EDIMA feedback on proposed
Directive on certain aspects concerning contracts for the supply of digital content

EDiMA, the European association representing European and global online platforms and innovative technology companies operating in the EU, has been and remains a strong advocate for the creation of an EU Digital Single Market (DSM). Accordingly, EDiMA welcomes the ambition of the European Commission (the Commission) to grow the digital economy by addressing the market fragmentation that has slowed the development of Europe's digital sector, and by increasing consumer confidence. However, the proposed Directive on certain aspects concerning contracts for the supply of digital content ('Directive'), risks creating new and substantial burdens and additional legal uncertainty for European traders, rather than removing barriers and stimulating economic growth and innovation to the benefit of European consumers.

EDiMA's fundamental concerns regarding the proposed Directive include the following:

1. The sequencing and review of existing legislation and the creation of new consumer law needs to be properly scrutinised in light of the Better Regulation Agenda.
2. The draft Directive creates confusion and, in some cases, directly contradicts existing legislation in the form of the Consumer Rights Directive (CRD) and General Data Protection Regulation (GDPR).
3. The proposal creates uncertainty due to the ambiguous scope and provisions it puts forward. A clear separation between digital content and digital services is needed.
4. The numerous references to and measures proposed regarding data in the text display a lack of technical understanding of the data driven economy, are not technically feasible in many cases and need much more analysis from experts.

Why propose the Directive now?
The Commission is currently carrying out a REFIT Fitness Check of EU Consumer law to be completed by 2017. In addition, the Commission is scheduled to review the CRD, including an evaluation of the provisions regarding digital content. This CRD review process is due to be completed by December 2016 and its results will feed into the REFIT Fitness Check.

The sequencing of the policy-making process around the proposed Directive is therefore questionable, as ideally the proposal would incorporate the learnings and analysis of such parallel and over-lapping initiatives. This would not only should ensure that overall changes to the consumer acquis as part of the DSM are coherent, compatible and do not result in additional regulatory burdens and fragmentation. Rather, the DSM should liberalise the EU's regulatory environment for digital business and innovations to thrive.

Moreover, the GDPR has only recently been adopted and it will take at least another two-three years until it can be evaluated, if the legislation fulfils its aim to increase user trust online, in particular with regards to the provision of data.

Additionally, the timing of the proposed Directive appears to be unusual especially bearing in mind the lack of evidence that there are actual consumer protection problems to be addressed in order to boost e-Commerce.

Uncertainty created by an overly broad scope

Definitions in the draft Directive are vague and imprecise. For example, the definitions of "digital content" and "data" overlap and in some instances appear to be used interchangeably. There is also confusion between the very broad definition of "data" used in the draft Directive and the legal definition of "personal data" established in the recently adopted General Data Protection Regulation (GDPR).

<u>Definition of digital content</u>

The definition of 'digital content' in the proposal is extremely broad and it is unclear how the definition affects other directives. The definitions are not sufficiently specific to make clear who is regulated in a given scenario and it is thus unclear which consumer interactions fall within the Directive's scope. The proposed definition includes, among others, data processing as well as cloud services (e.g. article 2.1.b yet no explanation is given by the Commission as to which service it has in mind for article 2.1.c - particularly whether it covers user reviews and comments). The new broad definition would alter the meaning and scope of digital content fundamentally and without any evidence that a) the current CRD definition is not providing sufficiently broad ("data which are produced and supplied in digital form") for consumers, and b) consumers would benefit from a widening of the scope in consumer regulation.

We fail to justify why it is necessary to depart from the definition of 'digital content' as included in the CRD, which in itself is a relatively new law. For Member States that have already transposed, or are in the process of transposing, the CRD into national legislation, this will surely create contradictory laws and thus legal uncertainty, which will affect European digital businesses, in particular the start-ups we seek to support through the DSM.

Europe's User-Created Content industry is growing: photo-, video-, and music-sharing websites (e.g. SoundCloud, DailyMotion, EyeEm), blogs, podcasts and social networks are creating unprecedented consumer benefits. We fear that the Commission has failed to take into account that the inclusion of these free services in the scope of the 'digital content' definition would be unjustified, as it would create additional regulatory burdens and uncertainty for operators of all size, and stifle a young and innovative sector.

<u>Definition of counter-performance other than money</u>
Particularly problematic is the inclusion in the Directive's scope of digital content provided for a counter-performance other than money – or so-called "free" content. Under Recitals 13, 14 and article 3, different definitions are used to determine whether free digital content is within the Directive's scope.

Included is the following: when "the supplier requests and the consumer actively provides" data as part of the counter-performance, meaning that the definition of "actively" is therefore key when ascertaining the scope and impact of the Directive. However, no definition is provided within the text.

