Position Paper on harmonised rules for the supply of digital content and online sale of goods

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

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The app industry has experienced explosive growth over recent years. In Europe alone, the number of available apps grew from 250,000 in early 2010 to 3 million by the end of 2014, and this rapid growth trajectory is showing no signs of slowing down.

The growing user base has fueled the market for mobile apps and app development, creating millions of jobs: the number of developers worldwide grew from half a million in mid-year 2014 up to 5.7 million in 2015[1]; of those, 1.3 million developers are European and two thirds of them are full-time professionals. Some impressive data and forecasts tell us that while the app sector's future growth potential could employ 4.8 million more people while contributing €63 billion to the EU economy by 2018[2], the global app economy was valued at $68 billion in 2013 and is estimated to reach $143 billion by the end of 2016[3].

Professionalism, consistency and the best app performance are the very basis of this great success: for developers building applications that work as universally as possible is key to consumer satisfaction, however, fragmentation makes conformity a real challenge for them.

At the Apps Alliance, we believe that the European Digital Single Market Strategy has the potential to help developers by bringing harmonisation to the marketplace. Nevertheless, the recent proposal for an EU Directive on certain aspects concerning contracts for the supply of digital content[4] falls short of this goal. Certain aspects concerning contracts for the supply of digital content simply create additional requirements instead of streamlining and simplifying the European regulatory framework governing app development. The Alliance is also concerned that the proposed legislation does not adequately encourage more robust consumer satisfaction and protection measures.

[1] Report "European App Economy 2015", (VisionMobile) – February 2015

[2] Study "Sizing the EU App Economy", (Gigaom) - February 2014

[3] BusinessWire, November 2014

[4] For further information on the proposed Directive, read here the European Commission Press Release. The Alliance Statement on the issue is published here.

The Alliance encourages European policymakers to re-evaluate the content of the proposal in reference to different issues. To name a few, the definition of "supplier"; provisions regarding conformity; and remedies with a specific focus on termination and the retrieval of data could all use further attention. In addition, a higher level of consistency with existing legislation, further clarification of some provisions and the adoption of faster procedures should be encouraged, for the benefit of all developers, small business and digital startups.

Scope and Definitions, Articles 2 and 3

Article 2 of the proposed Directive lists very broad definitions of digital content, integration, price, and the digital environment. If the list of definitions is left unchanged, it would be unclear what kind of apps would fall within the scope of the Directive and to what extent boundaries need to be drawn on an app supplied on a tangible product that includes digital content, such as wearable devices. Moreover, the Commission fails to acknowledge that consumers have lower expectations regarding free digital content than they do for paid digital content.

The proposal outlines the categories of content that fall within its scope in Article 3. We welcome the harmonisation of rules regarding digital content in general; however, we believe that the scope should not necessarily include digital content provided for by a counter-performance other than money. While the proposed Directive aims to cover a wide range of digital content, the provisions on free content may create a dangerous precedent that could hamper the industry's long-term growth. In order to keep the app industry innovative and keep pace with the fast-paced nature of digital content, active online companies must be able to rely on a well-thought-out legislative framework. We believe that by including free content in the scope of the Directive, additional challenges could arise when defining digital content, the valuation of the counter-performance and the establishment of specific remedies.

The Alliance urges EU policymakers to remove all references to "counter-performance other than money in the form of personal data or any other data" from the Directive.

Definition of 'Supplier', Article 2(b) and Recital 47

The Definition of supplier, described as *"any natural or legal person, irrespective of whether privately or publicly owned, including through any other person acting in this name or on his behalf, for purposes related to that person's trade, business, craft or profession"* creates uncertainty for software developers. In fact, it does not sufficiently clarify which player in the app supply chain -- the developer, owner of the content, or the hosting platform -- would be defined as the "supplier" and therefore be liable under the Directive, especially after national implementation. This could lead to more legal uncertainty for businesses without providing any additional protections for consumers.

The one and only reference to the "final supplier" as the entity that consumers should be seeking remedies from is made in Recital (47). The text implies that the entity that originally put the digital content onto the market is the supplier within the scope of the Directive and that every other actor involved in the supply chain is a third party. However, because this description is not used in the Articles of the Directive, the legal uncertainty remains.

