IAB Europe position on the European Commission's proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

The Interactive Advertising Bureau Europe (IAB Europe) takes note of the European Commission's proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (hereafter Digital Content Proposal).

IAB Europe is the voice of digital business and the leading European-level industry association for the online advertising ecosystem. Its mission is to promote the development of this innovative sector. Together with its members – companies and national trade associations – IAB Europe represents over 5,500 organisations[1]. IAB Europe is listed in the Transparency Register[2].

Digital advertising continues to generate considerable growth, value and jobs for the Digital Single Market. In 2006, the value of the EU market stood at €6.6 billion, versus €30.7 billion in 2014. This is an increase in spend of €24.1 billion and translates into a compound annual growth rate of 21.2%, or an average €3.0 billion per year[3]. With a year-on-year growth rate of 9.7% in H1 2015[4] compared to a 1.6% increase in overall EU GDP[5], the digital advertising sector continues to outperform the overall EU economy.

IAB Europe welcomes the European Commission's initiative and aim to shape cross-border e-commerce rules that consumers and business can trust. Such an initiative must pursue the joint objectives of serving European consumers as well as supporting the development of the digital economy and new business models. Although the Commission's proposal provides a good basis for working towards the development of contract rules for the sale of digital content, we continue to be concerned about the impact that some of the points contained in the initiative could have on businesses.

[1] The member countries are: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and United Kingdom. The corporate members include: 21st Century Fox, Adelphic, Adform, AdRoll, ADTECH, AdTruth, Aegis Media, Affectv, AGOF, AOL Advertising Europe, AppNexus, AudienceScience, BBC Worldwide, Clarins, CNN, comScore Europe, Criteo, Dailymotion, DMA Institute, eBay International Advertising, ePrivacy, Expedia Inc, Facebook, Fox Interactive Media, Gemius, GfK, Goldbach Media Group, Google, GroupM, Improve Digital, Integral Ad Science, IPG Mediabrands, Koan, Krux, MediaMath, Meetrics,
[2] 43167137250-27
[3] IAB Europe AdEx Benchmark report - the state of online advertising in Europe. 2014.
[4] IAB Europe AdEx Benchmark H1 2015, December 2015.
[5] eurostat

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I. Scope

From IAB Europe's perspective, **the key issue** with the Commission's proposal is the fact that the proposal covers contracts where "*the consumer actively provides counter-performance other than money in the form of personal data or any other data*" (Article 3.1). By doing so, **the proposal amalgamates money given as a counter-performance with data provided by the** consumer in the context of their use of a free digital content.

- **Money and data must be treated differently**

We would strongly contest the notion that users pay for digital content with their data. This would necessarily entail data ownership, a concept that is difficultly transposable to the matter in hand. Non-personal datasets for example often involve a series of rights that are spread across different stakeholders in a disparate way depending on the role they play. Where personal data is involved, the situation is even more complex as the GDPR grants the data subject explicit control rights that cannot be restricted.

User data are, by their very nature, different from money and ought to be treated differently. It is for instance relatively straightforward to revert a contract where the counter-performance is money — one can refund the money. However, it is not always so straightforward if a user wants to exercise their consumer right regarding a defective digital content product that is "purchased" by means of data. Data is neither exclusive, nor finite, making restitution uneasy.

In addition, assimilating data with money seems premature at this stage, as it necessarily entails transposing legal concepts from the General Data Protection Regulation (GDPR) that have just been adopted and are yet to be interpreted and implemented.

Finally, content providers that deliver their content for free should not be subject to contractual obligations that are similar to those of suppliers that receive remuneration from the consumer for providing content. Indeed, consumers have different expectations when it comes to content that they have paid for compared to content that they are receiving for free.

- **Legal uncertainty in the area of data protection must be avoided**

The use of personal data is currently very precisely regulated by the Data Protection Directive (Directive 95/46/EC). Its successor, the General Data Protection Regulation, was formally adopted on 14 April 2016 and will enter into force in spring 2018. Given that data currently drives the European digital economy, we believe that it is of utmost importance that its regulation be well circumscribed within existing substantive legal frameworks.

Yet, Article 3 of the Proposal, which defines its scope, stands unconnected with the GDPR.

- When Art. 3.1 of the Proposal refers to personal data that the consumer "actively provides", this translates – in data protection terms – as personal data that is processed on the basis of the consumer's consent (Article 6 GDPR)[6]; yet the Proposal does not use

[6] It seems relevant to point out that pursuant to Article 7 GDPR, "*[w]hen assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract*". Recital 43 of the GDPR adds that "*consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract,*

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that terminology.