The extension of the scope of the Directive to free digital content and services is particularly problematic as the applicable business models are predicated on scaling quickly to large (global) user bases, and benefit from the opportunity to easily create digital content and make reproductions given technological means. This very market dynamic ensures competitiveness and endless opportunities. If liabilities are imposed on these businesses (often small to medium-size enterprises or startups, developers), which stem from rights held by individual consumers, liabilities will "scale" just as quickly as customer numbers, and small app developers and digital content producers would be forced to fold if even a fraction of these liabilities ever materialise.

The wording '*personal data…and any other data*" adds to the lack of coherence. There is no guidance as to what is meant by "any other data", meaning the Directive could be triggered through any type of consumer interaction with no sense of proportionality. EDiMA would recommend removing "any other data" as it fails to acknowledge that consumers would have a much lower set of expectations in relation to digital content that is provided for free, than they would in respect to digital content that costs a considerable sum of money. It is difficult to comprehend what consumer harm this is seeking to address.

Given that these business models are still maturing, it would be better to forebear from extending the scope to contracts where the consideration is something other than price and to add a review clause to reconsider the matter in [2-3] years time. The review must include an obligation on the Commission to carry out an in-depth analysis of digital business models prior to any decision.

Lack of definition of exceptions regarding data usage

Generalising that one pays for free digital content or services with one's data is a very misleading simplification that does not cover the multiple ways that data can be collected and processed.

First of all, it is difficult to imagine why a business might want to use data other than for some purpose which might be loosely described as commercial. There are many legitimate uses of data that would be considered for "commercial purposes" but not with the objective of using it for a direct monetary purpose, which the idea of data as a counter-performance seems to be trying to address. Many suppliers of digital content rely upon big flows of aggregated and anonymised data to iterate and improve their digital product. There is a plethora of ways that data can be utilised to help businesses remain competitive and provide a better service for consumers that does not equal a like-for-like use of data as a counter-performance.

It would be disproportionate for the Directive to apply on such a broad basis, especially where the content is supplied for free. The lack of clarity due to the proposed Directives overly broad scope and its ambiguous exceptions will lead to severely negative consequences for a thriving digital business community and future consumer benefits, in particular for the growing app developer industry (including the mobile games industry in which Europe is already a leader), as it would impose more burdens, liability and legal costs on developers, the majority of whom are SMEs.

While the scope is an attempt to "future-proof" the legislation, it has ended up being so broad that it can include almost all digital content, services or websites currently offered for free. Any attempts to interpret it more narrowly, on an applicable level, are likely require European and/or Member State court interventions.

Uncertainty created by ambiguous provisions introduced in the Directive

Supply of content

The proposed Directive requires digital content to be 'immediately' supplied after the conclusion of the contract (article 5.2), which could be technically and practically impossible as immediate delivery could be hindered by factors out of the traders' control, e.g. consumer's Internet broadband provider (i.e., speed to download), and his/her device (e.g., space available in memory). A more realistic choice of language could be to replace the word 'immediately with 'timely'.

Burden of proof

Article 9 reverses the burden of proof, making the Directive excessively burdensome for the trader. This provision provides no protection for the trader where he is wrongly identified by a consumer as the supplier. It also creates new burdens for traders to prove which are not part of the existing consumer contracts *acquis*.

Shifting of the burden of proof onto suppliers does not reflect the complexities of digital content ecosystems. In many cases, it will be extremely difficult or simply impossible for suppliers to identify why the fault occurred, and/or which party or relationships between parties caused the fault. Given that the party with the burden of proof will need to present evidence as to why it is not liable, this complexity means that the supplier is likely to struggle in many cases to discharge that burden, even when, in many cases, the supplier has not actually supplied faulty content. In some situations, as envisaged in Recital 33 of the draft Directive, suppliers may be able to remotely access the consumer's device to determine why a fault has arisen (e.g., because of a system incompatibility) but in many cases this option will not be feasible or cost-effective, and of course raises important privacy considerations that may not have been adequately taken into account.

Requirements for conformity of goods

The provisions of article 6 are unworkable in the rapidly changing digital environment. The requirement for a contract to describe in a comprehensive manner at least quantity, quality, duration, version, possess

functionality, interoperability, accessibility, continuity, security to ensure that digital content is fit for the purpose to carry out a task that it would normally be used for is not feasible. The requirement would only create even more cumbersome terms and conditions for the consumers and cannot be guaranteed as digital content (as defined in the overly broad scope of the proposed Directive) will need updating or might need to be fixed due to an unforeseen development. In the case of consumable digital content (such as a song or a video) conformity is evident upon first use of the content. The time limit for notifying a defect should therefore be limited in time. Opening up consumer claims for an indefinite period of time could lead to abuses and undue reimbursements for content already consumed. For services supplied over a period of time, it is normal to assume that the quality of the service should be equivalent at any point in time.

