Source. The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. The ACT member companies finance, produce, promote and distribute world class content and services on a range of platforms benefiting millions of Europeans.

Introduction

We would like to bring to the attention of the institutions some concerns the ACT has in relation to the draft proposal for a Directive on certain aspects concerning contracts for the supply of digital content ("the Proposal").

The submission addresses the following issues specifically:

A. Burden of proof
B. Digital Content definition
C. Digital Content provided for in kind data
D. Conformity of the Digital Content with the Contract
E. Modification of Digital Content
F. Termination obligations on Traders and Consumers (right to reject)
G. Restriction of contracts to 12 months

A. Burden of Proof

Under the Proposal, the burden of proof for showing lack of conformity with the contract lies with the supplier. According to the Impact Assessment, consumer organisations '*unanimously considered that the trader should have the burden of proof*'. However, nowhere in the Impact Assessment does the Commission consider the impact of this change on service providers.

A chain of parties are involved when it comes to the delivery of digital content services to consumers, including the supplier of the content, the consumer's internet service provider and the consumer. Since the consumer is the one having relationships with these parties, they are better equipped to identify where and when things went wrong. Although Article 9(3) obliges the consumer to cooperate, this will only benefit the service provider to a certain extent, since the service provider does not have the possibility to know whether the consumer carried out the necessary steps to find out the root cause of the problem, and whether it could have perhaps been caused by the consumer's digital environment. Service providers are thus at high risk of incorrect or incomplete assessment.

ACT therefore urges the institutions not to lay the burden of proof on the service provider, and instead suggests that the Commission could assist consumers by issuing guidance on how to check the delivery path for digital content services.

B. Digital Content definition

The Proposal includes a new definition of *"digital content"* that is broader than the existing definition in the Consumer Rights Directive (2011/83/EC). The new definition is:

"(i) data which are produced and supplied in digital form, for example, video, audio, applications, digital games and any other software and (ii) services allowing the creation, processing and storage of data in digital form, including user generated content, as well as services allowing sharing of and any other interaction with content generated by other users" (emphasis added).

It is crucial that any new contract rules are clear as to what is included or excluded from their scope. For example, a television broadcaster delivers its broadcasts in digital format and may be providing a digital

content service in the sense that they are supplying digital content to the consumer directly via their television. There is not always a direct individual consumer relationship and therefore we assume that such situations would not be covered as there is no 'contract', but we would nevertheless like this to be clarified. Broadcasters are already subject to local media regulation and ACT members are required under their local media regulation to attain high standards in terms of technical quality and reliability. We do not believe that the intention behind the consultation is to capture such provision so would advise that any definition of digital content and the application of such definition needs to be carefully considered along with possible exclusions.

C. Scope: TV Like digital content provided for free should not be subject to the Directive

Article 3(1) of the Proposal states that '*This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data*'. Article 3(4) further states that '*This Directive shall not apply to digital content provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes*'.

Applying new contract rules to services which offer digital content for free but where there is notional "counter performance" e.g potentially very modest data provision is misconceived in the case of free TV services offered by broadcasters across Europe. These services are considered by users to be genuinely **free** and the data that is provided by users is generally very limited and is primarily used to tailor both editorial (and some advertising) to deliver a better free service. Ultimately the primary service to the consumer is still the provision of high cost audio visual content for free funded by advertising seen by consumers. The commercial viability of these free services depends on attracting the largest possible mass audience with as frictionless an experience as possible.

Put simply, the cost of offering the same level of consumer rights to every user of such a free service (often there can be tens of millions of users) would be very significant and would be hard to pass on to advertisers and could not be passed on to users (as with pay services). Such a cost could threaten the economics of free services which depend on having a far lower cost base and a much less individualised relationship with users than pay services. Factors such as brand reputation and competitive pressure ensure that mass use free digital content services deliver a suitable level of quality. There is no plausible basis to believe that there would be a mass abandonment of pay-TV content models in favour of free services if free TV or TV-like services online were not included within the scope of the proposed directive.

Recital 14 of the draft Directive already recognises that situations involving only exposure to advertising in order to gain access to digital content should be excluded from scope. This is an essential point that recognises the fundamental importance of the continued viability of free TV services that invest in original EU content. Most free TVlike online content offers in the market today require the provision of basic data on first registration to ensure the best possible service to consumers. Notwithstanding this, the essence of those services is still the exposure of a mass audience online to advertising in a similar way to TV channels.

We believe that, as a minimum, offers of TV and TV-like content online other than for money should not be subject to regulation– in other words they should not be caught by the proposed new Directive.

More generally, we are not supportive of the inclusion of digital content against in kind payment such as personal data and the current drafting of the provision is far from clear. But if the proposal is to remain

(albeit with the carve-out for TV and TV-like services suggested above) we would suggest that the proposed drafting could be clarified, especially in light of the Data Protection Regulation which is currently in trilogue. Extending contractual rights to consumers who have paid with personal data is controversial. In any event, it must be clear that it is only where the personal data has some commercial value that a contract is formed and that any remedies available to the customer must be proportionate. For example, it would be completely disproportionate to maintain storage capacity beyond what is required under data protection law (and, it should also be noted, data protection law may also require the deletion of some personal data).

