BEUC The European Consumer Organisation

The Consumer Voice in Europe

EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON CONTRACT RULES FOR ONLINE PURCHASES OF DIGITAL CONTENT AND TANGIBLE GOODS

BEUC response

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General remarks

BEUC welcomes the European Commission's consultation on contract rules for online purchases of digital content and tangible goods. Although consumers increasingly take part in the digital market, there are still significant obstacles and legal uncertainties related to consumer contract law.

This is particularly the case when consumers buy **digital content products,** such as music, apps, software, ebooks or films. In most Member States, consumer protection laws are inadequate for dealing with the particularities of digital products. The problem of the lack of an enforceable legal framework for those types of products undermines trust in the EU digital market, a challenge that must be tackled at EU level.

The Commission has rightly identified the updating of its consumer laws as a priority area, and has consequently announced a legislative initiative for the online purchase of digital content as one of the key initiatives of the Digital Single Market strategy.

BEUC supports the European Commission's intention to develop European rules for digital content products. This is a missing piece of the consumer law acquis, particularly with respect to guarantee rights and specific unfair terms in digital services.

A second legislative initiative announced in the Digital Single Market strategy deals with the **online sale of tangible goods.** Whereas we agree that there is an urgent need for new rules on digital content products, **we remain sceptical as to whether special rules for online purchases of tangible goods are necessary** since there are already extensive EU laws in place. The 2011 Consumer Rights Directive, for example, offers a comprehensive framework for consumer rights that is also applicable to online sales, and that significantly helps to reduce legal fragmentation whilst granting a high level of protection to consumers.

As regards the rights and remedies available to consumers when a good does not conform to its contract, the Consumer Sales Directive guarantees minimum protection standards across the EU. While it could make sense to further harmonise these rules throughout the EU, the creation of a parallel legal guarantee scheme applicable only to goods purchased online is highly questionable. Separate regimes for online and offline purchases is not a desirable concept from a consumer policy perspective.

Instead, the European Commission should continue to evaluate the functioning and potential reform of the Consumer Sales Directive as already envisaged in the framework of the 2016 REFIT exercise, and propose solutions to modernise this piece of legislation. In the meantime, model contracts for the online sale of goods could be developed and agreed between different stakeholders, such as consumer associations and e-commerce business organisations.

Finally, in its Digital Single Market strategy, the European Commission proposes allowing traders "to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods". The announcement that traders should be able to rely on their national laws (also referred to as the "home option") raises many questions and can be variously interpreted. **From a**

consumer policy point of view, such an approach is highly problematic as it could lead to the circumvention of existing national consumer protection standards granted by conflict-of-laws rules for cross-border transactions (as stipulated in the Rome I Regulation). These conflicts of law rules function as a safety net in case serious consumer problems arise and must remain fully applicable.

Part 1 – Digital content

Section 1 –Problems

1. In general, do you agree with the analysis of the situation made in the "Context"? Please explain.

Yes, BEUC agrees with the analysis.

Consumer harm in this sector has to do to a significant degree with the fact that European consumer protection legislation is barely applicable to such transactions and national legislation in nearly all Member States has not adapted to these types of products. This has led to legal uncertainty, a lack of consumer confidence and fragmentation of the Internal Market.

Legal uncertainty and the absence of European rules are felt particularly with regard to the question surrounding the consumer's rights against a defective digital product: for example, are consumers entitled to claim a replacement or a refund?

Consumers face additional difficulties because of overly complex, unfair terms and conditions which are often presented as EULAs, suggesting that limitations on use and technical protection measures have total precedence over legitimate consumer expectations and the balance of the parties' rights.

2. Do you think that users should be more protected when buying digital content products? Please explain why by giving concrete examples.

Consumers should be as far as possible equally protected when buying tangible goods or digital content. However, as digital content are more complex products, additional protection may be needed particularly when exercising the rights i.e. the supplier should be the one to prove that the defect was caused by the consumer and not the other way around. This should apply even beyond the so-called reversal of the burden of proof period.

Behavioural insights and economic studies showed that consumers face multiple concerns when it comes to accessing and using digital content products. They have been exposed by an economic study carried out for the European Commission in 2011[1], which grouped consumer harm in five categories: information and transparency; unfair terms and conditions; quality and access and privacy and security[2].

[1] EUROPE ECONOMICS (2011), "Digital content services for consumers: Assessment of problems experienced by consumers", available at: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm.
[2] Europe Economics, p. 56.

This study estimated the economic consumer detriment in the digital content market in the region of 64 billion Euros per year[3], from which 53,5 billion Euros were related to lack of access[4] and contract-law related issues[5].
In addition, there are numerous practical examples that can be cited to demonstrate the unique difficulties facing consumers in the area of digital content and thus the need for high levels of consumer protection. For example, our UK member Which? reported consumer concerns related to hidden costs of software updates[6], software updates causing operability problems[7] and bugs embodied in software[8].

The Norwegian Consumer Council in 2012 brought an interesting case against Sony when they discovered that in the terms of service of PlayStation 3 Sony claimed a universal right to change or remove functionality from the gaming console. In other words, Sony was able to remove other operation systems installed by the consumer like Linux in order to use the video-game console as a PC. Therefore, limiting the use of PlayStation 3 to what is offered by Sony's own operational system[9].

Restrictions in use are a common pattern in the supply of copyrighted material. Cases concerning limitations in the transferability of the content were raised in several occasions in German courts. Similarly, limitations steaming from Technical Protection Measures were central in cases related to format shifting of DVDs in France and Belgium.

3. Do you perceive difficulties/costs due to the absence of EU contract law rules on the quality of digital content products? Please explain.

Currently, national contract law regimes apply. This means that there is no total absence of legal rules.

For example, in France, when software is supplied in a durable support, part of the jurisprudence would consider the contract as sales while others see it as a contract of hiring. However when it comes to consumer contracts, as many parts of the Consumer Code apply indistinctly to goods and services or to tangible or intangible items, consumer would be somehow still protected in these transactions. The difference is given when it comes to legal guarantees, which exclusively apply - following the European model - to tangible mobile items.

