

PUBLIC CONSULTATION ON THE
FUTURE OF ELECTRONIC COMMERCE
IN THE INTERNAL MARKET AND
THE IMPLEMENTATION OF THE
DIRECTIVE ON ELECTRONIC
COMMERCE (2000/31/EC)

BEUC Response

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Summary

BEUC strongly believes that the e-commerce Directive has enabled the emergence of new information society services and has achieved a fair balance between the interests of all parties involved. **BEUC is opposed to any revision of the e-commerce Directive and calls instead for a clarification of some of its provisions with the aim of enhancing legal certainty.**

In order for e-commerce to reach its potential growth, the EU needs to demonstrate strong political leadership and undertake concrete actions to respond to unsolved and emerging issues which will help to boost consumers' trust and confidence. BEUC has identified an array of problems which face consumers when they purchase products online. These include:

- Lack of consumer information about their rights and the conditions for exercising them;
- Unfair Commercial Practices in online marketplaces;
- The exclusion of digital products from the scope of consumer protection legislation;
- Online payments;
- Delivery;
- Reimbursement;
- Reliability of online sellers;
- Data protection and privacy online;
- Lack of efficient mechanisms for consumer redress.

The EU need to remove barriers to the establishment of the Digital Single Market and competition, consumer choice and the respect of the non-discrimination principle. The achievement of these objectives are crucial components of the digital dimension of Europe's 2020 Strategy, which requires **well functioning and inter-connected markets, where consumer access and consumer welfare stimulate growth and innovation.**

As regards the specific questions raised in the consultation, BEUC takes the view that:

- the exception to the internal market clause regarding consumer contracts should be maintained;
- the fragmentation of the online content market along national borders is a major barrier to the establishment of the Digital Single Market and needs to be addressed;
- the rules on unsolicited commercial communications should be technology neutral and apply to all communication technologies;
- the provisions on ISPs liability provides for a balanced framework which clarifies the obligations of service providers, while protecting the interests of potentially aggrieved parties and should therefore be maintained;
- Web 2.0 services should be included in the scope of the liability provisions of the e-commerce Directive;
- the application of technical measures, including filtering, in order to fight against IPR infringements should be rejected;
- instead of focusing on the adoption of unfair and disproportionate enforcement measures, the European Union should adopt a coherent and forward looking copyright agenda;
- fOnline Dispute Resolution (ODRs) mechanisms must comply with the principles embodied in the existing EC Recommendations for Alternative Dispute Resolution.

The European Consumers' Organisation (BEUC) welcomes the launch of the public consultation on electronic commerce and the implementation of the e-commerce Directive with the aim of identifying the remaining obstacles to the take-up of e-commerce in Europe.

However, BEUC considers the online questionnaire as an inappropriate way of consulting with stakeholders. First the European Commission has limited the number of questions accessible to consumer associations. It is not acceptable that consumer associations are not allowed to provide their views on part 5 of the online questionnaire which deals with the liability of internet intermediaries. The provisions of the e-commerce Directive on intermediaries are of paramount importance to consumers, directly affecting their fundamental rights and freedoms, with significant implications for the freedom of information on the Net. The approach of the European Commission raises serious concerns from the point of view of transparency. BEUC has therefore decided to submit a paper response to the questions which we consider relevant to consumers' interests.

Issue 1: The development and practice of electronic commerce

14. Which problems, according to your information, are the most important ones encountered by consumers in their on-line purchases?

15. Please specify which delivery problems are encountered according to you by consumers

16. Please specify which payment problems are encountered according to you by consumers

17. Which obstacles are likely to dissuade consumers to buy on-line?

18. According to you, are consumers correctly informed of the following rights, related to their on-line purchases (excluding auctions)

There are different factors which explain the fact that consumers do not engage in online commerce, particularly cross-border. First, there are cultural barriers such as language¹, as well as reasons related to the demographic composition of the population² and the persisting digital divide between digital natives and non-natives, and secondly, specific problems linked to consumers' trust and the lack of confidence in the digital environment and in cross-border commerce.

¹ 82% of the websites evaluated by the European Commission during its mystery shopping exercise were only available in one language, YouGovPsychonomics, *Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, Final Report*, October 2009, p. 22.

² In 2008, 47% of individuals between 25 and 34 years old had ordered goods or services online in the last year, whereas the corresponding figure for individuals between 55 and 64 years old was 20%, Commission staff working document, *Report on cross-border e-commerce in the EU*, SEC (2009) 283 final, p. 11.

The European Commission, in its Communication on e-commerce, identified the fragmentation of consumer legislation as a regulatory barrier to the development of cross-border e-commerce.³ BEUC does not agree with this approach for two main reasons.

First, there are no clear statistics or data which justify such a conclusion. Furthermore, according to the European Commission's Eurobarometer, 74% of traders said that harmonised laws would make little or no difference to their cross-border activities.⁴ Secondly, consumers do not buy online across borders for reasons mainly related to different cultures, limited broadband penetration, lack of internet access⁵, privacy and security concerns, territorial discrimination by companies, problems associated with cross-border deliveries⁶ and a lack of sufficient redress and enforcement mechanisms adapted to cross-border complaints and infringements.

Consumers' concerns with online purchases

BEUC has identified an array of problems which face consumers when they purchase products online. These include:

1. Consumer Information

In online marketplaces consumers are rarely adequately informed about their rights and the conditions for exercising them (e.g. right of withdrawal, right to cancel the contract if the product is not delivered within 30 days after placing the order).

Furthermore, consumers do not know the obligations and responsibilities of the different actors involved in e-commerce transactions⁷ (i.e., traders, intermediaries, advertisers, search engines, etc).

³ European Commission, *Communication on Cross-Border Business to Consumer e-Commerce in the EU*, COM (2009) 557 final, p. 7.

⁴ European Commission Flash Eurobarometer, 2008 (no. 224).

⁵ Currently, fourteen Member States are below the EU 27 Member State average of household broadband access. In those countries, less than 50% of the population has access to broadband (European Commission, Commission staff working document, Europe's Digital Competitiveness Report, Vol. I, SEC (2010) 627, p. 29).

⁶ For example, the OFT study on Internet Shopping in the UK revealed that delivery and transport costs were key to low uptake in cross-border shopping by both consumers and traders, see 'Internet Shopping, An OFT Study', 2007.

⁷ For example, in order to buy on an auction website, the consumer will first have to conclude a contract with the auction site itself (a service contract - to have access to the technical infrastructure that allows him to purchase products) and second, another contract (a sales contract) with the seller. (For more information see: Riefa, Christine, 'To Be or Not to Be an Auctioneer?' Some Thoughts on the Legal Nature of Online 'eBay' Auctions and the Protection of Consumers', *Journal of Consumer Policy* (2008) 31:167-194).

