

E-COMMERCE

BEUC reflection paper

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Summary

Consumers should be able to enjoy the benefits offered by e-commerce¹ (convenient way to shop, access to more offers at better prices with no geographical or time limitation) while benefiting from a genuinely high level of protection. Taking into account the specificities of online commerce, consumers need more protection and safeguards in the online world than in the offline world.

We believe it is crucial to better examine and understand the main reasons why consumers do not engage more in e-commerce transactions in order to design effective policies and legislation. In addition, we encourage the Commission to launch behavioural studies on e-commerce with the objective to provide a mapping of the key behavioural traits affecting consumers' choices.

The current legislative framework needs to be adapted to the new challenges of e-commerce (including mobile e-commerce) such as: the lack of software interoperability, the inadequate information disclosure, the new privacy concerns, payment protection issues² and the purchase of digital content. Digital content represents the most-purchased product category and is likely to be the fastest growing product group in the future. This shift from physical goods to digital content (i.e. from CDs to MP3s, from books to e-books), is not reflected in the current EC legislation. Moreover, the proposal for a directive on consumer rights, which is currently pending in co-decision procedure, does not address the problems that consumers face online.

On the basis of evidence provided by our member organization, which are in daily contact with consumers, BEUC would like to stress the main fields where action is needed (and indicate what measures need to be taken):

- Make it possible to buy online: **access to e-commerce;**
- Who is behind the screen?: **reliability of online traders;**
- More transparency in online offers: better **consumer information;**
- Establish a solid and modern framework of consumer rights in online transactions: **consumer online contracts;**
- Make it more secure to pay online: **online payments;**
- Ensure safe shopping: **safety of goods purchased online;**
- Allow consumers to maintain control over their personal data: **data protection and privacy online;**
- Make it easier to complain and obtain redress following an online purchase: **complaints and redress.**

¹ For the purpose of this paper, e-commerce is defined as all Business-to-Consumer (B2C) taking place at a distance through media (computers and increasingly mobile phones) using information and communication technologies: internet but also web mobile, RFID...

² Survey "Pocket shopping - International consumer experiences of buying goods and services on their mobile phones" Marzena Kisielowska-Lipman December 2009 available at: <http://www.consumerfocus.org.uk/assets/1/files/2009/06/Pocketshopping.pdf>

In its Communication on cross-border e-commerce (October 2009)³, the European Commission proposed a series of measures in order to increase online activity in the EU. The communication is based on a series of findings⁴ which highlight that currently consumers do not reap the benefits of the internal single market for e-commerce as around 61% of cross-border online orders fail. According to the European Commission, several factors are responsible for the low take-up of cross-border e-commerce: the fragmentation of consumer protection rules⁵, the territorial management of copyright levies and the territorial nature of copyright and related rights, the different VAT reporting obligations, the diverging waste management rules, businesses shipment capacities etc...

While we welcome the Commission's communication, we consider that much more needs to be done in order to increase consumer confidence in e-commerce transactions in particular cross-border. Currently, consumers still face unacceptable difficulties when shopping online and these difficulties are not due to diverging national consumer protection legislations. For example, in the retail financial services area, meaningful levels of cross-border distance marketing of financial services have not yet been reached, partly because distance marketing is not yet one of the main channels used by banks⁶. The most recent Eurobarometer found that citizens rated language problems as the greatest barrier to purchasing financial services cross-border. The figure for language problems was 37%, followed by fraud risk (30%), incomprehensible (29%) or insufficient (26%) information and the extra costs involved (24%)⁷.

Access to e-commerce

The main pre-requisite to e-commerce is access to the internet and thus to online offers notably cross-border.

1) access to internet

In order to purchase online, consumers need access to the internet and to the appropriate devices. Currently, only half of European households have broadband access⁸. The costs of internet connection, as well as the slow take-up of broadband penetration in some Member States are major hindering factors to engage in e-commerce. According to a recent survey by our UK member ConsumerFocus⁹, apart from the cost issue, several factors also explain why consumers do not have internet access at home. Amongst those factors, are the fear that the internet may undermine face to face communication with friends and family, the fear of viruses and a lack of knowledge of how to overcome a threat to their personal data.

³ EC communication on cross-border e-commerce COM (2009) 557 Final.

⁴ EC Staff Working Document report on cross-border e-commerce, SEC(2009) 283 final.