Definition and role of the supplier

The Directive is unclear as to who is the supplier and thus obliged to offer remedies. This must be clarified to ensure that liability lies with the entity that, as a matter of contract, supplies the content to the consumer. There is a multitude of business models (a platform could be a retailer, an agenda or merely a technology platform) and it would be dangerous to enforce a one-size-fits-all solution. Furthermore, this creates contractual uncertainty for consumers and unnecessary legal confusion between commercial entities in the supply chain, especially when the requirement to supply content immediately is added (which is in direct conflict with the CRD).

The text sets a high bar for suppliers of digital content, including the award of damages for loss caused by non-conformity of digital content supplied.

Retrieval of data actively provided by the user

The text adds a practically and technically impossible obligation on digital content and service providers to retrieve any directly and indirectly customer generated (or stored) data and the obligation to provide it to the customer in a “commonly used data format”. Firstly, such a commonly used format does not exist. Secondly, and fundamentally, the idea that each bit and byte of data should be identified and traced back to a specific user, for a specific time frame, for a specific use, would create the obligation for each supplier of digital content to track, trace and identify all the data of all its users. It is unthinkable what this means in practice and is likely to violate the new GDPR and contrary to what the Commission intends to establish with this proposed Directive: simplification. The European Parliament and Council should obtain detailed and technical specifics from the Commission to clarify what this part of the Directive intends to do and how it impacts Europe’s startups and app developers.

EDiMA strongly believes the new GDPR should apply horizontally, and no additional conditions should be introduced in separate laws.

Modification and termination of contracts

The provisions on the modification/termination of a contract creates several rights for consumers to terminate the contract which go beyond what the CRD lays down. It is unclear when a consumer can invoke remedies provided in the proposed Directive. EDiMA believes that remedies should be limited to faulty digital content, provided that a clear definition of what is ‘faulty’ is given in the Directive.

Regarding the list of considerations included in article 6.2, EDiMA stresses that the supplier’s liability should be limited to the selling of what is offered/advertised. In this case, the supplier’s obligation to refund the customer only exists if the digital content does not meet these specifications or is faulty at delivery.

In addition, EDiMA would like to highlight that if the manufacturer of a device used to access the digital content fails to provide important information on the product's interoperability, functionality or security, the supplier should not be liable. Sufficient pre-contractual information is provided to consumers, as per the obligations under the CRD.

With regard to article 9, EDiMA is unclear as to how conflicts between the providers of content and the provider of services should be resolved. This issue will require further clarification.

Termination

Article 13 on termination as defined in the current proposal strongly needs further definition. Regarding article 13(1) EDiMA fails to understand what the proposed Directive refers to as the consumer's right to terminate the contract "by notice to the supplier given by any means". This is exceptionally broad and creates undue burdens on businesses, and does not give clear instructions to the consumer. Notice should be given through means made available by the trader to consumers (e.g. online form, customer service email or phone call). Considering the short period of time between notification and reimbursement (within 14 days from receipt of notice, article 12 (2(a)) it would be easier to centralise such requests.

Modification of digital content

EDiMA recommends that the provision on the modification of contracts in article 15 is limited to a direct supplier of digital content according to customer specifications – not a supplier of off-the-shelf digital content, who is not responsible for changes in the service (e.g., changes in application's operating systems).

Termination of long term contracts

The current proposals for long-term contracts create a parallel online regime than the one currently in force in the offline world. Having stringent rules for long term contracts could be to the detriment of two year offers which already exist and are only successful because consumers are offered considerate benefits in lieu for the longer term contract. Furthermore, the termination rights after 12 months do not work for promotional offers such as e.g. get 12 months but pay 10.

Regarding the final sentence of article 16.1 – "…any time after the expiration of the first 12 months period" – EDiMA would like highlight that this is unreasonable, especially for services that automatically renew on a monthly basis. Allowing to terminate at any time would imply reimbursement to the pro rata of whatever is left in that month which therefore imposes a disproportionate burden on the supplier.

Damages

EDiMA would like to highlight that the provision on damages described in article 14 puts supplier under the same liability as manufacturers or developers for a defective product. EDiMA believes that the maximum liability for supplier should be capped at the purchase price of the product, and that the "tortious liability" concept should be borne exclusively by the creator of the digital content.

Article 14.1 states that: "…damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract". This provision is broad and not testable and will require further clarification as to what the objective is. The stipulation that a failure to supply digital content can result in the digital environment being harmed, as per article 14 is also an unclear provision.