2. Unfair Commercial Practices in online marketplaces

Because of the anonymity rule on the internet, consumers are more vulnerable to unfair commercial practices by traders. For instance, consumers may be advertised the possibility to download unlimited software with a unique subscription even though in the end this is not technically possible or requests additional payments.⁸ Likewise, consumers are unable to find and access the contractual terms - contrary to the transparency requirements⁹).

As regards online commerce platforms (such as eBay, Amazon, Priceminister), it is common to find traders who present themselves as consumers in order to avoid the application of consumer's protective rules. Despite the relevant provisions of the Unfair Commercial Practices Directive, such platforms do not bear the responsibility of verifying the identity of the users.

Finally, traders in many cases take advantage of the 'limits' and restrictions of the means of communication used to convey pre-contractual information in order to mislead consumers. This problem is particularly relevant for mobile commerce, whereby terms and conditions may not be possible to appear on the small screen of a mobile phone.

3. Consumer Contracts and Digital Products

The current business models for distributing content online (audiovisual content, music, software, games etc...) raise a number of concerns from the consumer's perspective, ranging from the transparency and fairness of terms¹⁰ included in contracts for digital products to the consumer's remedies in case of a defective product.

The purchase of digital content consists of the electronic transfer of digital data to the consumer and presupposes a medium, hardware and/or software to allow consumers to access it. Consumer contracts for digital products, despite a number of specific characteristics, resemble contracts for the purchase of 'normal' goods.

Nevertheless, the European Commission in the proposal for a Consumer Rights Directive refrained from addressing the challenges of new technologies and market innovations which increasingly affect the daily lives of consumers. This proposed Directive will not solve any of the typical problems consumers face with digital content bought online. Indeed, it would either not be applicable at all (as in the case of legal guarantees) or it would apply, but only in a limited and not satisfactory way (as in the case of information requirements, unfair contract terms and the right of withdrawal) because the rules are not specific enough.. Furthermore, being a full harmonisation Directive, it would prevent Member States from introducing more specific and innovative legislation in this field.

⁸ UFC - Que Choisir, logiciels.fr, Le gratuit n'as pas de prix, (see:

<http://www.quechoisir.org/breves/Le-gratuit-n-a-pas-deprix/08AA91FEE108CE67C1257466004BF79E.htm>).

⁹ For example, websites designed in a way which make it difficult to find contract terms (small letters, successive links to get the terms, combination of colours which hide the right link).

¹⁰ For example the study of end user license agreements for computer software carried out in the UK by Consumer Focus's predecessor, the National Consumer Council, found that many contract terms contained unfair clauses, see 'Whose licence is it anyway? A study of end user licence agreements for computer software', Carl Belgrove, National Consumer Council, 2008.

The proposal missed an opportunity to make consumer legislation future proof and update the current consumer legislation according to the needs of consumers when buying digital goods.

4. Online payments

When paying online consumers face three types of problems: first, the lack of different means and the existence of discriminatory charges, second, the lack of interoperability between the means offered and finally, security problems. Please see the BEUC response to question 24 for further analysis.

5. Delivery problems

When buying online, or in general at distance, consumers face problems related to non-delivery, late delivery or damaged goods. Not only the delivery terms included in the contract are not respected, but also when the product is damaged during delivery it is unclear for consumers where to complain: the trader will try to avoid its responsibility by blaming the responsibility of the carrier who rarely will be able to remedy the lack of conformity.

6. Reimbursement problems

Traders selling through online commerce platforms usually impose strict requirements for reimbursing consumers, for instance when they exercise the right of withdrawal or when the product is defective. In addition, a number of cases have been reported where consumers had to pay in order to be able to exercise their right to return the product and get their money back¹¹.

7. Reliability of online sellers

Consumers often do not know the identity or the quality (whether a professional or another consumer¹²) of the trader and do not have access to adequate contact details and information about the seller and its establishment. In most cases, consumers will only be provided with an email address as the contact detail, which may prove to be insufficient, especially when there is no notification that the email has been received by the trader.

8. Data protection and privacy online

When surfing on the internet, consumers' data is collected by different actors (i.e. ISPs, traders, web browsers, publishers, affiliation companies, social networks platforms, ad-serving agencies...) and the vast majority of consumers are not

aware that this is taking place. Consumers do not always realise information about their web activities is being collected. Some may like getting targeted information that matches their interests - however, they may not realise that they might not be getting the full range of options available because of records of previously visited internet sites, already in the hands of some companies.

¹¹ UFC - Que Choisir, Pixmania, Payer pour être remboursé, 22/12/ 2008.

(see: <http://www.quechoisir.org/breves/Payer-pour-etre-rembourse/8C6F77C01361D4A0C125752400554057.htm>)

¹² This is a common situation among online auction sites where is optional for the trader to register himself as professional seller. For example, on eBay it is suggested to the trader to register as a professional trader if they are acting for business purposes, however this depends exclusively on the seller's voluntary action and there is no legal obligation for the intermediary to verify. (see: <http://pages.ebay.co.uk/help/sell/business/contextual/businessaccount.html>)

9. 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 countries¹³.

19. What are your views on the growth of the economic development of electronic commerce and information society services in Europe, in general and compared to its most important competitors?

The development of online commerce, both at national and cross-border level, has the potential to contribute to the achievement of the goals of the EU 2020 Strategy, boost the competitiveness of the European economy and improve consumer choice and welfare.

Nevertheless, the data provided by the European Commission, reveals a disappointing situation, with only one third of European consumers having made a purchase on the internet and only 7% of those having engaged in cross-border online commerce¹⁴. Furthermore, when comparing the EU e-commerce market to the US, the figures reveal the EU is lagging behind in terms of online commerce growth; while the EU ecommerce market was estimated at 106 billion Euros¹⁵ in 2006, the value of e-commerce transactions hit 250 billion US dollars in 2007¹⁶ in the US.

In order for e-commerce to reach its potential growth, the EU needs to demonstrate strong political leadership and undertake concrete actions to respond to unsolved and emerging issues which will help to boost consumers' trust and confidence. Ensuring a high level of protection for consumers' personal data and fighting against online frauds will provide consumers with a secure online environment, while the adoption of measures that bring down barriers to access, expand market choice and eliminate unfair practices are equally important. Furthermore, enforcement of existing legislation needs to be improved and consumers' access to effective redress mechanisms, including through judicial collective actions, needs to be guaranteed.

The real issue is whether or not the EU will be successful in creating a regulatory environment for the Digital Single Market that promotes competition, consumer choice and the respect of the non-discrimination principle. The promotion of these objectives are crucial components of the digital dimension of Europe's 2020 Strategy, which requires **well functioning and inter-connected markets, where consumer access and consumer welfare stimulate growth and innovation.**

¹³ EC Staff Working Document report on cross-border e-commerce, SEC(2009) 283 final.

