

IAB Europe revised 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

Please find below the observations of the Interactive Advertising Bureau Europe (IAB Europe) regarding 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 organisations¹. IAB Europe is listed in the Transparency Register².

Online advertising is estimated to account for over a million jobs in Europe and contribute over EUR 100 billion of “gross value added” (GVA) in Europe. Importantly, in the context of the EU's digital competitiveness ambitions, it acts as an incubator of high-end data analytics and other digital skills that can then be deployed in the wider economy³.

In 2006, the value of the EU market stood at €6.6 billion, versus €36.2 billion in 2015. This is an increase in spend of €30.2 billion and translates into a compound annual growth rate of 20.5%, or an average €3.0 billion per year⁴. With a year-on-year growth rate of 13.1% in 2015⁵ compared to a 1.8% increase in overall Eurozone GDP⁶, the digital advertising sector continues to outperform the overall EU economy.

IAB Europe supports the Commission's aim of harmonising digital contract rules. There is a clear and compelling need to reduce barriers to the uptake of cross-border digital services within the Single Market, including those arising from differing national provisions on contract law,

This said, IAB Europe does have some concerns with the proposed Directive as currently drafted.

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, Microsoft Europe, Millward Brown, Nextplora, Nielsen, nugg.ad, OMD, Orange Advertising Network, OpenX, PHD, Prisa, Publicitas, Publigroupe, PubMatic, PulsePoint, Quantcast, Quisma, RadiumOne, Rocket Fuel, Sanoma Digital, Selligent, SpotXchange, StickyADs.tv, Teads, The ADEX, The Trade Desk, TrustE, TubeMogul, Turn Europe, United Internet Media, Videology, White & Case, Widespace, Xaxis, Yahoo!

² 43167137250-27

³ [Report by IHS, November 2015, "Paving the Way: how online advertising enables the digital economy of the future".](#)

⁴ [IAB Europe AdEx Benchmark report. 2015.](#)

⁵ [IAB Europe AdEx Benchmark report. 2015.](#)

⁶ [eurostat](#)

I. IAB Europe has serious reservations about the notion of “data as a counter-performance” in the context of online services.

IAB Europe agrees that consumers may indeed participate in a value exchange when they access online services that are free at the point of consumption and that consumer protections need to be operative in the context of such exchange. However, in IAB Europe’s view, the paradigm of data *as such* as a counter-performance analogous to money is inappropriate, and would likely have unintended consequences that would disserve both consumers and suppliers if pursued in the current proposal.

For one thing, it would necessarily entail data ownership, a novel concept that has not yet been tested in EU regulation and that could present serious practical difficulties. 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.

In addition, 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.

A possible alternative paradigm would be that of access to online services in exchange for the user’s *agreement or willingness*, whether explicit or implicit, to let the supplier process (including monetising) his or her data. Looking at the problem in this way would allow the future Directive to draw in part on the framework of rights and obligations recently agreed in the General Data Protection Regulation (EU) 2016/679 (GDPR), notably with respect to data portability. But the concept needs much more reflection before being integrated into an EU-level legal instrument.

II. IAB Europe warns against internal inconsistencies in the scope of the proposal, misalignment with the GDPR and the imposition of disproportionately onerous obligations on suppliers.

Though IAB Europe notes that services provided in exchange for willingness to be the object of advertising are in principle out of scope⁷, some of the language in the proposal appears, probably inadvertently, to put that into question. Although the proposed Directive is intended to align to the GDPR, we note that with respect to the obligation on suppliers to return data to users in case of termination of a contract (an obligation that is analogous to the data portability right in the GDPR), the proposed directive goes much further than the GDPR, laying down requirements that would be disproportionately onerous for suppliers without providing any concomitant benefit to users. IAB Europe would strongly urge that, as with the GDPR, the data portability obligation only apply to data *uploaded or otherwise actively* provided by users on the framework of the contract. A different situation would lead the consumer protection regime contained in the proposal to be more onerous than the protection of fundamental rights afforded by the GDPR.

⁷ See e.g. Recital 14, which states that the future Directive “should also not apply to situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content”.

III. IAB Europe recommends clarifying 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.

IAB Europe therefore 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).

IV. IAB Europe recommends clarifying the definition of content.

IAB Europe believes that the definition of digital content used in the proposal 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*”. The latter definition appears to be more future proof and therefore more suitable for rapidly evolving technological solutions.