Similarly, in Germany, the categorisation of a contract for the supply of digital content took place in the frame of software transmitted embodied in tangible media, either pre-installed in a computer or supplied in a CD. The German Federal Supreme Court estimated that when software is supplied in tangible medium it should be treated like goods for the purpose of non-conformity and remedies. This jurisprudence anticipated

[3] This number represents the estimated gross loss including financial loss and value of time lost for the total online population in the EU 27 in 2010, see Europe Economics p. 145.
[4] Access problems are described as "unexpected service interruptions caused by unforeseen events at the supplier's end" and to a lesser extent to portability and cross-border access, see Europe Economics p. 75.
[5] including lack of information; unclear and complex information; quality issues and unfair contract terms.
[6] http://conversation.which.co.uk/technology/antivirus-subscription-renewal-cost/ ; http://conversation.which.co.uk/transport-travel/built-in-sat-nav-updates-expensive-investigation/
[7] http://conversation.which.co.uk/technology/software-updates-go-bad-iphone-ios8-samsung-smart-tv/ ; http://conversation.which.co.uk/technology/smart-tv-apps-facebook-iplayer-updates-panasonic-tv/
[8] http://conversation.which.co.uk/technology/fifa-13-video-game-bugs-glitches-crashes-refund-rights-xbox-360-ps3-wii-pc/ ; http://conversation.which.co.uk/consumer-rights/video-game-publishers-bugs-broken-drm-piracy/
[9] http://www.forbrukerradet.no/forside/pressemeldinger/playstation-3-violates-the-norwegian-marketing-control-act

the 2002 reform of the BGB (*schuldrechtsreform*), establishing in Section 453 (1) that *"the provisions on the purchase of things apply with the necessary modifications to the purchase of rights and other objects."*

However, since in contracts for the supply of digital content there is no transfer of ownership - which is retained by the rightholder under copyright law - it is not always clear to what extent this sales-analogy could be applied to other products different to software. As pointed out by Professor Rott in his report for the Amsterdam Study[10], the purchase of software or other copyrighted content could be seen as a special type of licensing contracts. This is based on the idea that what is transferred to the consumer is not a "good" but the entitlement to use an idea.

In Spain, digital content is not specifically covered and therefore the several rules of the Civil Code may apply. It is worth mentioning however that when the Spanish legislator transposed the Consumer Sales Directive, contrary to other national legislators, it adopted a broader material scope by covering "products" instead of just "goods". Therefore, part of the Spanish academia considers that for the purpose of conformity rights, the regime of the Consumer Sales Directive would be applicable also to digital content.

However, these national interpretations do not provide sufficient legal certainty to address consumers' problems when purchasing or accessing digital content because they are based on a legislation drafted for tangible goods and not taking into account the particularities of the digital environment, including digital content supplied in exchange of personal data.

The only country to our knowledge that has adopted a specific law for B2C contracts of digital content products is the UK. This is a positive development for British consumers but at the same time it increases the risks of fragmentation across the EU if national legislators start developing their own systems to protect consumers in digital content contracts.

Thus, EU is in a unique position now to develop a European framework addressing legal uncertainties around the rules applicable to B2C contracts whilst preventing further fragmentation of national laws.

4. Do you think that upcoming diverging specific national legislations on digital content products may affect business activities? Please explain.

We do not respond, at this point, to questions related to business activities. From a consumer policy point of view, however, there is a lack of legal protection and significant legal uncertainties under national laws in the area of digital content products that justify a legislative initiative.

[10] http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

Section 2 – Need for an initiative on contract rules for digital content products at EU level

5. The European Commission has explained in the Digital Single Market Strategy[11] that it sees a need to act at EU level. Do you agree? Please explain.

Yes, BEUC has called in the past for further harmonisation in the field of digital content products. We believe this is a missing piece in the consumer law *acquis* and we welcome the European Commission's vision to bring clear rules at EU level for contracts for the supply of digital content products.

6. The European Commission has announced in the Digital Single Market Strategy that it will make a proposal covering harmonised EU rules for online purchases of digital content. Other approaches include, for example, the development of a voluntary model contract that consumers and businesses could use for their cross-border e-commerce transactions or minimum harmonisation. What is your view on the approach suggested in the Digital Single Market Strategy?

When it comes to digital content products, BEUC believes it is possible to achieve a further harmonisation. Since national laws remain underdeveloped,full harmonisation in this area could be possible provided that it is at a truly high level of consumer protection.

A voluntary model contract could be considered as a complementary measure but it needs to count on a European legal framework within the consumer acquis to serve as a legislative background.

Section 3 – Scope of an initiative

7. Do you think that the initiative should cover business-to-consumers transactions only or also business-to-business transactions? Please explain.

Due to the nature of our activities, BEUC favours a B2C instrument.

8. What specific aspects in business-to-business transactions, if any, should be tackled? Please explain.

See answer to question 7.

9. Digital content products may cover inter alia the products listed below. Which of these digital content products/services should be covered by the initiative (tick as many as apply)?

[11] A Digital Single Market Strategy for Europe COM(2015)192 final.

- ☑ games, including online games
- ☑ media (music, film, sports, e-books) for download
- ☑ media (music, film, sports) accessible through streaming
- ☑ social media
- ☑ storage services
- ☑ on-line communication services (for example, Skype)
- ☑ any other cloud services
- ☑ applications and any other software that the user can store in its own device
- ☑ any software that the user can access online
- ☐ any other service that is provided solely online and result in content that the user can store in its own device (such as translation service, counselling)
- ☐ any other service that is provided solely online

Please explain your choice(s).

BEUC supports the digital content definition included in the Consumer Rights Directive and we believe it should be replicated in the forthcoming proposal to keep consistency between different consumer law instruments.

Additionally, a broad definition is necessary in order to encompass all types of digital products to ensure legal certainty of the applicable legal regime while not precluding future technological developments and the emergence of new methods of distribution of digital products.

However, not all services concluded online should be considered as digital content. For example a translation service provided by a qualified translator or legal counselling should continue being subject to the respective deontological rules.

An additional element to take into account is whether there has been a contract between the consumer and the supplier of digital content and what are the conditions around its conclusion to trigger the application of the conformity rules of the new instrument.

For example, the CRD Guidance Document refers to the "express" conclusion of a contract and therefore this could exclude contracts concluded through browse-wrap agreements. If that is the intention of the Commission in the use of the term "express", this should be clarified as in both click-wrap and browse-wrap agreements there could be a conclusion of a consumer contract in the sense of article 1 of the Consumer Rights Directive.

Finally, many issues related to digital services like storage and social networks were discussed in the frame of the Commission's Expert Group on Cloud Computing Contracts. The discussions highlighted the problem of unfair terms in contracts for the supply of cloud-based services. BEUC considers that the Commission should also consider developing rules for these type of services.

However, as for Voice over IP (VoIP) services, the APP or software needed to access the service should be consider as digital content but not the communication service as such. Any regulation related to quality of service of VoIP should be done in the telecommunications framework and respecting the principle of net neutrality.

10. Digital content products can be supplied against different types of counter-performance. Which of the following counter-performances should be covered by the initiative (tick as many as apply)?

- ☑ Money
- ☑ Personal or other data actively provided by the user (for example, by registration)
- ☑ Data collected by the trader (for example, the IP address or statistical information)
- ☑ Activity required by the user in order to access the digital content (for example, by watching an advertisement video, or visiting another homepage)

Please explain your choice(s).

We consider that all counter performance should be covered. However, the guiding principle should be whether there is a contractual relationship or not. The different types of counter-performance mentioned are all sufficient for the conclusion of a binding contract and this should be made clear in the new instrument. That is way it is important to clarify the scope of application of the instrument vis-à-vis browse-wrap agreements.