¹⁴ EC Communication on cross-border e-commerce COM (2009) 557 final.

¹⁵ European Commission's Staff Working Document, Report on cross-border e-commerce in the EU, 5 March, 2009.

¹⁶ United Nations Conference on Trade and Development, ICT and e-business for development, report submitted at the eleventh session of the Commission on Enterprise, Business Facilitation and Development, Geneva, 19-23 February 2007.

20. More specifically, do you have any indications that delivery problems would be an obstacle to the development of your electronic commerce activity? If so, which?

Please see response to questions 14-18.

21. Do you encounter problems in raising capital for your electronic commerce activities from banks or venture capital? If so, please specify?

BEUC will not respond to this question

22. Is a lack of knowledge of your legal or fiscal obligations in the context of electronic commerce or of the provision of information society services an element dissuading you from entering into such activities?

23. Are you deterred from undertaking such activity by insufficient offer of competitive legal or fiscal advisory services, specialised in electronic commerce or information society services?

BEUC will not respond to this question

24. Do you have information according to which payment problems (lack of choice in terms of methods of payment, confidentiality issues, refusal of payment cards from another Member State, etc) would be an obstacle to the development of your electronic commerce activity? If so, can you assess and illustrate these problems?

25. Do high bank charges for accepting payments hinder your online activities and do you think that, at European level, there are sufficient alternative payment schemes without high charges for the retailer?

26. Do you experience problems in accepting payments of small amounts due to the high level of bank charges (for instance merchant service charges) or, in general, due to the scarce availability of payment methods which are suitable for this purpose?

Despite the fact that several means of payment can be foreseen for online transactions, such as 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, in practice, most websites mainly offer credit/debit card, leaving the consumer with very limited choice. Traders either do not offer enough variety of means of payments for the consumer to choose from or, if they do, these means are overcharged with often disproportionate and non-cost reflective fees¹⁷.

¹⁷ This situation was also considered by the European Parliament in its resolution 21 September 2010 on completing the Internal Market for e-commerce which “advocates the development of an appropriate, efficient, safe and innovative system of online payment which can offer consumers

The consumer finds himself in a situation where he has either to decline the transaction or use the payment method 'promoted' by the trader. Furthermore, in order to make online cross-border payments consumers are obliged to count on an international credit card recognised by the trader. The same applies to debit cards and money transfers. However, most often the consumer will be required to use an internationally recognised card, while he will not be able to use national and/or local credit or debit cards.

Although developments of security measures in online payments have improved during the last years, consumers still do not have enough confidence to pay online. Parallel to the proliferation of new systems of electronic payment (i.e. money transfers through third parties such as Moneygram, Western Union or PayPal, credit and debit cards, e-banking, iDEAL¹⁸ etc), new threats have appeared. Phishing¹⁹, Vishing²⁰, Call-tag²¹, are only some examples of the risks that consumers face when buying online.

In order to protect themselves, consumers need to be well informed of the existence of such threats and the means to prevent them. For instance, they need to verify that a connection through a safe internet protocol is established before any payment takes place, to know how to use and update anti-malware programs and, to change passwords frequently.

In order to enhance consumers' confidence in online commerce, it is crucial to ensure that consumers will always have choice between different means of payment online and that any additional charges will be proportionate and cost-reflective. Furthermore, the development of appropriate, efficient, secure and innovative means of payment online needs to be promoted together with a strengthening of payment protection in online transactions. Overlay payment services which are asking consumers to provide their personal details in order to enter the website of the consumer's bank (details the consumer is supposed to keep confidential to ensure secure online banking) should be banned. Lastly, given the increasing importance of e-commerce, the specificities of payment protection in purchases done via mobile phones, notably the emerging issue of loans contracted by SMS²².

freedom and choice as regards mode of payment, does not involve fees which might undercut or limit choice, and ensures protection of the consumer's data."

¹⁸ It is a payment system developed in the Netherlands which allows consumers to pay online through their bank accounts (see: www.ideal.nl)

¹⁹ Phishing is a fraudulent practice which seeks to obtain information such as usernames, passwords and credit card details by masquerading as a trustworthy entity in an electronic communication.

²⁰ Vishing, as phishing, seeks to obtain private personal and financial information through social engineering over the telephone system, most often using features facilitated by VoIP.

²¹ In a call tag scam, criminals use stolen credit card information to purchase goods online for shipment to the legitimate cardholder. When the item is shipped, the criminal receives tracking information via email. They then call the cardholder and falsely identify themselves as the merchant that shipped the goods, saying that the product was mistakenly shipped and asking permission to pick it up when it is delivered. The criminal then arranges the pickup, using a 'call tag' with a different shipping company. The victim usually doesn't notice that a second shipping company is picking up the product and the shipping company has no knowledge it is participating in a fraud scheme.

²² Consumer Focus 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>

27. Are you aware of statistics or general or sectoral studies at national level on the electronic commerce market and in particular its cross-border aspects? If in the affirmative, which?

BEUC's members have provided the European Commission with data as part of the work of the European Consultative Consumer Group (ECCG), which have been taken into account in the preparation of the Communication on cross-border e-commerce²³. They have also carried out a number of studies on e-commerce. In particular:

- Study on 'Consumers and Online Shopping: Obstacles to cross-border e-commerce' by the Norwegian Consumer Council;
- Survey 'Pocket shopping - international consumer experiences of buying goods and services on their mobile phones' by Consumer Focus²⁴;
- Survey on 'Internet: a question of satisfaction' by Test-Achats²⁵;
- 'Internet Shopping', an OFT market study, July 2007;
- Study by the 'Asociación Española de Comercio Electrónico y Marketing Relacional'²⁶;
- Study by the 'Comisión del Mercado de las Telecomunicaciones'²⁷.

However, this list is only indicative, as consumer associations keep analysing on a regular basis the problems consumers face with e-commerce.

28. Are you aware of information on the types and growth of e-commerce businesses and on whether this substitutes or complements off-line retail services? If so, please specify.

N/A

29. In your view, what are the economic sectors where electronic commerce has developed significantly over the past decade and the fields where, on the other hand, its potential has not yet been sufficiently exploited?

As outlined by the European Commission²⁸, tourism is among the sectors where online commerce has developed significantly, with 42% of consumers who have engaged in online transactions, booking their travel and holiday accommodation online. Clothing and sports goods come second, followed by household goods and tickets for events.

On the other hand, the development of an online single market for copyright protected content has not been properly explored, despite a clear consumer demand. The main problem relates to the territoriality of copyright and the practices of collective management societies who tend to define territories

²³ Annex 3 of the EC Staff Working Document report on cross-border e-commerce, SEC(2009).