- Article 3.1 also uses the expression "*any other data*", which is not defined in the GDPR, hence suggesting that the Proposal also covers non-personal data, which leads to important technical difficulties, as explained later in this document. "*Any other data*" is not defined in the Proposal.
- Article 3.4 of the Proposal specifically excludes processing on the basis of a necessity for the performance of a contract or to comply with legal obligations (see Article 6.1, b and c GDPR) but only to the extent that the supplier does not further process the data in a way incompatible with the contract. For the sake of clarity, this last point could be framed positively rather than negatively.
- Article 3 of the Proposal does not make any reference to the other grounds for processing contained in the GDPR, namely the protection of vital interests (Article 6.1, d), the performance of a task carried out in the public interest (Article 6.1, e) and the legitimate interest of the controller (Article 6.1, f). In line with Recital 14, the latter should also be expressly excluded from the scope of the Proposal.
- Finally, the GDPR contains data and storage minimisation principles (Article 5, c & e GDPR). Processed data should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. Treating personal data as a "price" that consumers pay could be interpreted as encouraging consumers to "pay" with data in lieu of money and hence encourage the processing of consumer data where the GDPR generally restricts it.

- **Freedom of contract must be preserved**

Art. 3 (9) of the Proposal explicitly states that the Directive will not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract. Under the Proposal, this is so *only* in so far as these laws are not regulated in the Directive. This formulation may require clarification. In any case, as it stands, and in connection with Article 3.1, it seems to mean that, where data is actively provided by the user, a contract will have been concluded.

According to IAB Europe, this is a drastic initiative, which does not seem warranted by the Commission's aim to shape cross-border e-commerce rules that consumers and business can trust. Such rules should solidify existing notions and not create new concepts that have not yet been thoroughly tested at national level. Are we ready to consider that consumers pay with their email-address and any other information that they may provide? Are we ready to apply the national rules of 28 different Member States to a new form of digital contract, rendered against data, in a digital environment that is constantly evolving? Are we ready to prevent parties to a contract to decide whether they want to enter into a contract the counter-performance of which is data? Do we really want to restrict freedom of contract in the digital world?

According to IAB Europe, freedom of contract should not be limited in a way that prevents parties to a contract to decide whether data ought to be considered as a counter-performance. Freedom of contract is fundamental for the regulation of the constantly and rapidly evolving digital environment. Any restriction on the latter could seriously impede companies' ability to

including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance".

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innovate and hinder the growth of digital innovation in Europe.

To palliate such difficulties, IAB Europe suggests limiting the scope of the Directive to "*any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, monetary compensation is to be provided*". Alternatively, the scope of the Proposal should be aligned to that of the General Data Protection Regulation, notably by removing the reference to "*any other data*" and by referring to consent given by the consumer as per Article 6 § 1, a of the GDPR, rather than to situations where "*the consumer actively provides counter-performance other than money*".

II. Definitions:

- **On the definition of "digital content"**

For the purpose of the Directive, "digital content" means, as described in Article 2.1:

"*(a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,*
(b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and
(c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service;"

IAB Europe believes that this definition creates legal uncertainty by departing from the definition of "digital content" contained in the recently agreed Directive on Consumer Rights (2011/83/EC), which defines content as *"data which are produced and supplied in digital form"*. By being more generic, the latter definition is more future proof and therefore more suitable for rapidly evolving technological solutions.

IAB Europe believes that the definition of "digital content" contained in Article 2.1 of the proposal should be aligned to that of the Consumer Rights Directive, which defines digital content as *"data which are produced and supplied in digital form".*

- **On the definition of "supplier"**

Under Article 2.3 of the Proposal, "*supplier*" means "*any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession*".

This definition could potentially encompass companies that supply a service by which digital content reaches the consumer, even though these companies do not supply digital content to a consumer.

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IAB Europe suggests clarifying in Article 2.3 that for the purpose of the Directive, a trader does not supply digital content to a consumer merely because the trader supplies a service by which digital content reaches the consumer. This would be consistent with Article 5.1 (b).

III. Obligation to refrain from the use and allow consumers to retrieve the counter-performance and any other generated data

Article 13.2 on Termination holds that:

"*2. Where the consumer terminates the contract:*

(…)
(b) the supplier shall take all measures which could be expected in order to refrain from the use of the counter-performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer with the exception of the content which has been generated jointly by the consumer and others who continue to make use of the content;
(c) the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format;
(…)"

Similar obligations can be found in Articles 11 (failure to supply), 15.1 (d) and 15.2 (b) (termination following modification of the digital content) and 16.4 (a) and (b) (right to terminate long-term contracts).

It appears worthwhile to highlight that the definition of digital content contained in the Proposal being very broad, the obligations would practically apply to suppliers of any data produced and supplied in digital form (including video, audio, applications, games and other software), of any service allowing the creation, processing or storage of data in digital form (big data, cloud computing solutions), as well as any service allowing sharing or interacting with content generated by users (social networks, interactive websites, audio- and video sharing platforms, podcasts or blogs).

According to the Proposal, the Directive "*is without prejudice to the protection of individuals with regard to the processing of personal data and does not take precedence over conflicting provisions contained in other Union acts governing a specific sector or subject matter*" (Article 3.7 and 3.8).

Still according to the Proposal, in the case where the counter-performance consists of personal data, fulfilling the obligation to refrain from using data should mean, according to Recital 37, that

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"*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*".

Firstly, IAB Europe supports the view that where the data concerned is **personal data** in line with the forthcoming GDPR, the consumer's rights are already regulated by the GDPR. So as to avoid confusion and conflicts between data protection rules and contract rules, this Proposal's scope and the terminology used should be aligned with that of data protection law.

