was added that such a transaction could warrant special treatment in the default rules.

28. It was clarified that scenario 2 described three variants of transactions involving data generated by a connected device. The view was widely shared that variants (b) and (c) described transactions that warranted special treatment, although some reservations were expressed regarding variant (c) (see para. 29 below). It was observed that variant (a) was distinguishable on the assumption that the farming corporation (as data provider) exercised control over the "smart tractor" (as a connected device) and the processing of the data generated. It was also observed that the transaction described in variant (a) might not involve access to data as it was generated by the connected device as such, but rather access to data already in existence, in which case the transaction was like the transaction described in scenario 1 and could likewise display the features of the "passive" provision of data and warrant special treatment in the default rules (see para. 26 above).

29. It was suggested that what distinguished variant (c) from variant (b) was not so much the identity of the data provider (the manufacturer could also be the provider of a service referred to in variant (b)) but the assumption that the data was provided as a condition for operating the tractor. On that assumption, transactions described in variant (c) could be seen to be outside the scope of the default rules on the view expressed earlier regarding the provision of data that is necessary or incidental to the supply of a digital service (para. 20 above). It was added that such transactions should be outside the scope of the default rules because they took place within an established legal relationship or legal regime, such as sale of goods laws.

30. Similar justifications were put forward for excluding transactions described in scenarios 3 and 4, citing laws regulating the protection of consumers, data privacy and protection, and digital platforms. Alternatively, it was suggested that those transactions were outside scope because they did not actually involve a "provision" of data. A similar observation was made about the additional scenario (para. 26 above). It was added that, if such a transaction were covered, by logical extension, all contracts for data processing services would be covered by the default rules.

III. Issues for consideration by the Working Group

A. Possible refinement of article 13(1) and article 2(1)

31. Based on the above summary, the Working Group may wish to consider refining the list of factors in article 13(1) that characterize the transactions to which the special default rule in article 13(2) should apply, as well as the scope of application of the default rules as defined in article 2(1).

1. Article 13(1)

(a) Paragraph 1(b)

32. The Working Group may wish to consider deleting paragraph 1(b) of article 13.

33. Deleting the subparagraph entirely was already suggested at the sixty-ninth session (A/CN.9/1241, paras. 17–18). While nothing was said at the meeting to call into question the observation that "the passive provision typically involved access to a data source (e.g. data generated by a connected device)" (A/CN.9/1242, para. 61), the discussions revealed that other transactions may also warrant special treatment in the default rules. Thus, the factor in paragraph 1(b) could be said to be "indicative but not definitive" (A/CN.9/1241, para. 17) of the types of transactions warranting special treatment.

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(b) Paragraph 1(c)

34. The Working Group may wish to consider whether paragraph 1(c) of article 13 should be revised to focus on the exercise (rather than existence) of control.

35. Views expressed during the meeting tended to support the remaining factors in article 13(1), which describe transactions in which the data recipient provides the means to access the data (paragraph 1(a)) and the data provider has no control over the quantity or quality of the data (paragraph 1(c)).[5]

36. Nevertheless, the discussion did point to a possible refocusing of paragraph 1(c) on the data provider's exercise of control, rather than on whether it has control. This would allow transactions to be captured where the data provider has control over the relevant data source or information system but is not willing or able to assure the quantity or quality of the data, whether because it lacks the technical means to do so or is not "in the business" of providing data (see para. 11 above). A similar sentiment was expressed at the seventieth session, where it was suggested that the "passive" provision of data was defined not so much by a lack of control but rather by the absence of any guarantee by the data provider (A/CN.9/1242, para. 68). Revising paragraph 1(c) in this way could also be seen to accommodate the kind of analysis that gives effect to the objective of avoiding the imposition of obligations on the data provider that are "inappropriate".

2. Article 2(1)

37. The Working Group may wish to consider deleting the words "for the provision of data" in paragraph 1 of article 2 and substituting a requirement that the preponderant part of the data provider's obligations consists of the provision of data.

38. As noted above (para. 28), views expressed during the meeting support the view that transactions warranting special treatment in the default rules include those in which data is provided as counter-performance for the supply of goods or services (sometimes referred to as "data barter" transactions). At the same time, views were also expressed (para. 20 above) to suggest that such transactions would be outside the scope of the default rules if the reference to contracts "for the provision of data" is retained, as those words could be interpreted as requiring the provision of data to be the object – or subject matter – of the contract between the data provider and data recipient.

39. The application of the default rules to "data barter" transactions has been touched upon tangentially by the Working Group. For instance, the Working Group has heard that a distinguishing feature of data transactions is that data is not always provided in exchange for payment of a price[6] and may be provided in exchange for services (A/CN.9/1162, para. 68). The Working Group has also accepted that data might be provided in exchange for the provision of other data, as may be the case in some data pooling arrangements (A/CN.9/1242, para. 53), and has not taken up the suggestion to develop provisions regarding the payment of a price.

40. The ALI/ELI Principles directly address "data barter" transactions. Paragraph 3 of Principle 10 acknowledges that the focus of the agreement may not be on "access to the data" but on "the supply of another commodity (such as a digital service) in the course of which access to the data occurs". In other words, the provision of data need not be the object or subject matter of the contract. The commentary goes on to explain:

> In some transactions, access to the data may be the main subject matter of the agreement. More often, however, access to the data is not what the agreement, as reflected in the parties' declarations and any contract documents, is mainly

[5] The factor in paragraph 1(d), which described a transaction in which the data provider has no meaningful influence on the terms of the transaction, was deleted by the Working Group at its seventieth session (A/CN.9/1242, para. 69).