²⁴ <http://www.consumerfocus.org.uk/assets/1/files/2009/06/Pocketshopping.pdf>

²⁵ Test Achats magazine, Octobre 2009.

²⁶ http://www.aecem.org/estudios_en_abierto_aecem.html?11_opm=159

²⁷ http://www.cmt.es/cmt_ptl_ext/SelectOption.do?nav=publi_info_comercio_elect

²⁸ EC Staff Working Document report on cross-border e-commerce, SEC(2009).

alongside national borders as a means to increase their revenues from multiple licensing agreements with commercial users who wish to provide online content across Europe. Business models of legal offers for content online are often available only to consumers in a few countries²⁹, while the divergence of national systems of copyright levies on consumer electronics result in further market fragmentation. For further comments on copyright-protected material, please see our response to question 36.

30. Do you consider that the offer of viewing sporting and cultural events on the internet, for example by direct streaming, is sufficiently developed? If not, in your view, what are the obstacles to such development?

31. As organisers of sporting or cultural events, do you see an interest in proposing direct on-line access to your events, in particular if they are not broadcast on traditional media, at national level or in other Member States?

BEUC is concerned that the availability of sporting and cultural events on the internet remains limited. Despite the fact that some popular sports events, such as the World Championships of Football and Basketball, can be watched online in real-time, this is not the case with national sports events. Similarly, consumers who want to buy access to online streaming may often be provided with one single payment method, in most cases via credit card. Furthermore, the online streaming of sports events is only available on the web portals of the major TV channels, without any possibility to watch the sports events via other online platforms or dedicated websites.

The main problems relate to territoriality of broadcast rights and commercial arrangements in licensing agreements.

Territorial exclusivity of broadcasting rights remains the rule. Despite the adoption of the cable and satellite Directive³⁰ which aimed to facilitate the clearance of rights through a 'one-stop-shop' in the country of transmission, market fragmentation persists on the basis of a combination of encryption technologies and territorial licensing arrangements.

Furthermore, instead of being proactive and developing new business models which would allow consumers to watch their favourite sport event online, broadcasters and sports associations focus on the need to adopt stricter IPR enforcement mechanisms. BEUC regrets that the sports industry is following the same path as the music industry and adopts a rather narrow approach vis-à-vis the opportunities provided by the internet.

²⁹ For example, Spotify is available only in 5 countries. Apple iTunes is not available to all EU Member States particularly from Eastern and Central Europe.

³⁰ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

BEUC calls on the European Commission to propose concrete measures that would facilitate the development of new business models for online streaming of sports events. The recent broadcast by Youtube of the Indian Premier League's eight-team cricket tournament³¹ was followed online by 50 million fans and shows that consumers are ready to endorse similar business models.

Issue 2: Questions concerning derogations from Article 3 (Article 3(4) and Annex)

32. Are you aware of cases where a Member State applied the derogation possibility provided for in Article 3(4) of the Directive described above? If so, please describe how, indicating the information society services restricted (e.g. on-line media, on-line pharmacies, advertising or promotion of certain products like alcohol, services provided by regulated professions, broadcasting of cultural events or on-line sport events) and the basis for the derogation (public order, consumer protection, public safety or public health)?

33. In the event of an affirmative reply to the previous question, were you restricted in the exercise of your professional activity by the use of such a derogation?

The "temporary" derogations to the country of origin principle may be justified on the grounds of public health, public order or consumer protection. For example, according to the EU legislation³², no medicinal product may be placed on the market of a Member State without prior authorization from the competent authority of the Member State concerned (in some country a medicine can be classified as over the counter and in another as prescription only) and that the outer package and the leaflet must be in the language of the member state where the product is placed on the market.

Similarly, the Audiovisual Media Services Directive³³ allows Member States to restrict the retransmission of unsuitable on-demand audiovisual content which may not be banned in its country of origin, when such content may run contrary to the public order.

BEUC is concerned that a possible revision of Article 3.4 of the e-commerce Directive might result in consumers being exposed to abuses and unfair practices from providers in other Member States. In addition, the risk of forum shopping, where service providers will choose as place of their establishment the Member State with the most favourable legislation, is considerable and cannot be ignored.

³¹ <http://www.guardian.co.uk/media/2010/jan/20/youtube-live-indian-premier-league>

³² Directive 2001/83/EC on the Community code relating to medicinal products for human use.

³³ Article 2 of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance).

34. In your view, is the derogation to the internal market clause covering contractual obligations concerning contracts concluded by consumers, set out in the Annex to the Directive, still useful, despite the development over the last ten years of Community and national legislation concerning consumer protection? If yes, could you provide the reasons justifying the maintenance of such an exemption?

BEUC is surprised and finds this question redundant for two reasons. First, because the situation of consumer legislation during the last ten years has not changed. Since the main Directives of the consumer acquis (Sales of Consumer Goods and Guarantees Directive, Doorstep Selling Directive, Distance Selling Directive and Unfair Contract Terms Directive) were adopted, no further harmonisation has been undertaken. In this sense, the legal situation has not changed in relation to the time of the adoption of the E-commerce Directive.

Secondly, the nature of the Internal Market clause is not clear as to whether or not it constitutes a rule of international private law (in spite article 1.4 of the said Directive) and how its implementation affects the provisions of Rome I and Rome II. This is an ongoing discussion in the academic environment and the Commission has never given any clarification. Consequently, only once this obstacle is overcome can the question of removal of this exception to the internal market clause be discussed.

In any case, the current legislation is coherent with the dispositions of Rome I related to consumer contracts, where the general rule - in case the commercial activities are directed to the consumer's home country - is the application of the mandatory law of the country of the consumer's residence if the conditions of article 6(1) are founded. Consequently, **the exception of contractual obligations concerning consumer contracts should be maintained.**

35. Have you practised or been subject to discrimination on the basis of nationality or place of establishment/residence, or are you aware of such discriminations? If so, please indicate the information society services affected and the reasons given to justify this discrimination.

When shopping online, consumers often have the unfortunate experience of online traders refusing to accept orders from another country or applying dissimilar conditions and prices. 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.

The entry into force of the Services Directive³⁴ is crucial in addressing similar cases of territorial discrimination to the detriment of consumers. However, the European Commission needs to closely monitor the implementation by Member States to ensure the establishment of a coherent framework.

36. In your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services?

Despite the efforts to harmonise Intellectual Property Rights across the EU, the territorial nature of copyright has been left intact. Each Member State has its own rules regarding the granting of copyright, thus limiting their scope to their national territory. Maintaining the territorial nature of copyright and related rights in the EU is to the detriment of both consumers and commercial users alike, while it hinders the achievement of the Digital Single Market.