⁵ In relation to the EC's priority objective of increasing consumer confidence in e-commerce, the proposed consumer rights directive is presented as the main measure. In reality, the proposed directive has nearly no added value for consumers compared to the currently applicable legislation, in particular in e-commerce transactions. Furthermore, due to the fact that it would reduce consumer protection in many Member states, it would be counterproductive. For more information on the impact of the proposed consumer rights proposal, see www.beuc.eu.

⁶ EC Communication on the review of the distance marketing of consumer financial services directive (2002/65/EC) – COM (2009) 626 Final.

⁷ Special EB 298 (2008), Consumer Protection in the Internal Market.

⁸ See European Commission's Digital Competitiveness report released in August 2009 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1221>

⁹ ConsumerFocus survey "Broadband minded? Overcoming consumers' barriers to internet access" by Jillian Pitt March 2010 available at: <http://www.consumerfocus.org.uk/assets/1/files/2010/02/Broadband-Minded.pdf>

2) Fragmentation of the online market

Cross-border e-commerce only represents 6% to 7% of the EU online activity. There are several reasons why the internal e-market remains fragmented along national territorial lines.

Cultural difference such as language are one of the elements explaining the low take-up of cross-border sales (82% of the websites evaluated by the European commission during its mystery shopping exercise were only available in one language¹⁰). In the area of retail banking services, national differences in anti-money laundering legislations are always used as an argument by the banking sector as an obstacle inhibiting cross border distance marketing of banking services.

Another element leading to the fragmentation of the internal market for e-commerce is **copyright law**. The territorial nature of copyright laws is contrary to the very nature of the Internet as a borderless environment and is also responsible for the current fragmentation to the detriment of consumers. Each Member State has its own rules regarding the granting of copyright, thus limiting their scope to their national territory. Consumers seeking to buy copyright protected content online are often only allowed access to online stores in their country of residence and/or at different conditions, while the complexities for rights' clearance and the territorial management of copyright and related rights discourage commercial users from offering pan-European content to consumers.

Furthermore, the reluctance of distributors to serve consumers from another country also appears to be one of the major factors holding back cross-border e-commerce. Some goods and/or services are not available online due to **commercial reasons** and to **competition restrictions** imposed by traders e.g. the use of a 'brick and mortar' clause in selective distribution agreements, enabling manufacturers to impose a requirement that one or more physical stores are operated in the country before internet sales can be made, or the refusal by businesses to sell in countries where the market demand is small...

In practice, businesses are using **technology** to exclude consumers from other countries to access e-offers on the basis of their place of residence e.g. the user is automatically re-directed to national website because of his/her IP address, application of different conditions/prices to consumers from different member states, refusal to sell/deliver cross-border ... In some cases, consumers may be faced with a rejection or non-acceptance of their offer to buy during the ordering process (e.g. when giving the delivery address or bank details) despite the fact that no relevant information/notice was given when accessing the trader's website.

BEUC proposals:

- Ensure that access to broad band internet is included in the revision of the Universal services directive (2002/22/EC);
- Monitor the implementation of the revised Regulation on vertical restraints (C(2010) 2365) with the aim of ensuring that any restrictions to online sales or to the use of the internet by authorized distributors are prohibited (unless objectively justified);
- Investigate the reasons behind the online market fragmentation by leading sector inquiries in e-commerce with a particular emphasis on the sale of digital content and services online;

¹⁰ Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, YouGovPsychonomics on behalf of the European Commission available at:
http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf

- Ensure enforcement of article 20.2 of the services directive (2006/123/EC) which prohibits discrimination by traders on the basis of the place of residence of the service recipient and call on the European Commission to report on the application of this provision. An idea could be to oblige traders to indicate clearly on their home-page which countries they do supply;
- Clarify the scope of the private copying exception in the information society directive (2001/29/EC) and reform the current copyright levies systems to reflect the actual use of media/devices and introduce “one-stop-shop” system for the payment of copyright levies on products to be traded across the EU;
- Address the territorial nature of copyright and provide solutions to the current complexities of rights’ clearance mechanisms, through the establishment of extended collective licenses and further explore the extension of the principle of exhaustion to online exploitations.

Reliability of online traders

Consumers are reluctant to buy online because they lack confidence in the online marketplace. On the internet, consumers are in a weaker position than in high street shops as they cannot see the product or meet with the trader. It makes it more difficult for a consumer to establish whether an online trader is trustworthy or not, especially when shopping cross-border consumers have to rely on what is advertised on the screen (“who is behind the screen?”). Therefore it is crucial to ensure that the online marketplace respects trading practices.