Also much greater clarity needs to be provided about the proposed carve out in Article 3(4) which applies to: *"personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose"* and *"any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes"*. There are many legitimate commercial purposes for which this data could be used, excluding marketing purposes (for example mobile operators retain location data in order to route information to subscribers' locations – i.e. it is essential for the operation of the network and it has to be retained under data retention rules). So if commercial purposes is cast too widely, it could prevent traders from legitimately using such data to provide the service originally offered and using that data to improve the quality of that service. Otherwise a trader will not have certainty on whether or not they should be offering consumers certain rights.

D. Conformity of the Digital Content with the Contract

Article 6 (1) of the Proposal requires digital content to conform with

(a) any pre-contractual information which forms an integral part of the contract; and

(b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of conclusion of the contract and which the supplier accepted.

Requiring the digital content to conform to the contract is in itself a legitimate goal. However, when such an obligation goes beyond the actual terms of the contract, uncertainty is created for both parties as to the scope of the service provided. Firstly, it is unclear as to what pre-contractual discussions would fall under Article 6(1)(a) and at what point, before the contract is signed, a service provider will already be subject to obligations. It is moreover unnecessarily burdensome to keep track of all communication with the consumer before the consumer entered into the contract. The whole point of a contract is to provide clear terms for both consumers and service providers in order to state clearly the nature and level of service that should be provided.

Secondly, Article 6(1)(b) will lead to legal uncertainty as to when exactly the consumer is expressing his purpose for entering the contract during a discussion, and what is to be expected from the nature of the service in relation to what the consumer expressed during that discussion.

In conclusion, service providers and consumers need clear certainty of their respective rights and obligations of the contract in written and recorded form in order to avoid any unnecessary disputes resulting out of sheer lack of clarity.

E. Modification of the Digital Content

The ACT agrees that only alterations that have an **adverse effect** on 'the access or use of the digital content by the consumer' should be notified to the consumer (Article 15). We however believe that this should be limited to ***material*** **modifications** to a contract, i.e. a modification which alters the nature and scope of the

commitments of either party under the contract. Such a clarification is essential for us in that, where an update is not a material change of the digital content contracted for, there should be no need to notify the consumer. For example, when updates are regularly released overnight to set top boxes to ensure the proper functioning of the box and the content or to introduce new and improved features that were not part of the original product description, there should be no legal requirement to advise consumers each time that occurs. Service providers are far less likely to roll out improvements to their service if there is a possibility that some consumers would consider those changes to be adverse to their enjoyment of the service (even if only immaterially) and accordingly have a right to terminate.

It is also important to maintain the **separation of digital content and the service provided**, requiring service providers to notify changes that affect the *description* of the digital content provided (i.e. the nature of the service provided), as opposed to any changes to individual items of content (for example changes to the channel schedule).

We suggest that when modifications to contracts adversely affect the access or use of the digital content, the consumer should always be notified ***"at the appropriate time"***, which is not necessarily *"reasonably in advance",* but for example when the upgrade is about to be downloaded.

Moreover, the form of notification specified in Article 15(b) as a ***"durable medium"*** is too prescriptive. Such a requirement could have significant cost implications for service providers where consumers have not provided an e-mail address, where minor changes will have to be communicated to consumers through post. Such frequent updates will moreover frustrate consumers, thereby adversely affecting the quality of the service.

Finally, the **right to terminate** is too broad as currently drafted. Consumers should only be allowed to terminate if the modification is materially detrimental to them. For example, consumers should be allowed to terminate if the scope of features included is reduced, essential functionalities are discontinued, and these changes taken alone or in combination negatively affects the value proposition of the product for the consumer to a material degree.

F. Termination Obligations on Traders and Consumers

1. Means of Termination

Having the right to terminate the contract "*by any means*", as stipulated in Article 13(1) and 16(2) is inappropriately wide and unpractical. Such a broad notion will lead to disputes with consumers and consumer uncertainty: does it enable consumers to terminate a contract simply by communicating through social media (for example, tweeting to a broadcaster that they no longer want to use their service). This adds an increased administrative burden for the service provider and creates uncertainty for both consumers and service provider, since consumers will not know for certain whether their notice for termination has been received by the service providers or not. Instead, service providers should have the possibility to *direct consumers to specific means of communication for facilitating termination of contracts.*

2. Remedies

Consumers are sold digital content under contractual end user licence agreements (EULAs) giving them certain rights of use but not ownership or title to the content they are accessing. In this context the right to repair (or replace), under the terms of the EULAs, are remedies that are meaningful and can be capable of being exercised.