BEUC considers the territorial nature of copyright and the fragmentation by collecting societies of the online content market along national borders, as a major impediment to online commerce and a major barrier to the establishment of the Digital Single Market. This view is shared by the European Commission, as outlined in its Communication on cross-border e-commerce³⁵.

Consumers seeking to buy copyright protected content online are often only allowed access to online stores directed to their country of residence. Such barriers lead to a significant reduction of choice for consumers, particularly for consumers from the new Member States where there is a lesser abundance of service offers³⁶. In addition, territoriality of copyright may lead to price discrimination to the detriment of consumers. In fact, rights holders tend to define markets along national borders and set different prices and conditions for identical products and services in each Member State³⁷. For instance, a price comparison for the album 'Only by the Night' by the Kings of Leon on Amazon MP3 shows that a UK Consumer will have to pay €7.53, whereas a French person would have to pay €9.99 and a German counterpart €6.62³⁸.

Commercial users who want to provide online content services across the EU, have to seek a license in each of the 27 Member States. As a result, commercial users are at a competitive disadvantage compared to their competitors outside the EU. Such market fragmentation is contrary to the very notion of the internet as a borderless environment and goes against the objective of the European Commission to establish a Digital Single Market.

E-commerce, and in particular cross-border e-commerce, is also affected by copyright levies as a result of the way in which they are applied and managed.

³⁴ Directive 2006/123/EC of 12 December, 2006 on Services in the Internal Market.

³⁵ EC communication on cross-border e-commerce COM (2009) 557 Final.

³⁶ "Refusals to serve consumers because of their nationality of residence- Distortions in the Internal Market for e-commerce transactions", Natali Helberger

³⁷ Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009

³⁸ Study by Matrix Insight on business practices applying different condition of access based on the nationality or the place of residence of service recipients - Implementation of Directive 2006/123/EC on Services in the Internal Market, commissioned by the European Commission, DG Markt.

Due to the different levy rates in each country, online retailers are obliged to price products differently depending on where a customer is located. For instance, the copyright levy on an MP3 player may cost between €13.5 and €22.5 in Austria, whereas only €2.56 in Germany, which amounts to a difference up to 878.9% between two neighbouring countries. Subjecting customers shopping online from a retailer in another Member State to additional charges not only causes confusion and damages consumer confidence, but also deprives those consumers of the benefits in terms of choice and competition that the Single Market seeks to offer.

Furthermore, whereas in the offline world the customer pays the levy of the country in which the retailer is based, for products sold over the internet, levies may end up being imposed twice - once in the country where the retailer is based and again in the country where the customer is based. As a result, online retailers are often obliged to refuse the selling of consumers in another Member State in the fear that they will have to pay a copyright levy twice for the same product. This results in customers being unfairly 'penalised' and the benefits of e-commerce not being fully realised.

BEUC calls upon the European Commission to adopt concrete proposals to address the territoriality of copyright and market fragmentation by collecting societies. Legislative action is needed to facilitate multi-territory licensing accompanied by pan-European supervision of collectively negotiated tariffs and the establishment of transparency requirements in the operation of collective societies³⁹. BEUC has developed concrete proposals on the issue⁴⁰.

37. In your view, are there other rules or practices which hinder the provision or take-up of cross-border on-line services? If so, which?

Barriers to e-commerce may also stem from competition restrictions in the vertical relationship between manufacturers and suppliers. The European Commission has failed to address these challenges when revising the Regulation on selective distribution⁴¹; allowing manufacturers to continue to impose a 'brick and mortar' requirement on their distributors before engaging in online sales. This is neither sufficiently justified nor in line with the European Commission's commitment to boost online commerce. On the contrary, such a requirement will reduce consumer choice and will have a negative impact on the development of innovative business models by pure-play online retailers who aim to bring greater choice at reasonable prices for consumers who want to make the most of new technologies. It also fails to pass the test of promoting consumer welfare, which is central to the EC competition law.

In a competitive market, manufacturers and retailers should respond to consumers' preferences rather than dictate the terms on which consumers may access products. Although there might always be some products which consumers would prefer to buy offline because of objective reasons, such as the

³⁹ The UK consumer organisation Which? supports the enabling of cross-border passive sales for online content as the most effective way of ensuring consumers can access content across the EU.

⁴⁰ BEUC response to the Reflection Paper on creative content online Ref.: X/003/2010 - 05/01/10.

⁴¹ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

need to talk to an expert while sampling the goods, it should be the consumer who decides when this is appropriate and not the retailer. The new rules should not discriminate between the channel of distribution and between business models. Businesses must not control how consumers can purchase their goods or services.

Furthermore, the revised guidelines⁴² do not provide for legal certainty as regards categories of products for which restrictive distribution agreements may be justified, thus entailing the risk that selective distribution agreements are used for everyday products for which there would otherwise be no objective justification to be covered by selective distribution.

Issue 3: Cross-border commercial communications, in particular for the regulated professions. Articles 6 and 7 of the Directive cover commercial communications and, in particular, unsolicited commercial communications.

38. Are you aware of any mechanisms in your Member State which guarantee that unsolicited commercial communications can be identified in a clear and unambiguous manner by the addressee?

39. Do measures exist in your Member State which guarantee that the service provider who sends unsolicited commercial communications by email regularly consults "opt-out" registers (in which natural persons who do not wish to receive this type of communication can register)? If so, are these registers respected?

According to the information received by our members, opt-in is the rule as regards the sending of unsolicited commercial communications. The email has to provide the recipient with clear information regarding the identity of the sender as well as the nature of the message as unsolicited. In most countries, there are no centralised registries as regards emails contrary to the ones already in place for commercial communications via telephone or mail⁴³.

40. Is the legislation of your Member State sufficiently clear on the criteria making it possible to determine if a commercial communication can be regarded as unsolicited or not?

41. Is the 'acquis communautaire' (European law) on unsolicited commercial communications and national regulations well-adapted to new forms of commercial communications?

⁴² Commission notice - Guidelines on Vertical Restraints SEC/2010/0411 final.

⁴³ For example, in Belgium such a register can be found online at http://www.robinsonlist.be/index_fr.

A number of divergences continue to exist between national legislation of Member States. One example is the different definition of electronic email. Some countries have used the definition of electronic email provided for by the e-privacy Directive when regulating spamming⁴⁴, while others have not provided for any clarification of what can be considered as electronic email⁴⁵.

Despite the clarification provided by the revised e-privacy Directive, it is not yet clear whether the new rules also apply to new types of spamming, such as spamming sent as instant messages, search engines spam and geographically relevant spam sent through Bluetooth on mobiles. The European Commission should therefore clarify this question and ensure the coherence between the e-commerce Directive and other pieces of EU legislation, with the aim of providing a common definition of electronic mail and avoid legal fragmentation between Member States' legislation. Such a definition should be technology neutral and ensure that it covers all communication technologies.