Section 4 –Content of an initiative

11. Among the areas of contract law below, which ones do you think are problematic and should be covered by an initiative (tick as many as apply)?

- ☑ Quality of the digital content products
- ☑ Remedies and damages for defective digital content products
- ☑ How to exercise these remedies, like who has to prove that the product was, or was not, defective (the burden of proof) or time limits for exercising these remedies
- ☑ Terminating long term contracts
- ☑ The way the trader can modify contracts
- ☑ Other (please specify)

Please explain your choice(s).

An instrument covering digital content products should be as comprehensive as possible thus, BEUC agrees on the inclusions of conformity criteria, remedies and the exercises of such remedies.

BEUC would also support the inclusion of a rule for the termination of long-term contracts irrespective of whether the termination is caused by lack of conformity. This could be particularly relevant for subscription contracts. However, the right to terminate the contract within a certain period of time should work as a minimum standard and companies should be able to offer to consumers the possibility to terminate the contract whenever they want, as it is a common practice among suppliers of streaming services of music and audio-visual content.

Concerning the unilateral modification of the contract, we agree on the inclusion of a specific rule setting out the criteria to modify the contract and / or the service.

Particularly, we would welcome a rule allowing the consumer to terminate the contract when the modification alters the performance of the service or the price and to retrieve all his data in a usable format.

Additionally, the instrument should also cover specific unfair contract terms. Current businesses models for the distribution of digital content raise a number of concerns from the consumer's perspective regarding the compliance of End-User Licence Agreements with legislation on unfair contract terms.

Contrary to the 1999 Sales of Goods Directive, the 1993 Unfair Contract Terms Directive applies to digital content contracts. However, there are uncertainties as to how it applies to these products and not all relevant problem areas are clearly covered.

In contracts for the supply of copyrighted content, TPMs are enforced in clauses prohibiting the user to do certain acts like for example bypassing the technical measures. These types of clauses find their source in article 3 of the Copyright Directive.

However, we have found that in some cases rightholders or suppliers go too far in prohibiting certain uses that would be legitimate for the consumer like format shifting.

If we take the case of an e-book, in many instances the user is not allowed to transfer it or change format, for example into a pdf to be able to print it for a personal and non-commercial use. A similar case we have in relation to the format in which audio-visual content is provided e.g. to pass a movie (downloaded on a permanent basis) to a DVD in order to reproduce it on the TV. Again for personal and non-commercial purposes.

Case law at national level (see: Belgian case Trib. Brussels, 25 May 2004, RG 2004/46/A and French *Mulholland Drive* case, both initiated by Test-Achats and UFC-Que Choisir, respectively) declared that format shifting as a form of private copying is *illegal* if the right holder decided within the freedom granted under copyright law to bypass the private copying exception through the application of DRMs. This confirms the wide discretion of right holders to decide under copyright rule how consumers can access and use content.

However, if those contractual clauses are scrutinised under the fairness control of the Unfair Contract Terms Directive some of the prohibitions could be considered unfair. Notably format shifting for personal use.

For example in the UK a survey carried out by Which? showed that six in ten people (63%) believe that they should be able to copy copyrighted works for personal use. However, this is not reflected in the T&C of providers of digital content.

Another type of unfair term relates to restrictions in the use of the digital content. For example, a consumer cannot transfer a video game to a friend because it is linked to a specific subscription account or cannot use a different software on the game console than the one provided by the manufacturer because the supplier has reserved the right to update the software at their own discretion and even delete an operational system installed by the consumer that is not the one provided.

Our Norwegian member entered into a legal battle against Sony because of this and although they counted on the support of the national enforcer; the case was turned down by the court because there were no specific remedies protecting consumers against such practices.

http://www.forbrukerradet.no/forside/pressemeldinger/playstation-3-violates-the-norwegian-marketing-control-actt

Another case of unfair terms relate to restrictions in the portability and use of eBooks. For example, a study[12] carried out by our Norwegian member showed that Amazon reserves the right to delete all the purchased e-books from the consumer's account if the consumer terminates the contract with Amazon.

Finally, we included other typical unfair clauses in digital services in our contribution to the European commission's expert Group on cloud computing contracts:

http://www.beuc.eu/publications/beuc-x-2014-034_are_ec_expert_group_on_cloud_computing_contracts.pdf

Quality of the digital content products

12. Should the quality of digital content products be ensured by:

- ☐ Subjective criteria (criteria only set by the contract)
- ☐ Objective criteria (criteria set by law)
- ☑ A mixture of both

Please explain your choice(s).

BEUC considers that the criteria of the current conformity test under the Sales Directive could be applied to contracts for the supply of digital content. A mixture of objective and subjective criteria seem to be appropriate as it will provide sufficient flexibility as regard future forms of supplying digital content.

One key issue debated in the UK during the adoption of the Consumer Rights Act was around consumer expectations as a conformity criterion. For example, it was argued that digital content was unlike tangible goods so, for example, a consumer might expect a good such as a fridge to be free from any defects, even minor ones, but this it was not necessarily the case for digital content. This is not entirely true as the consumer may expect a higher level of performance from a software downloaded in exchange of a payment than a beta version for free. Thus, we consider that the consumer's legitimate expectations should be maintained as a criterion.

13. When users complain about defective products, should:

- ☐ Users have to provide evidence that the digital content products are defective
- ☑ Traders have to provide evidence that the digital content products are not defective if they consider the complaint to be unfounded

Please explain your choice(s).

It is extremely difficult for a consumer to prove the cause of the defect of a digital content product therefore it would be more appropriate that the burden of proof lies on the supplier.

[12] The final version of the study is not public at the time of writing this contribution.

Remedies for defective digital content products

14. What are the key remedies that users should benefit from in case of defective digital content products (tick as many as apply)?

- ☑ Resolving the problem with the digital content product so that it meets the quality promised in the contract
- ☑ Price reduction
- ☑ Termination of the contract (including reimbursement)
- ☐ Damages
- ☐ Other (please specify)

Please explain your choice(s).

BEUC considers that the remedies applicable to tangible good should be made applicable as far as possible to digital content products. This includes bringing the digital content into conformity (e.g. repair or replacement), price reduction and reimbursement. Thus, we agree with the list of remedies proposed by the European Commission.

In relation to damages, as this issue is covered by national contract laws, it would be necessary to see how the European rules would interplay with the national regimes. In this sense there is a higher risk of potential conflict between national regimes and the European laws if the new instrument would be a regulation.

Thus, BEUC advocates to continu with the legislative technique used in the consumer law acquis, namely harmonisation through directives, as this would give member states the necessary flexibility to adapt the new rules to their legal systems.

The inclusion of rules on damages must also guarantee a high level of protection and ensure that they will address specificities of digital content products that are not covered or are unlikely to be covered by national laws on damages. For example, BEUC would favour a provision on damages where defective digital content causes secondary damages to other goods (e.g. hardware) or digital content (e.g. software).
However, these rules should not prevent consumers from seeking compensation based on national rules on damages that would not be harmonised by the new instrument.