From the point of view of an app developer, the definition of "final supplier" in Recital (47) would be preferred over the definition of "supplier" currently provided in Article 2 because it would clarify who is liable under the Directive.

Therefore, the Alliance urges European policymakers to change the definition of "supplier" in Article 2 to include the definition of "final supplier" in Recital (47).

Conformity and Remedies, Articles 6, 12 and 15

The Alliance welcomes the proposed Directive's proposals, which aim to protect consumers against digital content that is not in conformity with the contract (Articles 6 and 12) bringing at least two important changes. First, it distinguishes contractual and statutory criteria for the conformity of the contract. Second, it applies an information-based approach that allows suppliers to fulfill contract requirements by fully informing consumers and describing the qualities of the digital content.
Both of these changes are commendable and need to be kept in national implementing frameworks. However, the unclarity of some provisions may confuse software developers and damage them legally and economically.

In particular, Article 15 envisages that modifications to content that "*adversely affects access to or the use of the digital content by the consumer"* can be undertaken only when the consumer is notified of the modification reasonably in advance and by an explicit notice. Regrettably, the provision does not provide a discipline applicable to modifications that do not adversely affect the digital content. Software developers are constantly improving their products in order to keep their customers as satisfied as possible. Therefore, minor updates to the digital content are necessary to provide the best user experience of the app. The Alliance believes that this missing information could lead to different applications of this Article at the national level, as the final regime will depend on Members States' interpretation.

On a different note, we foresee that the introduction of "goods-like" conformity requirements and remedies, including damages for non-conformity, would likely increase the cost of sales of digital content. Digital content has consistently been treated in most EU member states as a service that typically includes fewer conformity obligations and a more balanced proportionality of remedies

(relating to terms of contract, price, expectations, etc.). The regime established by the Directive in Articles 12, 13, 14, 15 and 16 creates unfair market conditions for specific types of apps and penalises some types of business models. As an example, while the replacement or refund of a €0.99 faulty app is both logical and understandable, being exposed to liability requirements with damage claims in the hundreds or thousands of Euros arising from the "sale" of that free app seems disproportionate. ***The Alliance urges EU policymakers to provide more clarity on the application of Article 15 in cases of non-adverse modifications to digital content.***

Integration of digital content, Article 7

As described in Art. 2 and the recitals, "integration" means "linking together different components of a digital environment to act as a coordinated whole in conformity with its intended purpose". In order to work properly, digital content needs to be correctly integrated into the consumer's hardware and software environment.

Art. 7 explains in further detail that when a lack of conformity of the digital content with the contract results from an incorrect integration, it should be regarded as a lack of conformity of the digital content itself and imply the application of related rules on remedies. The liability of the supplier emerges when the digital content is integrated by himself or under his control; when the software is installed by the consumer, the supplier is liable when they provide misleading instructions and when the incorrect integration was due to shortcomings in the required integration instructions.

The fact that in such scenarios, the lack of conformity stems from the sphere of the supplier, is extremely worrying for app developers because of such broadened contractual responsibility and an unclear definition of digital content suppliers.

In addition, correct integration is not only determined by the supplier instructions but requires user collaboration (which includes a series of actions ranging from being connected to a wireless network to restarting their phone, etc.) or depends on the status of the digital environment itself, meaning good conditions of the hardware and fairly updated and functioning software. In fact, most of the issues that users have with defective apps are due to a lack of device support or software updates, sent and controlled by the manufacturer. Because of this, while developers can benefit from standard operating system features, they still have to adjust versions and functionalities of their apps to different operating systems.

Besides leaving devices vulnerable to issues regarding security and privacy, the lack of updates does not allow mobile software to work properly and should relieve content suppliers from the liability

mentioned in article 7, as the state of settings and updates is not controllable by developers and suppliers beforehand.