BEUC is also concerned about the lack of efficient enforcement by public authorities. Although some Member States have already undertaken action with

regard to spam⁴⁶, there seem to be insufficient incentives to invest resources in the prevention and prosecution of spammers due to the technical and legal difficulties encountered when fighting spam and the fact that most spam is sent from outside the Member State. The cross-border nature of spam requires a coordinated approach by the relevant enforcement authorities. The need for coordination has been outlined by the European Commission which has highlighted the need for clearer and more consistent enforcement rules, dissuasive sanctions, better cross-border cooperation and adequate resources for national authorities⁴⁷.

42. What information society services provided by the regulated professions are you aware of or do you have access to?

43. Are you aware of which types of commercial communication practices are undertaken by the regulated professions (communication on fees, on specialisms, etc) in one or more Member States or at European level? For which regulated professions?

44. Are you aware of codes of conduct covering online commercial communications for certain regulated professions in one or more Member State(s)? If so, please specify.

45. What are, in your opinion, the obstacles to the development of codes of conduct for on-line commercial communications for regulated professions at European level?

N/A

⁴⁴ Belgium, Lithuania, France, Ireland.

⁴⁵ UK, Italy, Luxembourg, Greece.

⁴⁶ The Netherlands, France, UK.

⁴⁷ Communication from the Commission, Progress report on the single European Electronic Communications Market 2009.

46. Are on-line pharmacy services authorised in your Member State for over-the counter (OTC) medicines and/or for prescription-only medicines? If so, under which conditions? Please indicate the relevant legislative provisions.

According to the information we gathered from our members, the online sale of prescription medicines is legal only in some Member States (e.g. UK, Netherlands and Germany) while in other Member States the online sale is authorised only for non-prescription medicines (e.g. Belgium) or in the form of mail order when the web site is linked to a “bricks and mortar pharmacy” (e.g. Denmark).

Please find below a table for the EU 27 Member States and more detailed information regarding the conditions and the legal requirements for online pharmacies in some of the countries where they are legal.

Country	Is the sale of NON prescription medicines allowed?	Is the sale of prescription medicines allowed?
1. <u>Austria</u>	No	No
2. <u>Belgium</u>	Yes	No
3. <u>Bulgaria</u>	No	No
4. <u>Cyprus</u>	No	No
5. <u>Czech Republic</u>	Yes	No
6. <u>Denmark</u>	Yes	Yes
7. <u>Estonia</u>	//	//
8. <u>Finland</u>	Yes	No
9. <u>France</u>	No	No
10. <u>Germany</u>	Yes	Yes
11. <u>Greece</u>	No	No
12. <u>Hungary</u>	Yes	No
13. <u>Ireland</u>	Yes	No
14. <u>Italy</u>	No	No
15. <u>Latvia</u>	No	No
16. <u>Lithuania</u>	//	//
17. <u>Luxembourg</u>	No	No
18. <u>Malta</u>	//	//
19. <u>Netherlands</u>	Yes	Yes
20. <u>Norway</u>	No	No
21. <u>Poland</u>	Yes	No
22. <u>Portugal</u>	Yes	Yes
23. <u>Romania</u>	//	//
24. <u>Slovakia</u>	//	//
25. <u>Spain</u>	Yes	No
26. <u>Sweden</u>	Yes	Yes
27. <u>United Kingdom</u>	Yes	Yes

United Kingdom

Online pharmacy services have been authorised for both over-the-counter and prescription medicines in the UK since November 2009, subject to accordance with the following legislation:

- All pharmacies - including internet pharmacies - must operate in accordance with the National Health Service Regulations of 2005.
- All internet pharmacies must adhere to the 'Professional Standards and Guidance for Internet Pharmacy Services' which dictates a Code of Ethics detailing seven principles of professional responsibility for those involved in the sale and supply of medicines via the internet. These are designed to meet legal obligations under the Pharmacists and Pharmacy Technicians Order 2007.
- The sale and supply of medicines via the internet must be made in accordance with the Medicines Act 1968.
- The marketing of medicines must be done in accordance with the EU (Directive 2001/83/EC) and national pharmaceutical legislation.

In particular:

1. All pharmacies must be registered with the General Pharmaceutical Council;
2. All online pharmacies must be connected to a "bricks and mortar" pharmacy premises and therefore cannot exist as a purely virtual entity;
3. The pharmacy must have a responsible pharmacist in charge who is responsible for the safe and effective running of the online pharmacy service;
4. The pharmacist should be in a position to:
 - assess the suitability of the product for the user;
 - (for POMs) verify that the prescription and the prescriber are authentic;
 - provide good advice to all prospective customers;
 - establish that the person requesting the product is the intended user;
 - monitor potential misuse and abuse;
5. The patient should be advised to contact a local pharmacy if it is believed that through this their interests would be better served;
6. Health advice should be up-to-date and specific for each individual patient
7. The delivery mechanism is secure and medicines are delivered safely and in appropriate conditions;
8. There is a verifiable and comprehensive audit trail;
9. Delivery mechanisms are confidential;
10. Legal requirements for exports must be met and due consideration must be taken of differing licensing and classification standards of different countries;
11. When supplying medicines via the internet, records must be maintained of:
 - All customers' identity;
 - Details of medicines requested and supplied;
 - The information upon which decisions were made;
 - The identity of the pharmacist who assumed professional responsibility for the supply.

Spain

In Spain, online sales are not authorised for prescription-only medicines. Law 29/2006, 29 July, 'de Garantías y Uso Racional de los Medicamentos y Productos Sanitarios' (BOE núm. 178, of 27 July [RCL 2006, 1483]) Art. 2.5 prohibits sale by correspondence and on the internet of medicines and medicinal products subject to prescription. According to Spanish legislation, in the dispensation of medicines, being either 'over the counter' (OTC) or prescription-only, the presence of a pharmacist in an established and registered pharmacy is always required. Non-prescription medicines can be sold online, provided that there is a registered pharmacist and a registered bricks and mortar pharmacy anywhere in the territory. Nevertheless this last aspect is still not regulated.

Belgium

Online pharmacy services are authorised in Belgium only for OTC medicines and under strict conditions. The online sale of prescription medicines is forbidden according to the national pharmaceutical legislation (http://193.191.208.6/cgi_loi/loi_F.pl?cn=1964032530) Art 3, §4., while a community pharmacy can offer for sale via the internet non-prescription medicines authorised in Belgium and certain medical devices under the responsibility of the pharmacist.