In some cases, consumers do not know whether they are in touch with a professional or with another consumer. Consumer to Consumer (C2C) online sales is an area of growing concern.

BEUC proposals:

- Put in place labels for safe and secure websites. Such labels should be obtained provided the retailer fulfills certain specifications and should be supervised by public authorities;
- Strengthen cooperation between public authorities to quickly act against rogue websites paying greater attention to consumer complaints. Enhance the efficiency of the Consumer Protection Cooperation Network when it comes to the online market place (more resources to act quickly and to ensure the closing of websites);
- Ensure efficient enforcement of the unfair commercial practices directive (2005/29/EC) online e.g. it is a black listed practice under the directive to “falsely claim or create the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer”;
- Consider whether existing regulations on C2C transactions offer adequate protection to consumers shopping online.

Consumer Information

The internet is a great source of information. However, consumers lack knowledge about the independence of the information provided online.

Most online advertising is being done on search engines and search comparison websites. For example, in the United Kingdom, 58% of advertising online classifies as “search advertising” where traders pay for listing and prominent positions on search engines and search comparison sites¹¹. Yet there is limited transparency of information available to consumers about these practices.

The issues of blogs sponsored by companies and false customer feedback should also be addressed.

BEUC proposals:

- Provide consumers with easily accessible information on the rights and responsibilities of parties involved in e-commerce transactions (including on the responsibilities of internet intermediaries);
- Price comparison sites should inform consumers in a transparent way that results lists and advertising displays are provided according to commercial arrangements and therefore do not carry any ranking as to whether the advertisement may be appropriate to a consumer’s need;
- Commercial information must be clearly identifiable as such in order to avoid misleading consumers. Stealth advertising (i.e. clandestine marketing) and advertorials (i.e. mix of editorial and commercial content) that are not clearly displayed as advertising should be banned¹²;
- Ensure that companies which provide sponsored advertising services are accountable for ensuring that the links they sponsor comply with the legislation and do not advertise illegal websites;
- Ban sponsored advertising of illegal pharmacies online¹³.

Consumer online contracts

Online transactions, due to their specificities, require specific and appropriate consumer protection such as the need for an efficient right of withdrawal, specific information requirements adapted to the media as well as to the specificities of the conclusion of the contract online.

The distance selling directive, which covers most online purchases, is currently under revision in the form of the proposed consumer rights directive¹⁴. The Commission’s proposal on consumer rights needs to be amended substantially, including in the field of distance selling and e-commerce, in order to provide for benefits for consumers.

Neither the current EU legislation nor the pending Commission proposal provide for a future proof set of rules that will efficiently protect consumers when shopping on-line.

¹¹ Office of Fair Trading, Internet Shopping, OFT 2007 available at www.oft.gov.uk

¹² For more information, please refer to BEUC discussion paper on data collection, profiling and targeting online available at www.beuc.eu

¹³ For more information, please see BEUC position paper on counterfeit medicines (X/034/2008) available at www.beuc.eu

¹⁴ Proposal for a directive of the EP and the Council on Consumer Rights COM (2008) 614 Final.

The most obvious lacuna is the lack of an EU-wide set of remedies in case the consumer bought defective digital content goods or services (such as music downloads, computer games, software, additional phone services...etc). More and more consumers buy digital content online without being protected in an efficient way.

Furthermore, protection of children online and notably their capacity to enter into online contracts should be better taken into consideration. According to an international survey done by consumer organizations, in 76 per cent of cases, mobile payment transactions had no age restrictions attached¹⁵. The study also shows that mobile content marketed to youth was within easy reach of adult related content.