Misguided references to and measures proposed re: data in the data-driven economy

The principle of data as counter-performance equivalent to price is a significant departure from current consumer protection law. While the status of a transaction involving the exchange of goods will be clear to the parties concerned, it may not be similarly apparent whether, or to what extent, a trader is obtaining consideration in the form of data from a consumer in return for the provision of digital content or a consideration that is equivalent to price such that the full suite of consumer protections should apply.

The concept of data as a consideration also overlooks the myriad ways data are generated and processed in digital media, both as an essential component of providing services requested by a user and in secondary uses of data to provide value added services to users. The explanatory memorandum significantly over-simplifies this complex picture and importantly overlooks the effect of users exercising rights to opt out of data processing.

Data usage

The way in which the proposed Directive is drafted seems to consider that all actively provided data provided by the user is used to generate revenue for the supplier. This in fact is not the way all collected data is used. Data is often collected and analysed to improve the level of service (e.g. telemetric data). As the proposal has been drafted with a very particular business model in mind it does not fit with many others, for instance in the automotive, energy or health sectors. EDiMA believes that regulating one specific part of the DSM does not contribute to the EU's overall digital success; at home and globally.

Data as a counter-performance

The way the Directive is written considers data as a mode of payment for the provision of digital content. This is in itself a flawed premise as no particular value can be attributed to data nor can it be considered a currency. Data should be considered like sunlight and not like oil -- its supply is unlimited and it is basically zero cost. Collection of data is primarily used to deliver digital content and make it better. Most of it is not for advertising. Additionally, companies provide protections to keep that data safe and secure.

There are broad implications for numerous business models which need considered:

- The use and processing of data, while an important consideration, is a complex matter and cannot be simplified on the level this draft requires. The concept of proportionally urgently needs to be introduced, to reflect, in a more technically sophisticated manner, the multiple ways that data is processed.
- The technical impossibility of returning all data generated in a "commonly used data format".

The relevance of that data, which according to the directive, should be returned to the consumer, when, in many cases, it is of no use outside of that particular ecosystem.

Rights upon termination (Article 13 and 16)

According to the Directive in contracts where digital content is provided in exchange for counter performance other than money (among others personal data or any other data), the supplier shall refrain from using this data for commercial purposes upon termination. Theoretically this seems like an understandable assumption but it leads to questions. The draft fails to propose a clear definition of "commercial use". Data may be collected in order to be processed for the improvement of the service for example. It does not mean it will be sold on to third parties for advertising purposes. There is a myriad of reasons why data is collected and processed; the line is very thin and we should be very mindful not to make any assumptions.

However, as soon as data is processed, it becomes technically impossible to separate and identify the data subject and should there be a way to do so then this would be in direct contradiction with the spirit of the GDPR which encourages as much anonymised use of data as possible. Also, certain datasets are copyright-

protected (database directive, copyright directive) by the organisations who invest creativity into generating smart outcomes of the different data inputs. EDiMA questions which impact the requirements for the return of data might have on this.

Regarding data-ownership and the possibility to "return data as a remedy", EDiMA would like to point to the OECD Policy Note on Data-driven Innovation for Growth and Well-being (Oct 2015):

> "The risk of taking the wrong decisions raises questions about how to assign liability between decision makers, data and data analytic providers. The issue is exacerbated by the challenges associated with the concept of "ownership", which poses specific challenges when applied to data. In contrast to other intangibles, data typically involve complex assignments of different rights across different stakeholders who will typically have different power over the data depending on their role. In cases where the data are considered "personal", the concept of ownership is even less practical, since most privacy regimes grant certain explicit control rights to the data subject that cannot be restricted"

The proposal also fails to recognise the value in retaining some data, beyond the termination of the contract. This is the example of community forums where consumers can share experience or leave reviews. EDiMA is of the opinion that once the contract is terminated the data should still be available to other users. Because information is at the core of the service by forcing a deletion of the review or comment the service loses its value. Currently industry proposes a model whereby the data stays up in an anonymised way unless users delete it themselves.

By allowing consumers to retrieve their data after termination it seems like the proposal is attempting to address interoperability and the potential "lock-in" of consumers to a particular service provider. EDiMA strongly believes that this is not the right instrument to necessarily address this issue. Portability of data actively provided or generated by users such as an address book, calendar, email accounts, etc. is easily done. EDiMA would strongly caution against forcing traders into making their services all interoperable to satisfy portability. This is a lot more complicated than it looks: it is not as simple as moving a PDF document from one desktop to another. Forcing interoperability would align services on the lowest denominator available and be a threat to proprietary and innovative operating systems.