DIGITALEUROPE

DIGITALEUROPE's comments on the proposed Directive on contract rules for the supply of digital content

Brussels, 15 April 2016

EXECUTIVE SUMMARY

- DIGITALEUROPE supports the principle of full harmonisation proposed by the European Commission, as this will bring increased trust for consumers and legal certainty for businesses.

- We urge policymakers to promote the pre-existing framework of consumer protection legislation, in light of the Better Regulation agenda. New rules – which should not conflict with existing rules such as the CRD or GDPR - should only be drawn up when particular needs are identified after conducting the REFIT Fitness Check of EU Consumer Law and upcoming review of the Consumer Rights Directive.

- DIGITALEUROPE is very concerned about the extension of the definition of digital content to include, beyond products, services such as cloud storage, sharing and other processing of data and user generated content services. Such a wide scope would result in over-regulating and would also negatively impact the app economy, for instance.

- We are also very concerned about the proposed introduction of digital content or services provided for counter-performance other than money in the form of personal data or other data into the scope of the Directive. The lack of clarity of certain provisions makes it difficult to apprehend all the implications of such rules. We call against creating a single regime for paid and free services which would be at the disadvantage of SMEs and innovative services and would not reflect the different expectations consumers have whether or not they pay for the content or service.

- We urge the co-legislators to clarify the definitions including those related to the role and responsibilities of suppliers, especially where intermediaries are involved. While this proposal is limited to B2C contracts, some provisions will inevitably touch upon B2B relationships.

- We welcome the acknowledgement in the Directive that remedies for the lack of conformity with the contract should be possible, proportionate and lawful.

- DIGITALEUROPE would also like to stress that the termination rights offered by the Directive, combined with the lack of clarity as to the scope, give rise to disproportionate remedies for consumers (e.g. regarding the retrieval right for user generated content).

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- With regards to long-term contracts, DIGITALEUROPE considers that the rules applying for digital content should not differ from the rules applicable in the physical world. Consumers should be able to withdraw from a 12-month contract as agreed at the time of the conclusion of the contract.

INTRODUCTION

DIGITALEUROPE welcomes the ambition of the European Commission to unlock the potential of eCommerce in Europe. We recognise that harmonisation of EU law for online purchases of digital content must provide further confidence for consumers and consistency across the digital single market. We therefore support the principle of full harmonisation underlying the European Commission's approach that is necessary to bring legal certainty for business.

However, we are concerned that, in its current form, this Directive may inadvertently have an impact on other areas already regulated or currently being reviewed, such as the consideration of the General Data Protection Regulation and the platform assessment.

In particular, consumers are already benefiting from a strong set of consumer laws such as the Consumer Rights Directive (CRD), Unfair Commercial Practices Directive, the Unfair Contract Terms Directive as well as the Data Protection Directive and soon to be the General Data Protection Regulation. In the spirit of Better Regulation, we believe that it is essential to promote existing rules that strengthen consumer trust in cross-border commerce activities. New regulation should only complement where necessary. In particular, the REFIT Fitness Check of EU Consumer Law (to be completed by 2017) and upcoming review of the CRD (to be completed by December 2016) should be undertaken first to evaluate consumer law requirements in a holistic manner before introducing this Directive. Therefore, we urge the European Commission to carefully consider the potential knock-on effect of this Directive and to take a step back and wait for the outcome of these reviews before adding new layers of regulation.

SCOPE

Digital content

The proposed definition of digital content extends beyond products to also include services such as cloud storage, sharing and other processing of data and user generated content services, as an attempt to "future proof" the Directive. While we support, in principle, the implementation of rules that will stand the test of time, we remain concerned that such a wide scope would result in over-regulating. This would have some irreversible and adverse consequences on, for instance, the app economy or on the videogames sector, as considered further below.

Free Content

DIGITALEUROPE is very concerned about the proposal to create an additional regulatory layer to situations where "the consumer actively provides counter-performance other than money in the form of personal data or any other data" as suggested in Art 3(1). We believe that the current regulatory framework strikes a good balance between strong consumer protection on the one hand and innovation and fair competition on the other.

Putting free and paid digital content providers under the same regulatory regime would not create a level playing-field as mentioned by the Commission, but rather create a disadvantage for SMEs and innovative services. We would like to stress that, thanks to the availabilities of different business models (free, freemium, paid), Europe's digital content and service market has provided a new phase of enormous growth and enabled many consumers to access content in a manner that reflects their own preferences. The EU's app developer market alone is worth EUR 63bn and estimated to provide 4.8m jobs by 2018. To that end, DIGITALEUROPE recommends to limit the scope to digital content supplied in exchange for money.