BEUC proposals:

- Improve information requirements on websites and other online media such as mobile phones (e.g. clear information on the countries of delivery, information on responsibilities of vendors in transaction chains and customer services contacts, mandatory information requirements on the interoperability and playability of digital products);
- Improve the accessibility, readability, fairness and transparency of online contract terms and conditions¹⁶;
- Adapt the legislation on unfair contract terms to cover End User Licence Agreements (EULAs)¹⁷. The purchase of digital content and the installation of software require the user to agree to non-negotiable terms set out in a licence agreement – the ‘terms and conditions’. These (End-User) Licence Agreements are more like legal mandates than consumer options, raising concerns about the extent to which they favour the producer over the consumer;
- Improve the rules on the right of withdrawal in distance selling contracts. According to the result of the EU-wide mystery shopping exercise¹⁸, 68% of the offers were subject to special conditions regarding the right of withdrawal which may limit the ability of the consumer to exercise its right e.g. requiring the trader to return the product unsealed;
- Extend the consumer protection rules on legal guarantees to digital content¹⁹;
- Put in place effective mechanisms to protect children from access to illegal and harmful content (including pornography, tobacco, alcohol and gambling sites) notably via the development of age verification systems²⁰.

¹⁵ Survey “Pocket shopping - International consumer experiences of buying goods and services on their mobile phones” Marzena Kisielowska-Lipman December 2009 available at:
<http://www.consumerfocus.org.uk/assets/1/files/2009/06/Pocketshopping.pdf>

¹⁶ For a specific overview of the Spanish situation, see the study by our spanish member CECU on “Clausulas abusivas en el comercio electronico” available at:
<http://www.cecua.es/campanas/servicios/Informe%20Clausulas%20abusivas.pdf>

¹⁷ For more information, see study by the National Consumer Council “Whose Licence is it anyway” by Carl Belgrove 2008.

¹⁸ Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, YouGovPsychonomics on behalf of the European Commission available at:
http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf

¹⁹ Because of the restrictive definition of “good” in the proposed directive on consumer rights, which excludes goods of an intangible and immaterial nature, digital content is not covered by the scope of the chapter on sales and guarantees (chapter IV).

²⁰ For more information, please refer to the Trans-Atlantic Consumer Dialogue (TACD) resolution on marketing to children online available at:
http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=207&Itemid=

Online payments

Several means of payment can be foreseen for online transactions: payment of invoice by money transfer prior to delivery, e-services allowing payments and money transfers to be made through the internet, cash on delivery or pick up in stores, payment of invoice after delivery, e-banking or online banking, direct debit, cheques, gift vouchers... However, in practice, most websites mainly offer credit/debit card, leaving the consumer with very limited choice.

Furthermore, the lack of consumer confidence in online payment is a reason why consumers do not shop online. It has been proven that more than 40% of internet users are reluctant to buy online for fear of ID theft or other malicious activities²¹.

New issues linked to payment via mobile phones should also be considered.

BEUC proposals:

- Ensure consumers always have choice between different means of payment online and never pay extra fees if they do not use a specific means of payment. Add a requirement to this end in the consumer rights proposal;
- Encourage the development of appropriate, efficient; secure and innovative means of payment online;
- Encourage payment intermediaries to strengthen payment protection in online transactions;
- Prohibit “overlay payment services” which are asking consumers to provide their personal details in order to enter into consumers’ bank’s website (details consumer must keep confidential to ensure secure online banking)²²;
- Design websites in a secure way (security of the platform/website and of the communication of information between the website and the bank for example via https sites; encrypted information techniques, etc...);
- Take into account the specificities of payment protection in purchases done via mobile phones (notably the emerging issue of loans contracted by SMS)²³.

Safety of goods purchased online

It is important to ensure the safety of goods and products sold online. As consumers cannot see the product beforehand, safety of what is offered online should be carefully monitored.

The problem of counterfeited goods sold over the internet is a concern in terms of consumer safety. For example, in the health sector, internet-based sales of pharmaceuticals are by far the major source of counterfeit medicines.

²¹ 2006 International Telecommunication Union online survey (ITU, 2006).

²² On overlay payment services, see the press release of the Dutch National Bank at: <http://www.dnb.nl/en/news-and-publications/news-and-archive/persberichten-2009/dnb223392.jsp>

²³ ConsumerFocus Survey “Pocket shopping - International consumer experiences of buying goods and services on their mobile phones” Marzena Kisielowska-Lipman December 2009 available at: <http://www.consumerfocus.org.uk/assets/1/files/2009/06/Pocketshopping.pdf>

BEUC proposals:

- Improve the coordination of public and law enforcement authorities in the fight against unsafe products;
- Call on online commerce platforms to put in place specific guarantee schemes for consumers who have bought counterfeit goods (in a C to C contract) through a consumer-friendly procedure;
- Launch ad hoc campaigns to warn consumers against the risk of buying medicines online from unknown sources.