The range of conditions to be fulfilled are described in the legislation, namely 'Arrêté Royal portant instructions pour les pharmaciens', 21 January 2009, Art. 29 (http://193.191.208.6/cgi_loi/loi_F.pl?cn=2009012132). In particular, Art. 29, in derogation of Art. 27 allows the online sale of OTC medicines if linked with a pharmacy open to the public and if the purchase methods and the delivery system protect the consumer privacy – the minister can define methods to this end. The legislation indicates also that the web site must be designed to ensure a rational use of medicines and present the products in an objective manner. The web site should also include additional information detailed in the legislation such as the identity of the pharmacists, the package leaflets of all the products, an explicit invitation to contact a doctor in case of side effects, an explicit invitation to indicate sex, age, contact details etc and all relevant information of the user of the medicine. Special attention is also given to the delivery methods which should fully ensure the storage conditions. The pharmacist must guarantee the delivery within two days after receipt of the order. The web site should be registered with the national competent authority (AFMPS) and the l'Ordre des pharmaciens.

Denmark

In theory, in Denmark all pharmacies can sell via a website and consumers can use the internet to communicate with their local pharmacist. In practice, according to the Danish Consumer Council, this option is not taken up by pharmacists for commercial reasons and consumers do not know that they can use this channel.

Portugal

Online pharmacy services are authorized in Portugal for OTC and prescription medicines. These services are provided by a community pharmacy (brick –and mortar pharmacies) or stores that are allowed to sell OTC drugs. The delivery of the medicine must be made to the consumer’s home by a pharmacist or a technician. In the specific case of prescription medicines, the prescription has to be presented. Moreover, the pharmacy can only deliver the drugs in the specific geographical area in which they are allowed to do so (Portarianº 1427/2007).

47. Are there specific measures in your Member State on products (safety devices, checks of compliance with medicine marketing regulations, etc.), and/or on internet sites (specific logo indicating legal pharmacies, public register of legal pharmacies, etc.) aiming to guarantee that all medicines bought online are safe? If so, what are they?

United kingdom

The Medicines Health Regulatory Agency (MHRA) is specifically responsible for ensuring that all medicines supplied in the UK are safe and effective and it has also prosecuted offenders for illegal advertising. The MHRA’s main tool is an enforcement and intelligence group which carries out constant monitoring. It is supported by a 24-hour hotline which it encourages all agencies (pharmacies, police, customs etc) and individuals (health care professionals, members of the public) to contact should they come across suspect medicines. As foreseen by the EU pharmaceutical legislation (2001/83/EC) a system is in place whereby on being made aware of a public health risk, the MHRA will release a warning leading to the withdrawal of the medicines from the market.

All UK online pharmacies must be registered with the Royal Pharmaceutical Council. In January 2008 in response to the danger of illegal online pharmacies, the former Royal Pharmaceutical Society of Great Britain (RPSGB) launched their ‘Internet Pharmacy Logo’ to be displayed on all registered pharmacies websites.



This logo informs customers if the online pharmacy they have visited is connected to a legal pharmacy and includes that legal pharmacy’s RPSGB registration number. By clicking on this logo customers are then taken to the RPSGB’s registration pages which display the registration details of the pharmacy and the pharmacist in charge.

The RPSGB does however recommend that additional checks are carried out by the customer to ensure the pharmacies authenticity, including verifying a ‘bricks and mortar’ address, making sure that prescriptions are requested and ensuring that medicines are not provided without sufficient questions being asked.

Spain

Even though there is a general law 29/2006 that takes it into consideration, the regulation of internet sales of non prescription medicines is not yet developed.

Sweden

According to the Swedish Consumer Council, so far in Sweden there is no control over selling medicines over the internet. None of the Swedish authorities have been formally tasked to control this activity.

Belgium

Only public pharmacies are allowed to have an internet site and they have to comply with a strict national regulation. On the basis of the information provided by the Belgian Consumers' Association, Test-Achats, in Belgium some pharmacies check the authenticity of the medicines with a verification system called Aegate. This system provides real time medicines authentication and delivers up to the minute safety information, whilst the pharmacist is dispensing to the patient. It is however unclear how many pharmacies actually use this system, if it is reliable and effective and if it is used also for other commercial purposes.

The internet sites which sell medicines have to be registered with the Agency for Medicines and the Pharmacists' Association [Ordre des Pharmaciens/Orde van Apothekers]. There is a public register of legal pharmacies available on the website of the Belgian Agency for Medicines (http://www.fagg-afmps.be/nl/binaries/Websites_tcm290-43501.pdf)

The Agency recommends the concerned pharmacies to mention on their website a link to the website of the Agency of Medicines.

Portugal

There is a public register on the Portuguese Medicines Agency's website where it is possible to search for pharmacies who have online services. However, according to the Portuguese consumer organisation DECO, it is not easy to find this tool on the site.

Italy

Given that the sale of medicines online is not legal, in Italy there are so far no specific measures guaranteeing the safety of medicines bought via the internet.

In the context of the project IMPACT ITALIA (<http://www.impactitalia.gov.it>), the Italian Medicine Agency (AIFA) analysed some internet web sites and found that there are illegal online pharmacies who also steal credit card details. They also made inspections at land borders and detected a high quantity of medicinal products imported illegally.

In addition, the project 'TRACCIABILITA DEL FARMACO' foresees the inclusion of a bar code to identify all medicines and create a database with all medicines legally sold in the Italian market (see also the European Commission proposal to combat falsified medicines).

48. What are the advantages and disadvantages of the legal possibility for citizens in general or certain categories of citizens to buy medicines on-line and of having them home-delivered?

Provided that all the legal requirements are fulfilled (e.g. professional advice, adequate storage and delivery etc.), the main advantages of the legal possibility to buy medicines online are:

1. Ease and comfort of home delivery: Online pharmacies provide consumers with a quick way of accessing the medicines they need. This is of particular benefit to those who live in sparsely populated areas and those who have limited mobility such as the disabled or the elderly, provided they have an internet connection and are computer literate. According to Test-Achats, in Belgium many pharmacists deliver medicines at home (usually free of charge) when elderly or disabled patients cannot go to the pharmacy. Receiving the medicines at home and being able to make the purchase any moment is also time efficient.

2. Privacy: Internet shopping provides a wall of anonymity which allows consumers to purchase products which they would not be comfortable in purchasing as a result of fears of social embarrassment (e.g. sexual problems, baldness, depression, overweight) or not wanting to disclose their condition to their family and friends.

3. Choice and convenience: with online pharmacies consumers are exposed to a wider range of choice over both the pharmacies and medicines (especially for OTC) available to them. This leads to a better chance of acquiring products which are suitable for them at the lowest possible price (provided that the price of the medicines is not higher of that offered by traditional pharmacies and taking into account the costs of delivery). Knowing the exact name, type and classification of the medicines they buy can allow them to properly research and assess that medicine's suitability for them and also verify any advice they have received.