15. Should users have the same remedies for digital content products provided for counter-performance other than money (for example, the provision of personal data)? Please explain.

Yes, after termination of the contract the supplier should refrain from continuing processing the consumer's personal data. This solution was also proposed by the European Parliament in its first reading resolution on the Common European Sales Law proposal:

3. Where digital content is supplied in exchange for a counter-performance other than the payment of a price, such as the provision of personal data, and that counter-performance cannot be returned, the recipient of the counter-performance shall

refrain from further use of what was received, for instance by deleting received personal data. The consumer shall be informed of the deletion of personal data. (Amendment 232)

BEUC supports a similar rule for the forthcoming modified proposal.

Otherwise, including in a pre-termination scenario, there is no reason to limit the remedies available for counter-performance other than money. Counter-performance measures such as the provision of personal data provide significant value to the trader. Once it is acknowledged that such counter-performance is sufficient to create a binding contract, there is no sound reason to limit consumers' remedies when that contract is not properly performed by the trader.

16. Should users be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after they have acquired the digital content products or discovered that the digital content products were defective? Please explain.

An infinite period of time could be appropriate in some countries where this is a familiar concept in consumer law, for example in the Netherlands and Finland. However, for the sake of legal certainty and taking into account the legal diversity across the EU, BEUC would favour the application of a specific time period.

17. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which users have to exercise the remedies? Please explain.

In order to be consistent with the guarantee rights for tangible products, BEUC favours a single time period also for digital content.

18. Which time limit(s) do you think is (are) appropriate? Please explain.

In principle BEUC considers that digital content products should be subject to the application of the same limitation periods as tangible goods.

There is no evidence demonstrating why a shorter period is appropriate or necessary. Having the same time limit for seeking redress as is available for tangible goods does not mean that the digital products are expected to last as long as goods. The question of how long products should last must not be conflated with the question of how long consumers should have to seek redress.

19. If there is a right to damages, under which conditions should this remedy be granted? For example, should liability be based on the trader's fault or be strict (irrespective of the existence of a fault)?

If the European Commission decides to include damages into the scope of the proposal, BEUC would favour a case of strict liability. This is because for the consumer it is often very difficult to prove the existence of fault.

20. Should it be possible for damages to mainly consist of 'service credits' (extra credits for future service)? Please explain.

Compensation in the form of service credits is not always the most appropriate solution. Particularly, if the consumer does not want to continue with that specific supplier, service credits are nothing than future performance of a service that is not at the consumer's expectations.

Additional rights

21. Should users be able to terminate long term contracts (subscription contracts) for digital content products?

- ☑ Yes
- ☐ No

22. If you reply yes to question 21, please specify under which conditions and following which modalities should users be able to terminate the contract (tick as many as may apply):

- ☑ Termination should be expressed in advance
- ☑ Termination should be made by notice
- ☑ Users are provided with means to retrieve its data
- ☑ The trader may not further use the users' data
- ☐ Other (please specify)

Please explain your choice(s).

Consumers should be able to terminate long-term contracts with a prior notice to the supplier. However, this notice should not be subject to formal requirements and be made by any means that can prove the consumers intention to terminate the contractual relationship e.g. by email, letter, pre-form on the suppliers website.
In relation to the possibility for consumers to retrieve its personal data, BEUC considers that this is could be an important right for consumers that want to change providers or simply store the data somewhere else (hardware, cloud computing facility, etc.). However, it is necessary to highlight that these data must be "returned" to the consumer in a usable format. Failure to do so creates a barrier to switching and limits competition.

Additionally, we agree that after termination the trader should not be allowed to continue the further processing of the consumer's data and, it should also ask the consumer whether he wants his data permanently deleted.

23. In case of termination of the contract, should users be able to recover the content that they generated and that is stored with the trader in order to transfer it to another trader?

- ☑ Yes
- ☐ No

Please explain your choice.

A problem for the switching services, particularly social networks, is the lack of interoperability between the different platforms. Although this could be solved by industry standards, the possibility for the consumer to obtain his data back in a commonly usable format, would allow him to re-use these data in other platforms irrespective of whether there is automatic portability of data or not.

24. If you reply yes to question 23, please indicate under which conditions (tick as many as may apply):

- ☑ Free of charge
- ☑ In a reasonable time
- ☑ Without any significant inconvenience
- ☑ In a commonly used format
- ☐ Other (please specify)

Please explain your choice(s).

What is a "commonly used format" would have to be defined at a later stage, either via interpretative guidelines or through comitology.

25. Upon termination, what actions should the trader be entitled to take in order to prevent the further use of the digital content?

- ☑ Disable the user account
- ☐ Employ technical protection measures in order to block the use of the digital content products
- ☑ Other (please specify)

Please explain your choice(s).

When it comes to subscription contracts the most effective action is to disable the consumers account, however, some concerns arise in relation to permanently downloaded content. In this case, the supplier can control the further use of the content via technical Protection Measures. This is already a common practice in eLending of audio-visual products or eBooks.

Having said that, it is important to stress that the use of TPMs should not interfere with the normal use of the digital content by restricting for example the interoperability with other devices and software e.g. operation systems.

26. Should the trader be able to modify digital content products features which have an impact on the quality or conditions of use of the digital content products?

- ☑ Yes
- ☐ No

Please explain your choice.

Provided that the change in the service is at the consumers' benefit and does not imply a reduction in the level of quality agreed by the consumer at the time of the conclusion of the contract.

27. If you reply yes to question 26, under which conditions should the trader modify digital content products features which have an impact on the quality or conditions of use of the digital content products:

- ☑ The contract foresees this possibility
- ☑ The consumer is notified in advance
- ☑ The consumer is allowed by law to terminate the contract free of charge
- ☐ Other (please specify)

Please explain your choice(s).

As far as possible the contract should foresee in which cases the contract would be to need modified. However, do to the constant evolution of technologies it could not be possible to include all factors that could justified a contractual modification? Therefore, we would rather favour a list of clauses that could be modified provided that a) the consumer is informed in advanced and, b) he or she is allowed to terminate the contract free of charge.

This could include changes in:

- The performance of the service, including the way the data is collected and process;
- duration of the parties obligations;
- additional obligations for the consumer not foreseen in the initial contract and,
- price.

28. Which information should the notification of modification include? Please explain.

It should include:

- The relevant modification and the consequence impact in the execution of the contract.
- The right to terminate the contract and the notice period.
- The means to notify the supplier about the termination.
- Date of entering into effects of a) the new clauses or b) termination

- In case of termination, the applicable rights e.g. restitution of the consumer's personal data and confirmation that the supplier will stop processing the collected data.

Part 2 – Online sale of tangible goods

Context

In 2014, 50% of EU consumers shopped online, rising from 30% in 2007. With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU-28. The Commission's Digital Single Market Strategy has highlighted that this economic potential should be further unleashed by removing barriers.