[6] A/CN.9/WG.IV/WP.180, para. 24; A/CN.9/WG.IV/WP.183, para. 30; A/CN.9/WG.IV/WP.188, para. 7.

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about, but, rather, is an incidental element within a wider transaction about something else, such as provision of some digital service (e.g., search engine service, navigation service, messenger service) by the recipient of the data to whom authorization to access is granted. When this is the case, authorization to access is best seen not as the defining characteristic of the transaction but, rather, as a substitute for payment in money for the digital service.

41. If the Working Group wishes to ensure a broad scope of application for the default rules, one option would be simply to delete the words "for the provision of data" from article 2(1). However, as noted in the draft explanatory note (A/CN.9/WG.IV/WP.193, para. 13), these words also serve to ensure that the default rules do not inadvertently apply to a vast range of contracts concluded in the digital economy, such as contracts concluded electronically, contracts for data processing services, and contracts containing information-sharing obligations that are capable of being performed by electronic means.

42. An alternative option might therefore be to shift the focus of characterization from the transaction in general to the undertakings of the data provider in particular, i.e. the defining deliverable on its side of the contractual bargain. Doing so may also avoid the issue of data as counter-performance, about which concerns have been expressed within the Working Group (A/CN.9/1242, para. 67). The Working Group has previously considered limiting the scope of the default rules based on a characterization of the undertaking given by the data provider, but in the different context of "mixed contracts". Specifically, at the sixty-sixth session, a proposal to include a provision modelled on article 3(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[7] was put forward to ensure that the default rules did not apply to "contracts in which the preponderant part of the obligations of the data provider consists in the supply of services with respect to the data". Ultimately, the proposal was not taken up. However, the possibility was left open of limiting the scope of the default rules to those contracts for which the performance by the data provider was characterized by the provision of data (ibid., para. 68).

B. Reintegrating the substance of article 13 into the other provisions of the text

43. The Working Group may wish to consider whether the substance of article 13 should be reintegrated into the other provisions of the text, specifically those default rules that are to be disapplied under article 13(3), and whether a more nuanced approach to disapplying article 8 should be applied.

44. At the sixty-ninth session, various approaches to accommodating the "passive" provision of data in the default rules were put forward, including establishing a stand-alone provision and formulating the default rules so as to allow for their differential application (A/CN.9/1241, para. 12). At the seventieth session, there was broad agreement for the former approach, although the alternative approach of reintegrating the substance of article 13 into the other default rules was also advocated (A/CN.9/1242, para. 73).

45. Given that several default rules have already been formulated to accommodate the "passive" provision of data (A/CN.9/1202, paras. 14 and 16; A/CN.9/1241, paras. 42 and 43), and in view of the possible refinements to article 13(1) emerging from the informal consultations (see paras. 32–36 above), reintegrating the substance of article 13

[7] The proposed provision, contained in article 2(3) of the first revision (A/CN.9/WG.IV/WP.183), read as follows: "These rules do not apply to contracts in which the preponderant part of the obligations of the data provider consists in the supply of services with respect to the data".

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into the other default rules could be achieved with only minimal modification to the existing default rules. Specifically:

(a) Article 6 – a new provision could be inserted after paragraph 3 that, if the parties agree that the data recipient is to provide the means to access the data (as currently provided in article 13(1)(a)), the data provider is obliged to allow the data recipient to access the data by those means and not to impede that access (as currently provided in article 13(2));

(b) Article 7 – paragraph 2 could be amended so as not to apply if the data recipient provides the means to access the data;

(c) Article 8 – a provision could be inserted to the effect that paragraphs 2 and 3 do not apply where the data provider does not have control over the quantity or quality of the data (as currently provided in article 13(1)(c), with possible revisions as outlined in para. 34 above), although a question arises as to whether it is necessary to disapply paragraph 2.

46. Disapplying the conformity rules in article 8 in their entirety for transactions involving the "passive" provision of data has attracted broad agreement within the Working Group. If, however, it is accepted that the objective of article 13 is to avoid imposing obligations on the data provider that are "inappropriate", as was suggested during the meeting (see para. 11 above), a more nuanced approach to disapplying article 8 may be warranted. According to this approach:

(a) The basic standard in paragraph 1 should not be disapplied, consistent with the principle of party autonomy;

(b) The supplementary standards in paragraphs 2(b) and (c) need not be disapplied as they already do not to apply on their terms to transactions involving the "passive" provision of data;

(c) The supplementary standard in paragraph 2(a) might not need to be disapplied as it only applies where the quality and quantity of data can "reasonably be expected of data provided by the data provider in the circumstances". Admittedly, doubts have been raised about relying on the notion of "reasonable expectations" as a basis for the differential treatment of transactions involving the "passive" provision of data as it does not sufficiently recognise the asymmetry between the parties (A/CN.9/1241, para. 12). However, concerns about asymmetry between the parties have since diminished within the Working Group as a factor characterizing such transactions (A/CN.9/1242, para. 69);

(d) The assurances of lawful provision and use in paragraph 3 would be disapplied.

47. The result of this approach would be a single, cohesive set of legislative provisions that apply to all contracts within scope. It would also overcome some of the conceptual issues with article 13(1) that were identified at the seventieth session (A/CN.9/1242, para. 65). Moreover, it would reinforce party autonomy by preserving (not disapplying) those default rules that already defer to the agreement of the parties (e.g. articles 6(1), 7(1) and 8(1)).

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