If digital content or services provided for counter-performance other than money are to be included within the Directive's scope, it is recommended that certain articles and recitals are re-drafted to make clear precisely which interactions between consumers and suppliers will be considered to be in scope. Otherwise, there is considerable uncertainty on the scope of the Directive, where varying and unclear definitions could unintentionally result in virtually any digital content, service or website offered without payment from being within its scope.

Further, there is a lack of clarity regarding the concepts of a consumer "actively" providing data, with recital 14 explaining that access to photos by contractual agreement is 'active' provision, but access to or storage of data (such as a cookie) on a device would be 'inactive'. However, this conflicts with the position under the ePrivacy Directive which requires a user to agree to such access or storage.

It is also unclear under Article 3(4) how to identify when non-personal data is used for "commercial purposes". A practical example of the potential consequences of this lack of clarity is in the context of a video game. Non-personally identifiable data is collected for various purposes (e.g. the use of metrics to better understand gameplay and player behaviour within the game; to provide bug reports to improve the game) and it is unclear how the concept of "commercial purposes" would apply to them under the Directive. In view of the proposed restriction on the use of the counter-performance upon termination (Article 13(2)(b)), this will cause significant difficulties for industry which may be prevented from utilising data which is needed to continue innovating and improving the consumer experience.

User-Generated Content

It is also unclear what problem the Directive seeks to address by including user generated content within its scope. The inclusion of such content leads to issues in the context of termination and does not align with consumer expectation or industry practice in other industry sectors for reasons set out later in this document. It also risks impinging upon intellectual property law and introducing consumer confusion. It is recommended that user generated content is therefore excluded from the Directive's scope because it is likely to lead to unintended consequences in other sectors which will ultimately be to the detriment of the consumer.

DEFINITIONS

We would like to stress that a definition of "digital content" already exists and was agreed after considerable discussion at the time of the adoption of the Consumer Rights Directive in 2011. Having two different definitions of digital content will only make consumer rules more complex and confusing. If it is felt that specific legislation is required for digital versus other services, we recommend separately defining 'digital content' and 'digital services' and ensuring that obligations and remedies for each are considered separately and drafted specifically.

LIABILITY OF THE SUPPLIER

The Directive is unclear as to who the supplier is and thus obliged to offer remedies. Recital 47 introduces the concept of "final supplier" but this seems to be contradicted by Article 5 which implies that supplier is the entity putting the content onto the market. This must be clarified to make it clear that it is the entity that, as a matter of contract, supplies the content to the consumer. That may be but is not always the platform which makes the content available: who the retailer is will depend upon the platform business model. The platform could act as retailer, agent, or merely a technology platform (in which case the content creator or publisher is likely to be the retailer). For some digital content, only the creator (e.g. the company which coded a particular piece of software) can deal with conformity issues and patch the content; a retailer, who could be liable to provide a replacement, for example, may only have the file that is subject to the conformity issue. This does not mean that a retailer should not have liability, but careful consideration should be given while drafting the Directive to ensure accountable parties and applicable remedies coincide.

Similarly, it is important to distinguish between the making available of the content, which falls onto the trader i.e. the party contracting with the consumer (e.g. online retailers) from its delivery which is largely controlled by the telecom provider. Should there be an issue with the conformity of the content supplied, intermediaries should not be held liable. Remedies for the failure to supply therefore only seem appropriate if the lack of supply is caused by an instance within the supplier's control. It can reasonably be expected from the consumer to verify sufficient network coverage prior to making a purchase. Providing consumers with an indefinite automatic termination right (Article 11) would impose unreasonable burden on suppliers. In this case, we would argue that the burden of proof should be on consumers and not on the trader, at least for a limited period of time.

The lack of clarity around the definition and responsibilities of the supplier also opens up questions as to B2B relationships. While, this proposal is limited to consumer contracts some provisions will inevitably touch upon B2B relationship, specifically in those cases where an intermediary is involved.

REMEDIES FOR THE LACK OF CONFORMITY WITH THE CONTRACT

We welcome the European Commission's acknowledgement in Article 12 of the Directive that remedies for the lack of conformity with the contract should be possible, proportionate and lawful.

DIGITALEUROPE also agrees with the approach taken in Recital (37) that the consumer's right to terminate under Article 12 should be limited to cases where the non-conformity impairs the "main performance features of the digital content". However, the current drafting of the operative provision in Article 12(5) should be improved so that it is consistent with Recital (37) by inserting a materiality threshold. A literal reading of this Article could give rise to a termination right for any impairment to functionality or interoperability which would be disproportionate.