Data protection and privacy online

When surfing the Internet, consumers' data is collected by different actors (e.g. Internet Service Providers, traders, web browsers, publishers, affiliation companies, social network platforms, ad-serving agencies...). The vast majority of consumers at the moment do not realize information about their web activities – such as the products they check online or that they order - is being collected.

As shown by the mystery shopping commissioned by the European Commission, websites are requesting a lot of personal information from consumers email address, personal name and address but also gender (34% of offers), date of birth (27% of offers) and title (26% of offers).²⁴ Some service providers only allow consumers to access their services if they agree that their data can be used for marketing purposes. These practices potentially lead to a loss of consumers' control over their own data.

Furthermore, companies are able, via the enhanced possibilities of profiling consumers, to discriminate against consumers (i.e. by offering the same products at different prices based on individual users' online profile). Price individualisation practices already happen on the Internet²⁵.

BEUC proposals

- Improve the transparency, readability and fairness of existing online practices – including through better privacy notices and technical solutions. Currently, consumers do not read privacy notices due to their length, complexity and complicated language²⁶;
- Online targeting and profiling should fully respect data protection rules when these techniques collect and use data on tastes and behaviours that may be linked to an identified or identifiable person;
- Vulnerable consumers that are more sensitive to suggestion and are an easy target for advertisers, and in particular children and young people, should not be targeted by websites using profiling and behavioural marketing techniques;

²⁴ Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, YouGovPsychonomics on behalf of the European Commission available at:

http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf

²⁵ A retail photography website, for example, charged different prices for the same digital cameras and related equipment, depending on whether shoppers had previously visited popular price-comparison site ("Open to Exploitation", Annenberg Center, University of Pennsylvania, 2005).

²⁶ A study produced by the Consumer Council of Norway in November 2009 documents that consumers generally do not understand the terms of service that is offered by their favourite social networks. The study also shows that 94% of consumers asked say that it is important to retain control of their personal information that they share online. 67% of the same respondents are worried over the consequences of sharing personal information online:

http://forbrukerportalen.no/Artikler/2009/social_network-sites_grossly_undermines_users_privacy

- Sensitive data should only be collected after the consumer has given his/her express prior consent;
- The best way to ensure consumers' control over their personal data is to ensure that consumers can exercise their rights easily and at various levels;
- The challenges raised by the new online marketing practices should be taken into account in the revision of the EU General Data Protection Framework²⁷;
- Negatively discriminating offers based on online profiling and targeting (i.e. higher price) should be banned²⁸.

Complaints and redress

A major inhibiting factor to buying online is the fear of not being able to obtain redress or compensation in the event of a problem. This is even more the case in the context of cross-border purchases as 71% of consumers think that it is harder to resolve problems such as complaints, returns, price reductions, or guarantees when purchasing from providers located in other EU countries.²⁹

BEUC proposal:

- Oblige online retailers to improve in-house complaint handling mechanisms and customer services online (e.g. obligation to have formal online complaint/communication forms);
- Oblige Member States to set up ADR mechanisms which are compliant with the EC recommendations³⁰ and examine how efficient online dispute resolution systems could be established³¹;
- Foster the role of intermediaries (e.g. social networks, payment platforms, online commerce platforms...) in preventing scams and providing access to dispute resolution and redress. Clarify if these new types of intermediaries fall under the liability immunity of the e-commerce directive (200/31/CE);
- Put in place group action mechanisms allowing all victims of an e-trader to join their claims into one single action.

END

²⁷ For more information, see BEUC answer to the consultation on the revision of the EU General Data Protection Framework available at www.beuc.eu

²⁸ For more information, please refer to BEUC discussion paper on data collection, profiling and targeting online available at www.beuc.eu

²⁹ EC Staff Working Document report on cross-border e-commerce, SEC(2009) 283 final.

³⁰ Recommendation 98/257/CE and recommendation 2001/310/CE on out of court dispute resolution.

³¹ In Spain, companies signing a specific code of conduct (www.confianzaonline.es) adhere to an ADR mechanism whereby a first mediation is done by the AECCEM (Spanish association of e-commerce) in a maximum deadline of 7 days after the request is made. Should the mediation not be successful, the case is referred to an arbitration court which decision must be respected. In Portugal, the Magistrate's Court (ADR body) can deal with the mediation phase and eventually the judging phase of the dispute with all the process being done online (not necessary for the consumer to travel).