If traders decide not to sell outside their domestic market, this may limit consumer choice and prevent lower prices by lack of competition. Today, traders may be deterred from doing this by differences in contract law which may create costs for traders who adapt their contracts or increase the legal risk for those who do not. For example, depending on the Member State, consumers may have two years, five years, or the entire lifespan of the purchased product to claim their rights. In business-to-business transactions, where no specific EU rules exist, negotiation on the applicable law may also create costs.

Legal background at EU level

As for digital content products, certain aspects of contract law have already been fully harmonised for online purchase of tangible goods by consumers. In particular, the Consumer Rights Directive has fully harmonised the information that should be provided to consumers before they enter into a contract and the right to withdraw from the contract if they have second thoughts. The Unfair Contract Terms Directive provides rules against unfair contract standard terms for consumer contracts. In addition, contrary to digital content products, remedies in case of defective tangible goods are also regulated at EU level in business-to-consumers transactions (under the Consumer Sales and Guarantees Directive). Nevertheless, this harmonisation only sets minimum standards: Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility – on different points and to a different extent.

Section 1 – Problems

29. In general, do you agree with the analysis of the situation made in the "Context"? Please explain.

BEUC only partially agrees with the analysis. It must be stressed that under the Rome I Regulation, parties can freely designate the applicable law to the contract. This also holds true for B2C-relationships: the Regulation allows professionals to contract under their own law, which is why standardised contract terms regularly contain choice of law-clauses. The legal framework of the Rome I Regulation has merely established a weak safety net for cases where the *lex contractus* chosen provides for less protection than the mandatory consumer law of the country where the consumer has his habitual residence and where the professional pursues or directs its activities to that country and the contract falls within the scope of such activities.

It is also not clear that contract law differences are a key barrier to cross border trade for business. The risk of fraud is a common concern, while the compliance costs with different tax regimes, advertising regimes, court processes (e.g. costs of litigation when enforcing court judgments) and local language requirements will often be more significant. Accordingly, when assessing the barriers to cross border trade it is important to distinguish between contract law costs, other legal costs and the general cost of doing business so that a proportionate regulatory response can be identified.

Second, the analysis of the situation is somewhat one-sided as it only focuses on transactions costs of businesses while ignoring the problem that consumers are reluctant to shop online because they lack confidence in the online marketplace. While businesses may operate their product- and financing strategy under various laws, consumers face substantial difficulties when leaving their familiar legal system due to their economic inferiority. When it comes to internet shopping, consumers are even more 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?"). Furthermore, 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. (BEUC reflection paper on E-commerce, Ref.: X/030/2010 - 06/05/10). The purpose of the initiative, to improve the conditions for the functioning of the internal market, will therefore not be achieved unless the consumers' needs are adequately addressed.

Third, the analysis fails to address the issue whether the establishment of an additional set of contractual rules for online-purchases of tangible goods is appropriate to address the asserted problem of fragmentation and compliance costs. In fact, the creation of a second legal guarantee scheme for online purchases only would lead to more fragmentation, less legal certainty, and the 'second class' protection of consumers buying in the 'physical' world. We are therefore sceptical about the introduction of specific rules for distance selling since this will be confusing for consumers.

If, however, the Commission decides to create a specific harmonising instrument, the support of which will depend on 1) the range of matters covered by the scope of application, and 2) the level of consumer protection. Full harmonisation can only be supported when the level of consumer protection is truly high, existing consumer protections across Member States are not watered-down, and the issue at stake necessitates such an approach. However, in view of the potential problems to find fully harmonising legislative solutions which satisfy all EU consumers' expectations, we remain sceptical about the announcement of new rules for the online purchase of tangible goods.

30. Do you think that users should have uniform rights across the EU when buying tangible goods online? Please explain why by giving concrete examples.

First and foremost, consumers should benefit from a high level of protection by consumer law when engaging in cross-border transactions. The support of full harmonisation will, again, depend on whether the level of consumer protection is truly high and whether the issue at stake necessitates such an approach.

31. Do online traders adapt their contract to the law of each Member State in which they want to sell? If yes, do they face difficulties/costs to do so? Please explain.

According to the Eurobarometer Report on European contract law in consumer transactions of 2011, only 7 % of businesses consider the "need to adapt and comply with different consumer protection rules" as having a large impact on their decision to sell cross-border to consumers. The flash Eurobarometer Report 300 shows that 80 % of the traders believe that harmonised contract law in the EU would make "little or no difference to their cross-border trade". Notably, these figures refer to a time before the provisions of the Directive 2011/83/EU of consumer rights had become operational. The Directive has, inter alia, fully harmonised certain core rules for distance and off-premises contracts with the aim of reducing compliant costs for businesses. It can therefore be assumed that the above mentioned numbers are even lower now. Furthermore, BEUC believes that, in order to assess the repercussions of the difficulties for online traders to sell cross borders, the results of the not-yet submitted EC report on the application of the Rome I Regulation, in particular as regards the application of Article 6, shall be taken into account.

32. Do you think that any such difficulties and costs dissuade traders from engaging at all or to a greater extent in cross-border e-commerce? Please explain.

See answer to question 29 and 31.

Section 2 - Need for an initiative on contract rules for online sales of tangible goods at EU level

33. The European Commission has explained in the Digital Single Market Strategy that it sees a need to act at EU level. Do you agree? Please explain.

BEUC sees a need to act at EU level in the field of digital content products (see Part I, answer to question 5). When it comes to tangible goods, BEUC recognises that legal harmonisation is a regulatory tool for B2C contract law which may improve cross-border e-commerce since it has the potential to boost clarity for both consumers and traders. However, the creation of diverging rules for online and offline transaction in the field of legal remedies and unfair commercial terms are problematic. There is a risk of exacerbating consumer and business confusion over the applicable rights in any given set of circumstances leading to the risk of unnecessary disputes. There is also the potential impact on competition between online and offline retailers to consider.

If the Commission nevertheless decides to create uniform rules, they can only be justified when they institute a truly high level of consumer protection (see answers to questions 1 and 2).

34. The European Commission announced in the Digital Single Market Strategy that it will make a proposal allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods which would be harmonised in the EU. Other approaches include, for example, the development of a voluntary stakeholders' model contract that consumers and businesses could use for their cross-border e-commerce transactions. What is your view on the approach suggested in the Digital Single Market Strategy?

BEUC strongly opposes the proposal of creating a rule allowing traders to rely on their national laws. Certainly, the gravity of the potential creation of such a rule would depend on the scope of application of the future instrument, however, the Commission must take into account that the "trader's home option" would have serious repercussions on the current regime of conflict of laws rules, in particular the Rome I Regulation. Under its current regime, the law of the country where consumers are domiciled will apply by default and consumers can, as a general rule, not be deprived of the level of protection afforded to them by the mandatory rules of their home country, in case the professional pursues or directs its activities to the country where the consumer has his habitual residence and the contract falls within the scope of such activities. Article 6 is therefore regarded as an important safeguard for consumer rights which should not be undermined by a future instrument (see also answer to question 1).

