



# HOW TO INCLUDE DIGITAL PRODUCTS INTO THE CONSUMER RIGHTS DIRECTIVE? BEUC PROPOSAL FOR AMENDMENTS

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This paper is an addition to BEUC's position paper X/060/2010 on  
digital products

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## Consumers' rights proposal BEUC amendments on digital products

### *Recital (new)* *Definitions*

Commission Proposal	BEUC Proposal
	<i>Digital goods transmitted to the consumer in a digital format, where the consumer obtains the permanent possibility of use should be treated as goods for the application of the provisions applying to sales contracts.</i>

#### Justification

The provisions of the proposed Consumer Rights Directive are suitable for those types of online purchases of digital content that consist of an one-off transaction against payment. Such contracts, which constitute the majority of online purchases of digital content transfer the ownership to the consumer, allowing him to use it on a permanent basis, in a similar way as he acquires the property of a book, a CD or DVD. On the contrary, when the consumer only acquires a temporary right to use the digital content, mainly the case of streaming of content or video-on-demand services, such contracts should be excluded from the scope of the provisions applicable to sales.

#### Article 2 (4) Definition of goods

Commission Proposal	BEUC Proposal
"Goods" means any tangible movable item with the exception of: <ul style="list-style-type: none"> <li>a) goods sold by way of execution or otherwise by authority of law,</li> <li>b) water and gas where they are not put up for sale in a limited volume of quantity;</li> <li>c) Electricity</li> </ul>	<i>"Goods" means any tangible <b>or intangible</b> item, including water, gas and electricity with the exception of goods sold by way of execution or otherwise by authority of law.</i> <ul style="list-style-type: none"> <li><del>a) water and gas where they are not put up for sale in a limited volume of quantity;</del></li> <li>b) <i>Electricity</i></li> </ul>

#### Justification

The definition of "goods" should include intangible items. Following the proposal definition of "goods" only covers tangible items. This means for instance that the provisions regarding guarantees for lack of conformity (chapter IV of the proposal), cannot be applied to digital content products (software, on-line music etc.).

This definition of “goods” as tangible, although appropriate in the off-line world, no longer reflects the needs of consumers in the digital era, where more and more goods are purchased or downloaded in an intangible, digital format. The downloading of most digital goods (software, music, games, ringtones...) to be used on a permanent basis, is a one-off transaction against payment, by which the consumer receives digital files for permanent use. Such contracts, which constitute the majority of online purchases of digital content, transfer the ownership to the consumer, allowing him to use it on a permanent basis, in a similar way as he acquires the property of a book, a CD or DVD. The format in which a product is presented or purchased should not matter in terms of consumer protection: consumers should be equally protected on line and off-line.

Article 5  
General information requirements

Commission Proposal	BEUC Proposal
	<p>...</p> <p><b><i>(s) the application of technical protection measures for digital products, where applicable;</i></b></p> <p><b><i>(t) the interoperability of digital products with hardware and software according to what the trader is aware of or can reasonably have been aware of, including any lack of interoperability. ...</i></b></p>

*Justification*

...

Lits (s) and (t) refer specifically to digital products. As regards lit (s), consumers also need to receive sufficient and clear information concerning any restrictions on the use of the purchased digital goods, that might be prescribed by the contract and/or applied by a technological system, and that affect the usability of the good contrary to consumers' expectation as to the essential characteristics of the purchased good. Technical protection measures (TPM) can be used to implement such restrictions, limiting or controlling the possibilities of use (restricted number of views or limited time period) or copying (limited number of CD burns or of transfers to portable devices). The application of TPMs amplifies the problem of playability and interoperability, since the consumer is usually required to use specific software or equipment to read files covered by TPM and TPM can also restrict the possibilities of files transfers between different platforms or devices. Receiving information on these issues is of prior importance for the consumer of digital goods. However, it is not always made available by the providers and, when it is disclosed, it may be unclear and hard to understand. As for lit (t), the provisions on information requirements of the proposed Consumer Rights Directive do not correspond to the specificities of digital goods. When buying digital goods, the consumer interest relies on the ability to exchange data from one software or hardware to another, as well as the ability to use of the digital goods on the device or equipment of their choice.

Interoperability is an important means to achieve consumer welfare in the digital environment. Consumer interest relies heavily on the ability to exchange data from one software to another, and from one person to another, but also on the ability to understand that information so that it can be used. However, consumers very often face problems that are either due to the lack of interoperability in equipment, whereby the digital content acquired by the consumer cannot be played or read on all equipments from the very beginning or due to the lack of interoperability between old content and new hardware or software.

Article 32

General principles

Commission Proposal	BEUC Proposal
	<p>...</p> <p><b>4. Where the contract is concluded for the acquisition of digital goods, the terms of use are not considered as the subject matter of the contract.</b></p>

*Justification*

...

Contracts for the sale of digital products often contain clauses that impose restrictions on the use of the purchased content that may result in a significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer. It should then be made explicit in the proposal that such contracts are not covered by the exception relating to the main subject matter of the contract, but that contract clauses related to the use of digital content fall under the unfairness test.

Annex III: Contract Terms which are presumed to be unfair

Commission Proposal	BEUC Proposal
	<p><b>(m) enabling the trader to limit the agreed performance of the product or to unduly limit the interoperability of digital products with hardware and software;</b></p> <p><b>(n) restricting the use of digital products permitted under copyright law;</b></p>

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