Given that point (b) offers a very weak safeguard clause, ***the Alliance urges policymakers to rethink the inclusion of such an extended definition of liability by eliminating Art. 7 provisions, or including a shared responsibility with reference to the manufacturer – app developer – content supplier.***

Remedies: termination of contract and data retrieval, Articles 13 and 16

The Alliance's views on remedies in the Directive, in particular on the termination of contract and data retrieval, are as follows:

- We are concerned with Article 16 and the right to terminate long-term contracts. The Article's title implies that this provision deals with the termination of all long-term contracts, however, it only applies to the termination of contracts in cases where there is neither lack of conformity nor a modification that adversely affects the consumer.
  We call on policymakers to assess the set period of twelve months, as businesses choose contract durations that exceed this limitation because it distributes the costs of content over a longer period, decreasing monthly fees for consumers. Limiting businesses to twelve months is unnecessary and it would not increase consumer protection or benefit users.

- The requirement that digital content providers take "*all measures which could be expected*" to refrain from the use of a counter-performance other than money once a contract is terminated (Article 16, paragraph 4) raises concerns.

The proposed Directive currently reads:

(a) the supplier shall ***take all measures which could be expected in order to refrain from the use of other counter-performance than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer****;*

(b) the supplier shall provide the consumer with technical means ***to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent this data has been retained by the supplier****. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format;*

We believe that further clarity is also needed to define both "*expected*" measures and what kind of data falls under the provision "*any other data collected by the supplier in relation to the supply of the digital content, including any content provided by the consumer*" and what kind of "*content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent this data has been retained by the supplier*" can be given back to the consumer.
We must flag that retrieval of data is a complicated and costly technical process. In order to be able to carry out this remedy, developers would need to track every action the consumer takes within the app. If a company does not collect this information already -- which many of our members currently do not -- it would be technically impossible to comply with the remedy as drafted by the Commission.

Due to the complexity of data retrieval, the rapidly evolving app industry, the additional administrative burden posed on developers and the evolving interaction between consumers and apps, this Directive should solely set the framework for providing financial compensation for non-conformity.

A provision that calls for suppliers to avoid using counter-performance other than money is already included (when personal data is involved) in the recently concluded General Data Protection Regulation. Therefore the provisions in Articles 13 and 16 and Recital 37 of the Directive are redundant and may create additional legal uncertainty for businesses.

Finally, it is unclear how this provision will impact "freemium" apps, where apps are offering basic services free of charge, but an upgrade or more advanced features must be purchased by the consumer. How do developers qualify the consumer generated-content and retrieval of data when an in-app purchase has been made? Is it still considered content provided against a counter-performance other than money? Further clarification and guidance for developers is needed.

The Alliance urges EU policymakers to remove all statements that "the supplier shall take all measures which could be expected in order to refrain from the use of the counter-performance other than money which the consumer has provided in exchange for digital content."

Instead, EU policymakers should provide more clarity on how this Directive will impact "freemium" apps and whether this falls under the content provided against money or provided against a counter-performance.

Conclusion

The Alliance agrees that the European Commission has a role to play in harmonising and improving consumer protections in contracts that supply digital content. Legal certainty is particularly important for businesses engaging consumers across Europe. However, policymakers must closely examine the potential impacts that new regulations will have on software developers given the unique size, skill, and composition of this critical workforce. Newly imposed administrative burdens have the potential to

stunt growth and innovation in the European app industry, as developers find it increasingly difficult to comply with data retrieval as a remedy in non-conformity provisions regarding termination of contracts, as well as the overall confusion caused by the ambiguity in the directive.

To make the directive more workable for developers, a number of uncertainties need clarification, particularly regarding its definitions and scope. To avoid legal uncertainty, European legislators must create rules that are simple, clear, and comprehensible. Finally, we urge the EU institutions to have a close look at what kind of EU legislation is already in place and applies to the supply of digital content, such as the Consumer Rights Directive and the recently concluded General Data Protection Regulation. The Alliance fears that duplication of rules will create unnecessary burdens and legal uncertainty for software and application developers.

About the Alliance:

The Application Developers Alliance is a non-profit global membership association that promotes and supports the app development industry. Alliance membership includes developers, designers, publishers, platforms, device manufacturers, carriers and other service providers.
The Alliance provides a collective voice for developers and aims to represent them on matters affecting the application development ecosystem. The Alliance believes EU policy should maximise the development of new online and mobile services and business models to the benefit of innovators and EU consumers. Therefore, the Alliance supports the development of a European Digital Single Market facilitating innovative mobile applications.