AmCham EU's position on Directive on certain aspects concerning contracts for the supply of digital content

The Commission's proposal on digital content: further measures needed to drive online cross-border consumer transactions and consumer confidence.

POSITION PAPER

Executive summary

AmCham EU welcomes the Commission's proposal on digital content. However, further work needs to be undertaken to ensure that the proposed rules are to effectively deliver the promised benefits to consumers and traders of all sizes. In particular, the introduction for the first time of the monetisation of data is a worrying development, which could impede rather than boost the data economy in Europe. We are also concerned with the disproportionate level of harmonisation. The relationship with other relevant existing rules should also be further assessed. We look forward to working with the European Parliament, the Council, and the Commission to develop the proposed text to ensure that it will drive online cross-border consumer transactions and consumer confidence.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totaled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the initiatives of the European Commission aimed at facilitating the integration of the digital dimension into the Single Market. From this perspective, AmCham EU supports the Commission's intention to improve the quality and coherence of European online contract law in the framework of the better regulation agenda.

This proposal would provide a harmonised set of rights for consumers when they buy digital content in digital form; and a single set of rules and obligations for businesses who market and sell digital content.

However, we believe that further work needs to be undertaken with regard to the proposal for a Directive on certain aspects concerning contracts for the supply of digital content to ensure that the proposed rules are to effectively deliver the promised benefits to consumers and traders of all sizes. In particular, the introduction for the first time of the monetisation of data is a worrying development, which could impede rather than boost the data economy in Europe.

A number of national legislative frameworks already exist, such as the Consumer Rights Act in the UK or the new changes in the Dutch Code covering digital content which came following the implementation of the Consumer Rights Directive.

AmCham EU members consider that the proposal lacks alignment with the existing legal framework and national rules already in place. We are foremost concerned with the disproportionate level of harmonisation which leads to an unnecessary level of regulatory intervention, as well as the issue of proportionality. In addition, we have concerns with the relationship with other relevant existing rules such as the Unfair Contract Terms Directive and the Consumer Rights Directive. Consideration needs to be given so that the proposed Directive does not disrupt well established and satisfactory business practices and compliance arrangements that have been developed under existing national laws such as the CRA or the Dutch Code.

We therefore look forward to working with the European Parliament, the Council, and the Commission to develop the proposed text to ensure that it will drive online cross-border consumer transactions and consumer confidence.

The following items are of specific concern to AmCham EU:

1. Broadening of scope – including 'free' digital content – monetisation of data

The scope defined in the proposed Directive (Article 3) includes for the first time in European legislation 'free' digital content, meaning content that is provided in exchange for personal data or any other data of the consumer.

While AmCham EU understands that the proposed Directive aims to cover a wide scope of digital content, we are concerned by the inclusion of the notion of monetisation of data. The proposed

directive states that any "***personal data or any other data"*** beyond what is necessary for conformity to the contract is considered as "***counter performance other than money"*** and therefore seen in the same way as a financial payment.

The digital content industry is a young and dynamic one – many offerings have not been on the market for more than a decade. Legislating at this point digital content risks closing off new avenues for market developments. The European Union could see itself fall back even further in the global competition.

AmCham EU fundamentally believes the proposed text represents a dangerous and unnecessary precedent which could impede the take-off of the nascent data economy in Europe. In addition, this presents a future risk for consumers in the long term as this could create a two-tier approach, whereby consumers paying for digital content with their data would only have access to lower grades of content than those who pay a fee, resulting in poorer consumer choice and poorer consumer service for no real added benefit in terms of consumer protection. AmCham EU considers that approaching data as a currency misunderstands where the value creation happens. It is in fact not the data itself, but the data analytics and processing done by the supplier that add value, including higher consumer value in terms of better tailored and higher quality service.

The directive is intended to apply only to B2C scenarios, but will in practice impact many B2B relationships as well. Although the directive imposes primary obligations on "suppliers" of digital content to consumers, B2B businesses are not fully excluded from scope. It should be clarified that B2B transactions are not in the scope of this directive.

At a more general level, AmCham EU is not convinced that new legislation is necessary for digital content contracts concluded in exchange for data. For every transaction involving the collection of personal data in particular, privacy law foresees ample and sufficient remedies which are always available to all consumers, and for the rest of consumer data that may not qualify as personal, courts at the national level have applied existing contract law on the sales of goods on application by analogy, giving consumers adequate protection.

2. Broad definitions – legal uncertainty

Article 2.1 lays out the definition of digital content:

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 any other interaction with data in digital form provided by other users of the service.*

Recital 11 further stipulates that "*this Directive should apply to all digital content independently of the medium used for its transmission*", enshrining the principles of technology neutrality to "*maintain the future-proof nature of digital content*". At the same time, "*this Directive should* ***not apply to digital content*** *which is embedded in goods in such a way that it operates as integral part of the goods and* ***its functions are subordinate to the main functionalities*** *of the goods*".

While AmCham EU welcomes such a comprehensive approach in principle, we have doubts as to whether the proposed directive's definitions will be workable in practice, especially given their

manifold potential overlaps and inconsistencies with (1) the other European definitions of 'digital content' and 'trader' as adopted in 2013 in the Consumer Rights Directive, as well as with (2) the definition of 'information society services' as per the eCommerce Directive of 2000. In addition, it includes services allowing the creation, processing or storage of data as well as services allowing the sharing of and any other interaction with content provided by other users. These are not covered by the CRD, hence remedies would be unclear.