Where the counter-performance consists of personal data, the obligations introduced by the Proposal are unnecessary as consumers already have ways to limit the processing of data relating to them under the GDPR. Under Article 7 of the GDPR, the data subject notably has the right to withdraw his or her consent for the processing of personal data relating to them at any time**.** Where processing is based on consent, the GDPR also notably provides a right to access (Article 15) a right to rectification (Article 16 GDPR), a right to erasure ("right to be forgotten) (Article 17 GDPR) and a right to restriction of processing (Article 18 GDPR). With the exception of the right to erasure contained in Article 17, all of the above-mentioned rights are non-retroactive. At the same time, the right to erasure is bound by a limited list of grounds for erasure. In addition to the above, data subjects also benefit from a right to portability under Article 20 of the GDPR.

However, if the Proposal is to duplicate rights that consumers already have under data protection law, its terminology should be aligned with that of data protection legislation.

Given that the above-mentioned provisions each involve the consumer's entitlement to terminate the contract, due to, respectively, failure to comply, non-conformity, modification of the contract or an inherent right in case of long-term contract, **reference should** logically each time **be made to the consumer's entitlement to withdraw his or her consent under Article 7 of the GDPR**. Termination on the above-mentioned grounds should entail withdrawal of consent by the consumer.

With this in mind, the Proposal should also be consistent with Article 7.3 GDPR, which clearly states that "[*t]he withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal*". In other words, **consent withdrawal cannot affect the lawfulness of the data already processed before the contract was terminated and therefore cannot impose the erasure nor the retrieval of such data**. **Under the GDPR, users remain free to *request* a retroactive erasure (Article 17) under specific conditions and to make use of their right to portability (Article 20)** in order to "*receive the personal data concerning [them], which [they have] provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided*". At the maximum, this Proposal could oblige the supplier to inform the consumer of the existence of such rights but it cannot change their substance.

Where a consumer makes use of their right to withdraw their consent, the Proposal should also logically allow the supplier to terminate the contract. Without this, the supplier may be obliged to keep on supplying a service without receiving any counter-performance in return. This would be incompatible with the well-established principle of civil law pursuant to which non-performance of an obligation in a bilateral contract leads to termination of the

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contract. This is particularly important in the context of Article 16.1 (termination of long-term contracts), which expressly establishes a minimum term of contract of 12 months.

Secondly, IAB Europe has grave concerns about the inclusions of **non-personal**, ie. anonymous **data** in the scope of the above-mentioned obligations as **non-personal data cannot, by definition, be linked to the consumer**.

A consumer may have supplied anonymous data by filling out a survey. The supplier may also have collected anonymous data about the use of the content. This data may have been aggregated by the supplier to generate statistics (e.g. web analytics) in order, for example, to better understand consumer needs and modify content accordingly.

In such case, it would be next to impossible to un-aggregate the data and link it to the original consumer. This requirement (if at all possible and feasible) could dramatically reduce citizen's free access to independent and diverse content on the Internet by placing a disproportionate burden on content providers. With considerably increased costs, smaller providers would have no other option than to increasingly charge money for their online content at the expense of content accessibility. Others run the risk of becoming non-profitable and could cease to exist. It could also create new risks such as making personal data available to the wrong persons either due to human/system errors or due to hacking of systems intended for giving users access to data about themselves.

For these reasons, **the requirement would end up pushing suppliers to identify the consumer and, by doing so, work at cross-purposes to privacy-by-design mechanisms already put in place by industry.** Where data could have simply been kept anonymous, the identification of the consumer, and in some cases, profiling, would become necessary. This would be inconsistent with Article 10 of the General Data Protection Regulation, which states that "*If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation*".

Finally, this would also pose difficulties in terms of datasets that have been protected by the organisations that are investing creativity into generating smart outcomes through them (see Database Directive (96/9/EC) and InfoSoc Directive (2001/29/EC)).

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As per IAB Europe's recommendation on limiting the scope of the Proposal to digital content supplied against money, these obligations should be removed.

Should these obligations be kept, IAB Europe suggests amending the terminology used in Articles 13.2 (b) and (c), 15.1 (d), 15.2 (b) and 16.4 (a) and (b) in order to align the Proposal with the scope of application of the General Data Protection Regulation, notably by:

- **(i) limiting the scope of the Proposal to personal data by referring to "*personal data"* as opposed to "*the counter-performance (…) and any other data…*";**
- **(ii) stating that in case of termination on the above-mentioned grounds, the consumer shall be deemed to have withdrawn their consent under the GDPR (Article 7);**
- **(iii) requiring the supplier to inform the consumer of their right to erasure (Article 17) and portability (Article 20) under the GDPR;**
- **(iv) deleting any reference to "refraining from the use", "allowing the consumer to retrieve", "deleting" or "rendering the data anonymous";**
- **(v) including a provision allowing the supplier to terminate the contract where the consumer makes use of their right to withdraw consent;**
- **(vi) introducing a provision similar to Article 10 GDPR as to prevent that consumers be personally identified in situations where this would otherwise not be the case.**

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