In this respect, it shall also be noted that under the current regime of private international law, the court of the country where the consumer is domiciled will regularly apply the *lex fori.* Any rule that obliges courts to always apply foreign law would lead to serious disadvantages for consumers, who would have to rely on foreign law if they were to make a claim in the courts of their country. Consumers could very hardly estimate their chances when litigating and thus would more than now be precluded from access to courts. Consumers would also need to adduce expert evidence of the foreign law, which is likely to generate disproportionate cost, discourage ADR contrary to the aims of Directive 2013/11/EU (on consumer ADR), and render existing consumer rights ineffective because they cannot be enforced in practice.

For a long time, BEUC has asked for a European Model Contract (EMC) that does not displace national law but should make it practically redundant for most imaginable consumer disputes. Crucial to the practical effectiveness of the rules is the link to a process of Online Dispute Resolution (ODR). The EMC concentrates on the rule for forming contracts and dealing with delivery and quality of goods as well as payment. The proposal is limited to sale of goods contracts. This is seen as the sector most likely voluntarily to adopt this proposal. Its advantages will include the fact it is voluntarily adopted by business and supported by consumer organisations, involves no issues of legal competence or private international law, promotes ADR and can be adopted quickly (BEUC, A European Model Contract for E-Commerce Businesses to Consumer Sales, X/2012/023 - 12/04/2012). In view of the possible consolidation of the rules on off- and online contracts due to the REFIT of the Directive 1999/44/EC, BEUC considers that the EMC could, in the meantime, serve as a useful option. The Commission is silent on the question how to link the initiatives on online and offline contracts.

To a voluntary model contract for digital content products, see under Part I, answer to question 6.

Section 3 – Content of the initiative

35. Do you see a need to act for business-to-consumers transactions only or should the EU also act for business-to-business transactions? Please explain.

BEUC does not support the inclusion of B2B contracts in a future instrument. In light of the different characteristics of B2C and B2B contracts and taking into account possible frictions between a comprehensive legal instrument and already existing legal instruments, such as the Vienna Convention (CISG), a B2C-only approach promotes the need of simplicity and predictability.

With respect to SMEs, it must be noted that they face different problems when going cross-border than consumers and can therefore not be treated as such. However, many Member States have chosen to apply consumer protection rules to other persons or entities such as NGOs, start-up businesses or small enterprises due to their similar position as consumers in terms of lack of bargaining power and expertise. A full harmonisation-approach should take into account those protective rules.

36. What specific aspects in business-to-business transactions, if any, should be tackled? Please explain.

BEUC will not address this question (see answer to question 7).

37. Among the areas of contract law below, which ones do you think create problems related to national divergences which should be covered by an initiative (tick as many as apply)?

- ☑ Quality of the tangible goods
- ☑ Remedies and damages for defective tangible goods
- ☑ How to exercise these remedies, like who has to prove that the product was, or was not, defective (burden of proof) or time limits for exercising these remedies
- ☐ Restitution of price and tangible goods in case of termination of the contract
- ☐ Unfair standard contract terms beyond the existing protection
- ☐ Other (please specify)

Please explain your choice(s).

We do not subscribe to the view that national divergences necessarily create 'problems' which should be covered by an initiative. BEUC recognises, however, that differences between national contract laws bear a certain potential for harmonisation and coordination of national laws. This is in particular the case when differences in national laws are detrimental to consumer protection. We consider that at this stage, a future instrument could cover the area of "remedies for defective tangible goods" but are more sceptical regarding the area of damages (except for a reference to national laws) because of the different existing national concepts of damages and approaches to right to damages.

Quality

38. Which should be the criteria for establishing the quality of the tangible goods? Should there be any additional/different criteria in addition to those already provided by Article 2[13] of the Consumer Sales and Guarantees Directive? Please explain.

[13] Article 2 (Conformity with the contract).

Since the seller is directly liable to the consumer for the conformity of the goods with the contract, a clear and common definition of conformity (or non-conformity) is crucial for consumer protection. BEUC considers the current definition in the 1999/44 sales directive as good but it should be assessed whether the current criteria for conformity or the presumptions of conformity are sufficient. In the UK[14] for example, the criteria "freedom from minor defects", "appearance and finish" and "safety" are expressly mentioned in the national law and these should be covered by an EU instrument as well. In any case and in line with the European Commission's Circular Economy agenda, the criterion of 'durability' should be expressly added to the current definition in the 1999/44 directive. We refer, for example, to the standards for vacuum cleaners, which - according to new measures implementing the eco-design legal framework - will soon require a durability of 500 hours of use or about 8 years average durability. Currently, under the Directive 1999/44 there is a legal presumption that the goods are in conformity with the contract if they, inter alia, show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods. Notably, the inclusion of a durability criterion would not lead to a minimum durability guarantee or undermine the normal use rule. It would concretise the reasonable expectation of consumers and contribute to the function of the conformity test to serve as a regulatory instrument to increase lifetimes and durability of products. This must also be seen under the aspects of the EU's objective for a green, circular economy as well as for achieving sustainable consumption and production.

Furthermore, it would be a missed opportunity to not take into account, and to put forward to stakeholders, the results of the envisaged REFIT exercise on the Directive 1999/44/EC as announced in the Commission Work Programme 2015.

39. How long should the period be during which the trader is required to prove that the tangible goods were not defective at the moment of delivery? Please explain.

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1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
2. Consumer goods are presumed to be in conformity with the contract if they:
(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
(c) are fit for the purposes for which goods of the same type are normally used;
(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.
3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:
- shows that he was not, and could not reasonably have been, aware of the statement in question,
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

[14] The United Kingdom has included the following criteria as elements of quality of goods under the Consumer Rights Act 2015: 'fitness for all the purposes for which goods of the kind in question are commonly supplied', 'appearance and finish', 'freedom from minor defects', 'safety', and 'durability'.

Burden of proof is a key issue for an effective enforcement of consumer rights. An obligation to prove the defect could prevent consumers from seeking the remedies they are entitled to. However, the current EU regime only provides for a minimum legal guarantee period of two years combined with a six-month period for the reversal of the burden of proof for the defect.

This means that only within the first six months after purchase it is presumed that the product was faulty from the start; afterwards the consumer who would have to prove that the defect was already inherent in the product when he bought it, which is most of the time not possible without an expert investigation due to the complexity of current products and the high costs implied in technical expertise to assess the defect. The reversal of the burden of proof-period is the key for improving the enforceability of guarantee rights. BEUC therefore defends a period for the reversal of the burden of proof that is not shorter than two years to ensure that within that period consumers can effectively exercise their guarantee rights without unnecessary burdens. The length of this period should not depend on the product category.

