



May 24, 2016

## **Joint Industry Declaration on the Digital Content Directive**

Our organisations, representing the full array of creators, developers, and distributors of digital content, write to express our substantial reservations with the Commission's latest proposal for a Directive on the contracts for the supply of Digital Content (DCD). We fully support the objective of DCD to boost e-commerce by providing clarity to consumers and legal certainty to businesses, but having analysed the proposed text, we have identified several elements that we worry would significantly undermine the objectives.

### **Consumers could face contradicting rules reducing certainty and choice**

We are concerned that the proposed DCD would overlap with the existing consumer acquis i.e the Consumer Rights Directive, the Consumer Sales Directive, the Unfair Commercial Practices Directive, and the Unfair Terms Directive, which are all under review as part of the so-called REFIT exercise. It is not clear what the DCD would add to this framework and whether it would, as the Commission asserts, provide for regulatory clarity. The review of existing legislation and the creation of new consumer law needs to be properly assessed in light of the Better Regulation Agenda. We urge policymakers to wait until the REFIT exercise is completed to ensure that the intended scope and definitions within the DCD do not end up creating greater uncertainty for both businesses and consumers.

The DCD also includes provisions which duplicate and contradict other EU laws, for example on the return of data upon termination of the contract, which appears to duplicate the data portability provisions of the recently-adopted, and not yet fully implemented, General Data Protection Regulation. As well, the DCD extends the provision of data portability beyond personal data currently within the General Data Protection Regulation to include "any other data", which is currently not defined at all.

### **One-size fits all approach is ill-suited to diverse types of content**

We are concerned that the proposal's "one-size-fits-all" approach is ill-suited to the rapidly changing marketplace for digital content. Creators, developers, and distributors of digital content are continuously coming up with new ways to meet and anticipate customers' expectations. Streaming content, cloud computing, and remote storage of documents and photos are all relatively new, and dynamic services. The market and consumer preferences for

each are evolving rapidly and over the coming years these markets will change in ways that can only be imagined today. To put in place a single set of rules for such a wide variety of business models appears unnecessarily prescriptive. Any attempt to be future proof without identifying which problem the legislation is actually seeking to remedy nor recognizing the specificities of each type of digital content will only stifle innovation ultimately creating more, not less, consumer confusion.

More specifically, in the draft, “Digital Content” is broadly defined to capture many different circumstances and types of distribution and consumption of content, which merit tailored treatment and rules.

The definition of “suppliers” of digital content is equally unclear and will have to be decided on a case-by-case basis depending on the business model.

More clarity is also needed on what the proposal considers to be ‘any other data’. Failure to propose a clear definition will only confuse consumers about their rights, not bring legal certainty to businesses, and discourage the innovation and growth the DSM aims to facilitate.

The way in which the proposal currently considers data as a counter-performance remains an important concern. It could inhibit the roll-out of online services, damage existing successful and popular business models Contractual freedom should be upheld.

Policymakers should work together to ensure that the DCD does not undermine contractual freedom. Contractual freedom is instrumental in providing consumers with the best services and products at the most competitive prices, tailored to the consumer’s needs.

The DCD’s approach would be substantially improved if it contained provisions that ensure consumers have the freedom to contract on terms that they chose. Unfortunately, this is not now the case in the DCD, which could lead to forcing providers to change their price modelling and business practices, at the overall expense of the consumer.

### **Liability provisions will undermine business incentives and limit consumer choices**

We find the DCD’s approach to liability to be ill-suited to the needs of the digital content economy. The transposition of rules designed decades ago for physical goods to digital content will require suppliers to factor in new liability considerations, resulting in less choice for consumers at higher prices. Rather than focusing on meeting customers’ needs through innovation and continuously improving content, suppliers will need to mitigate their exposure to a restrictive set of rules. The Directive could therefore make it more difficult for businesses, especially European start-ups and SMEs, to grow, innovate, and compete within and outside the EU.

Furthermore, the current wording of the proposed Directive on liability in the supply chain is vague. The DCD gives the right to suppliers to seek redress from providers of content or any other actor involved in the supply chain, essentially transforming the Directive from a Business-to-Consumer set of rules to one also encompassing Business-to-Business. This was not the intention of the Directive (as per Article 3) and it needs to be clarified that Business-to-Business transactions will be excluded from the scope.

## **Conclusion**

We strongly agree that fostering e-commerce by boosting consumer trust and business confidence through a simplified, harmonised set of rules is an important goal and an essential element to achieving a EU Digital Single Market.

We are deeply concerned, however, that, as proposed, the DCD would not meet its objectives of promoting choice for consumers. Rather, by failing to fully account for current and potential future market developments, changing consumer needs and existing legislation, we believe the proposed DCD would create greater uncertainty and risk for both consumers and suppliers, especially start-ups and SMEs within the EU, resulting in fewer innovative content providers and incentives for companies to innovate and grow.

We stand ready to work with co-legislators to engage constructively in an effort to find practical, meaningful, and effective solutions to bring added value and consumer benefits in a successful EU Digital Single Market.

The organisations endorsing this letter are:



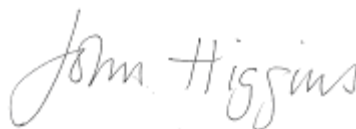
Andreas Galanakis  
Policy Director  
AmCham EU



Catriona Meehan  
Director of EU Policy and Government Relations  
Application Developers Alliance



Thomas Boué  
Director General, Policy – EMEA  
BSA | The Software Alliance



John Higgins  
Director General  
DIGITALEUROPE



Siada El Ramly  
Director General  
EDiMA



Simon Little  
CEO  
ISFE