In particular we are concerned with Article 2.1 as well as with 2.3 for the definition of 'supplier', both of which create real legal uncertainty as to how such definitions will be applied in national laws. Given the broad nature of digital content, AmCham EU asks itself how these definitions can be applied in practice. Traders will face not more, but less legal certainty as the result of this directive, without providing any additional protection for consumers.

Finally, with regards to Article 6.2 on the requirement for conformity of goods, the proposal puts forward that in case the contract does not describe in a comprehensive manner at least quantity, quality, duration, version, possess functionality, interoperability, accessibility, continuity, security, (all of which in an online environment it most probably will not be able to do) digital content must be fit for the purpose for which digital content of the same description would normally be used. In assessing that, the proposed directive requires that any public statements made by the supplier or any person in the supply chain up to the producer be taken into account. That could mean that the scope of the suppliers' contractual obligation to provide digital content in conformity can be determined by a third party through public statements. The practicality of this is unclear.

In light of our concerns raised above on monetisation of data, AmCham EU therefore calls for further legal clarity in the definitions, in particular of digital content (Art. 2.1), which should be defined in the same terms as in the Consumer Rights Directive which has just been transposed into national laws.

3. Reversal of the Burden of Proof – and the need for a time limit

Article 9 introduces the reversal of the burden of proof. The supplier will have to show that the content was in conformity at the time of the conclusion of the contract and ever after during the supply of the content – and not the consumer.

While AmCham EU welcomes the harmonisation of the EU rules on the burden of proof for digital content, we feel that the absence of a time limitation will be counterproductive to the overall goal to boost cross-border e-commerce. Directive 99/44/EC sets the minimum limitation period to at least two years for B2C contracts for the sale of goods. Such a limitation ensures that traders do not risk liability claims for an indefinite period of time, eliminating a significant deterrent to engage in e-commerce. In addition to providing legal certainty for traders, it also reflects the fact that over time digital content, while not subject to wear and tear in a similar way to tangible goods, can cease to function due to technological change or can become obsolete. In the end, introducing a time limit also benefits the consumer as this would also limit costs.

4. Termination and data retrieval

Articles 13 and 16 put forward the consequences of termination of the contract for lack of conformity of the digital content. AmCham EU would like to highlight some concerns over three particular areas.

Firstly Article 13.1 asserts the consumer's "*right to terminate the contract by notice to the supplier*", making unilateral termination possible. Put simply, consumers would have discretion to arbitrarily terminate the contract, which provides high legal uncertainty for the suppliers and a lack of clarity as to how this provision would work in practice.

AmCham EU believes that this would be improper as it would create an unfair burden of uncertainty on suppliers for no obvious justification. AmCham EU believes that on this point, the Directive can either defer to national rules on judicial termination, or else explicitly draw on those rules to harmonise them and offer mutual safeguards for both parties against arbitrary unilateral termination.

Secondly, AmCham EU has strong concerns on Article 2(b) which calls for the supplier to take all measures to refrain from using '*counter-performance other than money'* which the consumer provided in exchange for the digital content – relating therefore to the personal data or any other form of data mentioned in Article 3.1. We are concerned that at least as far as personal data is concerned this notion is already included in the General Data Protection Regulation recently concluded; potentially creating legal uncertainty in what remedies should apply in what cases and on what legal grounds.

In addition, the burden is on the supplier to show it has taken *all measures* which could be expected for the data retrieval to take place, which in practice will be very difficult to apply, and in many cases will not provide any meaningful benefit or protection to the consumer, but will likely be highly detrimental to the supplier.

Thirdly, Article 16 as proposed would grant the consumer a similarly discretionary and arbitrary prerogative to terminate any contract lasting longer than one year. This provision would disrupt a whole range of well-functioning consumer facing business practices such as subscription models designed to reward loyalty and long term contracts designed to offer higher value propositions to the consumer through commercial rebates. Termination within 2 weeks would also create complications as suppliers would only need to refund the portion of the fee the customer has not used as Art. 16 (3) ties the amount to be refunded to the period of time the service was used.

In the absence of any tangible evidence proving that there is a market failure in the area of long term consumer contracts which can only be addressed by such heavy handed regulatory intervention, AmCham EU would advise against introducing such a disproportionate and unnecessary requirement. Indeed, this again would create an ominous risk of uncertainty for suppliers, who could only hedge this unfavourable position by increasing consumer prices, reducing rebates and scaling down loyalty reward schemes, to the ultimate detriment of European consumers.

AmCham EU recommends that close consideration is taken of the right to termination on these three points, so as to ensure legal and practical accuracy, predictability and certainty for both the consumer and the supplier.

Conclusion

Overall, AmCham EU welcomes the initiative of the European Commission to improve the quality and coherence of European online contract law. However we think that the proposal remains insufficient to attain a suitable degree of harmonisation of contract law in the EU on certain elements, while going over and beyond what would be proportionate and necessary on others. As a result, companies would still need to rely on different rules for different distribution channels in some

respects, while at the same time they would see well-functioning business practices disrupted for no demonstrable benefit in terms of consumer protection.

We urge the European institutions to carefully re-assess the proposal and its potential impact. Particular attention needs to be devoted to the addition in a European legislative framework of the monetisation of data and the long term implications for consumers and suppliers of digital content.