Importantly two Member States already stipulate a reversal of the burden of proof of two years. Any harmonisation should live up to this standard, which is of fundamental importance for consumers and the practical value of the guarantee rights. In this respect, BEUC calls for an assessment of the importance of the reversal of the burden of proof-period within the Regulatory Fitness and Performance Programme (REFIT). The Commission itself has already launched a Consumer Market Study on the functioning of legal and commercial guarantees for consumers in the European Union which was supposed to serve as "a benchmark for the requirements set out in the Sales and Guarantees Directive and in the corresponding national legislation" and which was supposed to feed into the REFIT exercise. It would be a missed opportunity to not take into account, and to put forward to stakeholders, the results of this study.

Remedies[15]

40. Which contractual rights should the buyer have in case of a defective good (tick as many as apply)?

- ☑ **Repair or replacement of the good**
- ☑ **Price reduction**
- ☑ **Termination of the contract (including reimbursement)**
- ☑ **Damages**
- ☑ **Right to withhold the payment of the price until the defect is remedied**
- ☐ Other (please specify): **Self-repair**

Please explain your choice(s).

We consider that at this stage, a future instrument should not cover the area of damages (except for a reference to national laws) because of the different existing national concepts of damages and approaches to right to damages.

[15] Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.

41. Should the buyer have a free choice of remedies or should there be a hierarchy of remedies (namely the trader is first given the option to repair the good)? Please explain.

BEUC suggests to abstain from a hierarchy but to allow for a free choice of remedies instead. If the good is not in conformity with the contract, the consumer should always have the possibility to choose between different remedies available. The consumer should be entitled to require the trader to repair the goods, to replace them, to have the price reduced, or, if not a minor defect, the contract rescinded. A future instrument should recognise the right of consumers to switch between remedies. Furthermore, if the consumer chooses the remedy and the same or another defect has appeared after the good was first repaired or replaced, the consumer may resort to other remedies.

Several countries do not have a hierarchy of remedies and we have never heard from the business in these countries that this is not manageable. Discretion of a judge to reduce a refund in specific circumstances could be taken into account. However this should not amount to a general right of the trader to require payment for use.

In case that the Commission maintains the current hierarchy of remedies, a full harmonisation approach must be rejected because this would lead to a significant reduction of choice and thus protection in several Member States which provide for rules which are more beneficial for consumers.

BEUC is opposed to the introduction of the general principle of a debtor's right to cure.

Time limits to exercise remedies[16]

42. Should the buyer be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after the buyer has bought the good or discovered that the good was defective? Please explain.

For the sake of legal certainty and taking into account the legal diversity across the EU, BEUC would favour the application of a specific time period. Yet, an infinite period of time would be appropriate in some countries where this is a familiar concept in consumer law, for example in the Netherlands and Finland. For these countries, BEUC favours the inclusion of a saving clause which allows them to maintain their rules for the guarantee period so as to ensure that their national laws are not precluded and consequently consumer do not suffer from new EU rules.

43. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which the buyer has to exercise the remedies? Please explain.

There are a number of countries that provide for a prescription period longer than the legal guarantee period within which a consumer can bring an action against a trader for

[16] *Idem.*

the lack of conformity. A future instrument should leave such national rules untouched – not least so that consumers and businesses in those Member States do not encounter conflicting regimes for online purchases of tangible goods and other purchases - hence only harmonising the legal guarantee period, which should not be shorter than six years.

44. Which time limit(s) you think is (are) appropriate? Please explain.

BEUC defends a legal guarantee period not shorter than six years. In several countries, the guarantee period is longer that the minimum of two years, ranging from three to five to six years or is designed as a non-absolute period based on the expected lifetime, which is much more adequate and fair concept for goods, in particular of course for durable goods. A full harmonisation of a legal guarantee period shorter than six years must be rejected because this would lead to a significant reduction of protection in those countries.

In addition, BEUC defends a period for the reversal of the burden of proof that is not shorter than two years to ensure that within that period consumers can effectively exercise their guarantee rights without unnecessary burdens.

Finally, it is important that if the Commission opts for the harmonisation of the legal guarantee period or prescription period, any future initiative shall include rules of suspension of these periods, for example in the cases where parties negotiate, of judicial and mediation/arbitration proceedings, or during repair/replacement.

45. Should the time limit(s) be shorter in case of second-hand tangible goods?

There should be no shorter time limit for second-hand tangible goods. In general, there is no need to introduce an exception for second-hand goods in relation to legal guarantees. Save for the remedy of replacement, where the second-hand good is not in conformity with the contract, the consumer should also have the possibility to choose between the different remedies available.

Damages[17]

46. If there is a right to damages, under which conditions should this remedy be granted? Should liability be based on the trader's fault or be strict (namely, irrespective of the existence of a fault)?

We are at this stage, sceptical regarding the area of damages (except for a reference to national laws) because of the different existing national concepts of damages and approaches to right to damages.

[17] *Idem.*

Notification[18]

47. Should the buyer be obliged to notify the defect within a certain period of time after discovery? If so, should the period start from the moment the buyer is aware of the defect or, rather, from when he could be expected to have discovered the defect? How long should the period be? Please explain.

For B2C contracts, an obligation to notify should be rejected as being burdensome and unsubstantiated. As consumers would often be unaware of such a legal requirement, it would be unjustified and disproportionate to deprive consumers of remedies for the reason of non-compliance with a notification obligation. Sanctions linked to the omission of notification must in any case be avoided. Currently about half of the Member States do not stipulate a duty to notify and we are not aware of any problems for traders resulting from a lack of this duty. Consumers are always interested to notify as early as possible.

Commercial guarantees

48. Commercial guarantees are voluntary commitments by the trader to repair, replace or service tangible goods beyond their obligations under the law. Do you think uniform rules on the content and form of commercial guarantees are needed? Please explain.

The overlap of commercial and legal guarantees is an increasing concern since consumers can often not easily make the distinction between a commercial guarantee, generally offered by the manufacturer, and the legal guarantee rights which they have in all cases and free of charge.

Often consumers are informed that no legal guarantee exists or traders give consumers the impression that only the commercial warranty applies to their purchase (ECC-net summary report: Legal guarantees and commercial warranties on consumer goods in the EU, Iceland and Norway).

It is important to have a clear definition of the concept of commercial guarantees that takes into account the existing types of commercial guarantees, for example integral guarantees and paid-for guarantees. BEUC understands that under the definition as provided by Article 2(14) of the Consumer Rights Directive, both categories are comprised.

Most importantly, consumer should be informed about their rights under both legal and commercial guarantees and be informed about the added value of the commercial guarantee. Under the Consumer Rights Directive, the traders is only obliged to inform about "about the existence and conditions" of commercial guarantees.

49. Could these requirements on the content and form of commercial guarantees be modified contractually or should they be mandatory rules? Please explain.

BEUC advocates for mandatory rules which guarantee a high standard for consumers.