Where refunds are to be provided to consumers, we believe they should be made via the same payment method used to make the payment to avoid additional costs, in order to prevent unreasonable costs for the service provider, particularly for SMEs and avoid money-laundering concerns.

In some cases, it is worth noting that what is a reasonable period of time within which to bring a digital content into conformity may vary depending on the nature of the content and applicable business model and distribution method.

LINKS WITH THE DATA PROTECTION FRAMEWORK

We are concerned about the clear overlap between the proposed Directive and the requirements contained within the General Data Protection Regulation, which deal explicitly with user control and use of personal data. Those requirements apply fully to the areas which this Directive is seeking to address and therefore the proposed approach of overlaying requirements does not appear to accord with better regulation principles.

As for the data relationship between the user and the supplier, it is governed by the Data Protection Directive (95/46/EC) and related instruments. Article 7 of the Directive sets out a series of legal basis upon which a service provider may lawfully process user data provided as part of the user's use of the service provided. Consent is only one of them. These are largely reflected in Articles 7 and 8 of the GDPR. Deeming the provision of data to be counter-performance for contract law purposes, whether that is what is agreed by the parties to the relevant contract or not, would directly undercut Art 7 of the Directive. It would have the effect in practice of making consent the only lawful basis for processing user data, contrary to the express legislative intention set out in the Directive and against which background the e-commerce ecosystem has developed to date.

We believe that it should be for the service provider and its users to determine the terms on which they contract, subject, of course, to consumer protection laws and other legal obligations. Freedom of contract remains a fundamental precept of the Internal Market. Seeking to impact privacy relationships through a channel parallel to the GDPR would be inconsistent with a predictable, coherent and stable legal regime, which is essential to the proper functioning of and investment in a true digital single market.

TERMINATION OF THE CONTRACT AND RETRIEVAL OF DATA

The proposal introduces the possibility for consumers to retrieve all the data produced or generated through the use of the digital content to the extent that data has been retained by the supplier (article 13). DIGITALEUROPE is concerned that the termination rights proposed by the Directive, combined with the lack of clarity as to the scope of the Directive (in particular, regarding counter-performance other than money, as explained above) give rise to disproportionate remedies for consumers which do not align with consumer expectations or industry practice and in circumstances where it is unclear what problem the Directive is seeking to address by providing such remedies (e.g. regarding the retrieval right for user generated content). These points are considered further below.

1. Which data and content can be retrieved (Art 13(2)(c): The distinction between data and content as well as the question of which data and content the consumer should be allowed to retrieve need to be carefully considered and clarified, although this is not easy. DIGITALEUROPE believes that, for example, consumers of cloud storage services should be allowed to retrieve the original content they have uploaded as well as any modification to the content made via the service provided that no third party intellectual property rights are infringed as a result.

   We also question the value of retrieving data such as the complete history of a search engine or a progression in an online game.

   In summary, the potential scope of this obligation is extremely broad, and does not reflect consumer expectations or industry practice. It may also contradict existing intellectual property law.

In relation to personal data, consumers already have the right to retrieve such personal data as a subject access request under the Data Protection Directive and this right is further enhanced through the new right of portability (Article 18) that is introduced by the General Data Protection Regulation. As such, there is no need to legislate in this area and to do so would lead to consumer confusion.

2. Commonly used format for retrieving content (Art 13(2)(c)): For many suppliers, there would currently be no technical means to retrieve the large amounts of data which may be generated by consumers using digital content (e.g. how often they visit a website, their interactions with other users online). Nor do we believe there is a demand for this type of data. Further, the imposition of a commonly used data format would result in stifling innovation and would become costly for businesses. Moreover, a 'commonly used' format leaves open the potential for a less secure mechanism.

3. Refraining from using data in case of termination (Art 13(2)(b)). In certain circumstances, data is collected to improve the services for *all* consumers. Does that mean that such data should be returned to the consumer and the supplier should stop using it in respect of its other consumers? As per the above, DIGITALEUROPE is of the opinion that only data that has value to end-users should be returned to them. It must also be noted that companies are under a separate legal obligation to retain records where such records constitute a record of a transaction that is necessary for financial and auditing purposes. This period is typically at least 7 years throughout Europe. Such records cannot be returned and not retained without breaching legal obligations in this area.

4. Making the content inaccessible – Article 13(3) would allow the supplier to make the content inaccessible upon termination. While this is technically feasible in the case of an online service with a user account, this is practically impossible to enforce in the example of downloaded content such as an app. The trader has no access to the content once downloaded onto a device. It would be technically very difficult and would go against privacy rules. Deleting content on users' devices requires a fundamental change to the way in which devices can be used, and the privacy and security practices across user interface and ecosystems. Requiring the ability to enter into consumers' device and remove content would need a much more intrusive approach which would need constant remote monitoring of the device, and create a large privacy and security risk. For certain types of content, this would also require the re-introduction of DRM technology in order to mitigate fraud.