With digital content, in most cases there is no meaningful way for a consumer to **return** the content. By way of example, our member companies' offer streamed audiovisual content to their customers via their set top boxes or on the go, on phones or tablets. The customer never owns this content but rather has a temporary

licence to access it via a streaming service - with no copy of the full programme on their device. In others words, the consumer does not hold a copy of the content and therefore could not 'return it'. Where the trader can show that the content has actually been consumed (e.g. the customer has watched the film) then the trader is in an even more complicated position. This is because under many existing contractual relationships, the trader will pay to the original rights holder a fee for each time content is downloaded. There are thousands of such contracts between content providers/rights holders (film studios etc.) and traders (Pay TV platforms, Netflix, iTunes etc.) under the terms of which rights holders charge traders on a pay per view basis for each time a digital asset is downloaded.

Administering a **refund or reduction in price** would place a financial burden on digital content providers that is entirely disproportionate to the cost of the individual's claim. This process would be extremely complicated from a copyright perspective because content providers would need to recover any payments already made to the producer or underlying rights holders (who are often paid on a per-consumer-click basis), thereby creating a further burden on them but also on others in the value chain. At the very least a price reduction should be proportionate to the overall value of the contract, as currently stipulated by Articles 12(3) and (4).

Notwithstanding that returning digital content is either impossible or impractical, if consumers were able to reject the content, we are concerned that the **scope for abuse** is significant and could have serious implications for Europe's creative industries. Our member companies would be extremely concerned if certain remedies resulted in an increase in the potential for fraud whereby, for example, a consumer would download a film, watch it and then claim that the quality was not satisfactory while asking for a refund. It would be extremely costly for providers to have a system in place to examine each and every claim to verify whether the claim was bona fide and indeed it may not even be technically possible for the provider to ascertain the root cause. Tools to combat abuse would involve significant costs to providers which are ultimately borne by consumers. As explained above, content providers often pay digital rights holders per copy and if would be difficult for the trader to prove to the rights holder that the content had been deleted by the consumer. It might also incite digital content providers to move a lot further down the road of encrypting and restricting end users ability to copy or modify in any way digital content.

Finally Article 12(5) of the Proposal that allows consumers to **terminate** contracts if there is a lack of conformity with the contract is wholly unsuitable for contracts for the ongoing supply of services that comprise digital content. The notion of conformity only makes sense in a contract for the supply of a particular item of digital content, such as transaction video on demand.

3. Retrieval of Data

The right of the consumer to retrieve data under Article 13(2)(c) places a disproportionate burden on service providers and is inappropriate for the objective it tries to pursue. Recital 38 states that the aim of introducing this obligation on service providers is '*to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract*'. In this respect, it is difficult to understand why it is necessary to have a right to retrieve data that goes beyond what the consumer would have been able to retrieve if the contract was terminated under normal circumstances. When a consumer enters into a digital content service, they have the option to choose how they will export the data once the contract expires or is terminated. If a consumer indeed had the right to retrieve data at the end of the contract then it would be reasonable that a consumer is not placed in a worse situation if they terminate the contract as a result of the service provider's non-conformation. However, if this is not something that consumers are to expect under non-breach terminations, it is disproportionate to expect service providers to implement mechanisms to live up to this obligation.

Moreover, the forms of data that have to be retrieved are too broad. '*data…generated through the consumer's use of digital content*' could include all data retained by the supplier even if the consumer is unaware that such data exists. For example, some data are retained for the purpose of tailoring the service to the consumer, such as recommending content to consumer. It would be unreasonable for service providers to have to consider how to identify this data and provide it to consumers in a commonly used format.

G. Restriction of Contracts to 12 months

The ACT would be opposed to any restriction on traders' ability to sell digital content (as defined) under a contract with a minimum term that exceeds 12 months (including any renewal periods). In the market place today there are many content aggregators who provide digital content on the basis of 12-24 month contracts.

The business cases underlying these arrangements are often based on the acquisition of content for re-sell over a definite period of time. They usually assume that the consumer is able to commit to watching that content over that same period of time or pay early termination charges, representing the profit that the trader would otherwise have made had the consumer fulfilled their original contract obligations. This allows traders to (1) offer free of subsidised equipment such as set top boxes and related services (e.g. installation of a satellite dish); (2) have some assurance around their projected revenues and make investment decisions accordingly; (3) make content available at a much lower price than would otherwise be the case, based on the consumer's commitment; and (4) at the end of the initial contractual commitment period, offer consumers further discounts in exchange for a contract renewal. We do not therefore see how consumers would benefit from the proposal to prevent traders from making digital content available on the basis of minimum terms that exceed 12 months. We would suggest that the proposal if enacted will be counterproductive and ultimately harm consumers as they will have to pay more money to receive the same digital content (services). As the market is very competitive we would also suggest that there is no need for this type of reform. The market continues to generate many alternative propositions that consumers can choose between and which are right for them.

For more information on the ACT position please contact Emilie Anthonis – EA@ACTE.BE

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