[18] *Idem.*

Unfair terms

50. Should there be a list with contract terms which are always to be regarded as unfair? If yes, which terms should always be regarded as unfair? Please explain.

51. Should there be a list of standard contract terms which are presumed to be unfair? If so which terms should be on such a list? In particular, how to treat advance payment which is very frequent in the online world? Please explain.

Ad questions 22 and 23: BEUC is not in favour of including unfair commercial terms into the new legislative measure. BEUC therefore also opposes the introduction of black and grey lists for unfair terms. This would lead to consumer confusion, as some contract terms would be indicated as unfair in the context of an online purchase of tangible goods but not in the context of other consumer contracts.

However, if an introduction of lists of clauses would be considered, an indicative non-exhaustive list of terms always to be regarded as unfair and an indicative non-exhaustive list of terms which are presumed to be unfair would be the only options in our opinion. BEUC rejects a full harmonisation approach for unfair contract terms. For this purpose, the European Commission should take into account and put forward to stakeholders the envisaged REFIT exercise on the directive 1993/13. In this respect, attention should also be drawn to the Parliament's first reading position on a Common European Sales law, in which the European Parliament proposes additional terms to be always considered as unfair (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

ANNEX

This Annex to the consultation contains questions on product-related rules such as labelling. These questions are not linked to the Commission future proposal announced in the Digital Single Market Strategy on contract rules for online purchases of digital content and tangible goods and provisions on labelling will not be included in that initiative. However, since the issue of product-related rules such as labelling is also mentioned in the Digital Single Market Strategy in relation to cross-border e-commerce aspects, this annex has been attached to the consultation.

Context

In a Digital Single Market, both consumers and traders should be confident in trading cross-border without barriers that may be created by differences between national rules. The EU's Digital Single Market Strategy identified several obstacles stopping businesses and consumers from fully enjoying the benefits of the Digital Single Market and highlighted the objective of *"ensuring that traders in the internal market are not deterred from cross-border trading by (…) differences arising from product specific rules such as labelling"*.

Different technical specifications or rules on labelling and selling arrangements may apply in specific areas and, depending on where in the EU the consumer is located, national product-related rules may require the trader to adapt their products and packaging accordingly. Although the mutual recognition principle applies, Member States may justify such rules by a public-interest objective taking precedence over the free movement of goods, such as on health and safety grounds. National measures which hinder the free movement of goods have to be justified and have to be necessary to effectively protect the public interest invoked. However, even for product categories for which harmonised rules apply, Members States can - under certain conditions and in accordance with a legally established procedure - introduce certain additional mandatory labelling requirements at national level.

This situation means that online suppliers of goods and services who wish to serve a pan-European market may potentially need to know about, and comply with, 28 differing sets of national regulations. Finding out which regulation applies in which case may be difficult. 37% of firms in the EU that have experience with selling online to other Member States stated that lack of knowledge of the rules that have to be followed is a barrier to selling online cross-border. Moreover, 63% of firms that have no experience with selling online cross-border stated that they believe that lack of awareness of which rules have to be followed may constitute a barrier[19]. This shows that the perceived barriers are significantly higher than the real barriers and that there is space for better communication and transparency. This situation creates information and compliance costs for online traders, especially for small and medium-sized enterprises, and in particular when the value of the transaction remains low.

[19] European Commission, Flash Eurobarometer 413, 2015.

Section 1 – Problem

1. In general, do you agree with the description of the situation made in the "Context"? Please explain.

As to the free movement of goods, BEUC rejects the subtext of the analysis that public-interest objectives or consumer protection are barriers which could be abolished by a future legislative instrument. Overriding mandatory rules under primary Union law which allow Member States to derogate from the principle of mutual recognition relate to key non-economic general interests, such as public morality or public security or the protection of the health and life of a human, the protection of which is an inherent feature of EU law and prevails over the free market integration.

2. Do you consider that certain national product-related rules should oblige traders to alter their product/product information when they sell their legally marketed products to consumers in other Member States?

Yes.

3. If you answered yes to the previous question, please explain which products and on which grounds.

Specific questions for traders

4. Do you have information about all the national product-related rules in the Member States?:

a) To which you sell on-line?
b) To which you do not sell into but where there would be a market for your products?

5. If you answered yes to the previous question, please explain:

a) How did you obtain this information and at what cost?
b) How did you address the need to comply with Member State-specific requirements?

The explanation is already given in our response to question 1.

The European Court of Justice has developed clear case law on justified restrictions on the principle of free circulation of goods.

Additionally it is difficult to discuss about alleged Internal Market obstacles due to consumer information / labelling without having a more detailed and concrete problem description. BEUC would ask the European Commission to provide firstly a mapping of the different national labelling requirements that are suggested to create problems for traders.

We furthermore would like to underline that the European Commission's problem description is unbalanced. It only looks through the lens of traders and their interest in easy product marketing without even mentioning that justified national rules can protect and inform consumers better, thus serve the public interest (for example in the field of information or restrictions to the use of chemicals in consumer goods, information about food, information or warnings about health implications etc.).

Specific questions for consumers

6. Would you consider buying the following products from another Member State, provided you are fully informed?*:*

	in a physical shop in the other MS	on-line
- a product labelled according to the rules of that EU Member State	Yes / No	Yes / No
- a product packaged according to the rules of that EU Member State	Yes / No	Yes / No
- a product made according to product specifications of that EU Member State	Yes / No	Yes / No

We cannot answer these questions as they are directed to individual consumers and we did not undertake a consumer survey. We however would question the value of any answers given to these questions as the methodology is biased and the text is not clear.

If consumers were "fully informed" as the questions suggests, this would mean that consumers know about the differences between the labelling in their own country, to which they are used to and of which they understand the language and the labelling in the country they buy from. In addition it seems to suggest that in all cases when consumers buy they would understand the language of the labelling which may not be the case for example if they buy in a physical shop in another country. This is an entirely unrealistic scenario.

Furthermore, the question whether the consumer would buy a product labelled according to the rules of another country is not relevant in the context of evaluating the justification of labelling rules, simply because public interest objectives may have led a countries legislator to stipulate certain labelling rules of which the consumer is not aware.

Section 2 – Need for an initiative on product-related rules such as labelling

7. In the Digital Single Market Strategy, the European Commission pointed to product-related rules, such as labelling, as a possible obstacle to cross-border e-commerce. Do you agree? Please explain.

No. see above.

Section 3 – Content of a possible initiative

8. Should an action at EU level for product-related rules affecting cross-border on-line sale of tangible goods cover:

a) Difficulties related to different product specifications at national level

Yes / No

b) Difficulties related to different packaging rules at national level

Yes / No

c) Difficulties related to different labelling rules at national level

Yes / No

d) Other issues, if so, please explain

We cannot answer to this question because as said, first of all a much clearer problem definition would be needed. Finally we would like to add that the digital single market is only one form of the single market and that diverging rules for digital purchases should be avoided where not specially required and justified by the selling method.

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