DAMAGES

Consumers should not be entitled to damages. We believe that remedies are sufficient and that evaluating the damage would be complex, thus not effectively protecting consumers. This could also result in increasing prices as companies may need to include this in their pricing to accrue for potential damage claims.

LONG-TERM CONTRACTS

DIGITALEUROPE believes that the Directive should differentiate between the different types of renewals: some services apply a monthly renewal; others would request consumers to enroll over a long period of time.

Generally, we also believe rules applying to long-term contracts for digital content should not be any different than the rules applicable to similar contracts in the physical world. When entering into a contract for a period of 12 months, consumers should be able to withdraw from it after the period agreed with them at the time of the conclusion of the contract.

Providing consumers with the right to terminate after 12 months of any contract by giving notice "at any time and by any means", with termination taking effect within 14 days from receipt of the notice, would not only introduce a disproportionate burden on businesses (who would have to monitor any forms of communication for termination notices) but would also undermine the ability of suppliers to reduce the costs of digital content services (and thereby make it accessible to more consumers) in exchange for a longer contract term. It is common practice that traders either offer a trial period during which they waive the remuneration or offer a discount depending on the length that a consumer is willing to commit to a subscription for the digital content. In those cases, consumers should not have a right to terminate the contract if a discount was applied (for example, a magazine is offered for 12 months for the price of 10). Providing consumers with the possibility to cancel their subscription while a discount has been given to them would prevent traders from offering volume discounts. In the case of auto-renewals of the contract, consumers are de facto given the possibility to withdraw from the contract prior to the time of renewal.

The overall impact of article 16 would undermine supplier's incentives to continue investing in innovation and will ultimately be to the consumer's detriment.

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CONTRADICTION WITH THE CONSUMER RIGHTS DIRECTIVE

In its current form, we believe the proposed Directive actually contradicts the Consumer Rights Directive (CRD) in a number of ways, for instance:

1. It conflates the terms of 'digital content' and 'digital services';

2. It uses the terms 'data' and content' without any apparent distinction; and

3. It requires the supplier to supply the content "immediately" (Art 5(2)), which is at odds with the CRD. This may have the effect of creating a disproportionate termination right which fails to strike the right balance between the interests of consumers and suppliers. This is because it could result in the supplier having to provide a refund for content under the CRD that the supplier has had to immediately (and, for most digital content, irretrievably) provide to the consumer in order to comply with the digital content Directive.1

It is important therefore that further scrutiny is applied to the scope and effect of the proposed digital content Directive to ensure that it does not lead to inconsistencies with the consumer law provisions under the CRD.

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1 The default position under Article 9(c) CRD is that, in relation to digital content delivered on a non-tangible medium (e.g. by download/streaming), a customer has 14 days from the day the contract is entered into or concluded to cancel the contract. However, Article 16(m) CRD provides an exemption to the default requirement to give customers a 14-day cooling off period, provided that (a) the performance of the contract has begun with the consumer's prior express consent; and (b) the consumer has acknowledged the loss of the withdrawal right. Where a supplier fails to satisfy the requirements of Article 16(m), the 14-day cooling off period is extended by a further 12 months.

In other words, under the CRD framework, a supplier wishing to supply content immediately must satisfy the Article 16(m) exemption requirements to avoid being in the position where it immediately supplies the content (e.g. a film for download) which the consumer downloads within the 14-day cooling off period and then asks for a refund. In that situation, unless the supplier has satisfied the Article 16(m) requirements, the supplier would have to accept the cancellation and provide a refund, even though they cannot readily 'reclaim' the supplied digital content from the customer (because the film has already been downloaded onto the customer's hardware), leaving the customer able to benefit from the supplied content and a full refund.

Article 5(2) of the digital content Directive, on the other hand, requires the supplier to "supply the digital content immediately" and a failure to do so entitles the consumer to immediately terminate the contract (Article 11). On a reasonable construction of Article 5(2), as it currently stands, the supplier may feel obliged to immediately supply the digital content under Article 5(2) but may not be able to comply with the requirements under Article 16(m) CRD. Therefore, where digital content or service is supplied to the consumer, but not 'immediately', this could result in the consumer having a termination right for content that it has already received and leave the supplier having to refund for content that cannot be retrieved from the consumer. This would afford a disproportionate right to terminate which fails to strike a proper balance between the interests of consumers and suppliers.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 60 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

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