The main disadvantages are:

1. Lack of physical examination: Most online pharmacies use questionnaires to establish the suitability of a medicine for a patient. This then bypasses the traditional physical examination which is ordinarily undertaken by a GP or medical professional. With this there is the obvious risk of misdiagnosis or that additional medical problems are not identified which would have otherwise been flagged by a relevant medical doctor. The health care professional cannot even tell whether patients are the age or sex they are claiming. As a result, any traditional doctor-patient relationship is forgone and the associated duty of care and liability cannot be secured. In this context, it is important to remember that pharmaceutical care is "the direct, responsible provision of medication-related care for the purpose of achieving definite outcomes that improve a patient's quality of life". Pharmaceutical care involves not only medication therapy (the actual provision of medication) but also decisions about medication use for individual patients. Therefore the direct relationship between a pharmacist and an individual patient is essential.

2. Counterfeit drugs and illegal pharmacies: With the establishment of legal online pharmacies comes a high risk that illegal equivalents will be set which will not operate under the regulatory framework which prevents the sale and distribution of counterfeit medicines and which ensures that at all times the medicines being offered to consumers are safe for them to use. From the consumer perspective it also becomes difficult to know whether an online provider is legitimate and registered. They also increases consumers' insecurity in relation to the protection of personal data, the provision of product related information and on possible frauds with credit cards details.

3. Advertising: Allowing online pharmacies to operate legally opens the door to possible illegal advertising of prescription medicines - by both legal and illegal pharmacies - as the monitoring of online advertising is significantly more difficult and requires alternative methods of regulation and enforcement.

4. The supply of banned or unapproved medicines: Without adequate supervision, online pharmacies provide a far easier platform than regular pharmacies from which to supply medicines which are either illegal or unapproved. In addition they create the possibility for more abuses of medications.

49. Are you aware of studies or surveys relating to the volume of legal or illegal purchase of on-line medicines within the European Union and, more specifically, in your Member State? If so, what sources and assessment methods were used?

BEUC members in different countries tested sales of medicines on the internet to verify the safety and reliability of this supply channel. They also made laboratory analyses to assess the quality of the products they purchased. The results are worrying:

- In most cases they managed to buy prescription-only medicines without prescription;
- The laboratory tests revealed major quality problems, in addition to concerns regarding the storage and shipping of the products. A survey⁴⁸ published in October 2009 by the Dutch consumer association Consumentenbond, found that out of the 47 orders received, in 16 cases the dosage of active ingredient exceeded the standard dosage by more than 10% or fell short of it by more than 10%. In many cases the medicines contained the wrong substance or contamination of other substances;
- They received pills wrapped in newspaper sheets or loose bags;
- They did not find any safety information on the web sites⁴⁹;
- the medicines were not accompanied by the patient leaflet or the leaflet was an inaccurate translation;
- The web sites did not disclose the origin of the products and declined any responsibility⁵⁰;
- Many of the web sites they used no longer existed two months afterwards.

Many national competent authorities launched campaigns on the risks of illegal internet sales⁵¹.

⁴⁸ Consumentenbond, October 2009.

⁴⁹Salutest, Altroconsumo n.210, December See for example http://www.aemps.es/ciudadanos/campañas/medicamentosinternet/ventaMed_Internet09/index.htm in Spain, www.CrimeMedicine.com in Sweden, <http://www.internetpillen.nl/> in the Netherlands and in Belgium <http://www.medicaments-par-internet.be/fr/.2007>.

⁵⁰ Teste Saúde, DECO Porteste, n.70 December 2007. OCU, November 2009. <http://www.ocu.org/adelgazamiento-y-obesidad/alli-se-puede-comprar-en-internet-s473204.htm>.

The Spanish Medicines Agency elaborated a draft document on a strategy on anti-counterfeit medicines⁵² following the debate on the European Directive on this issue. According to the document up to now, even though the incidence of this problem is quite low, it is expected to grow. As a result of joint police and administrative actions, they recently inspected and started legal proceedings against 81 web pages who sell medicines illegally.

In Portugal, the national medicines agency carried out some studies on consumers' behaviour regarding purchasing medicines online and they interviewed 800 people⁵³:

In Italy, between 2009 and 2010, the Health Committee of the Senate conducted a survey on the phenomenon of counterfeit and pharmaceuticals' e-commerce in consultation with all stakeholders, including consumers' organisations⁵⁴.

Interesting information regarding the size of the phenomenon can be found in the results of Operation Pangea II, an internationally coordinated action that took place from 16 to 20 November 2009, focusing on the online sale of counterfeit and other illegal medicinal products. This type of action sought to attract attention to the purchase of medicines over the internet, more particularly in the illegal segment. This operation was the fifth in a row and was set up by the British medicines authority (MHRA).

Operation Pangea II was coordinated by Interpol under the aegis of the IMPACT initiative of the WHO. This initiative was further supported by the World Customs Organisation, which investigated the postal distribution linked to internet ordering, and by the PFIPC. Twenty-six countries collaborated in this operation. A number of websites offering medicinal products were screened. Once again, an increase in the number of such sites has been noticed.

The operation focused on the essential characteristics of illegal websites, the companies offering these products, the payment systems and the delivery of the orders via postal packages⁵⁵.

Issue 4: The development of the press on the internet

50. Does the regulation of advertising contracts require an adaptation in the virtual world? If so, can you specify the problems and the possible solutions?

⁴⁷The strategy can be accessed in:

http://www.aemps.es/actividad/publicaciones/docs/publica/estrategia_med_falsificados_2008-2011.pdf

⁵³http://www.infarmed.pt/portal/page/portal/INFARMED/MAIS_NOVIDADES/NOTAS_IMPrensa/Tab/No%20%E2mbito%20de%20uma%20semana%20de%20forma%E7%E3o%20internacional%20para%20combater%20a%20contrafac%E7%E3o%20INFARMED%20divulga%20sondagem%20sobre%20os%20portugueses%20que%20compram%20medicamentos%20na%20Internet

⁵⁴ The stakeholders contributions can be found at: <http://www.senato.it>

⁵⁵ <http://www.interpol.int/Public/ICPO/PressReleases/PR2009/PR2009111.asp>

New forms of advertising are emerging and they are overtaking traditional media such as television, newspapers, magazines, etc. as a consequence of a shift towards digital media⁵⁶. Although advertising has brought benefits to consumers, especially in the online environment where it has fuelled the growth of content, a number of existing practices lack the necessary transparency and fail to comply with the existing regulatory framework to the detriment of consumers.

An additional issue arises in relation to available enforcement and remedy mechanisms to protect children, who are particularly susceptible to online advertising. For example Consumer Focus research 'A Tangled Web: Marketing to Children'⁵⁷, which examined current regulation on online advertising to children found that children are not adequately protected by either the law or industry self-regulation. This is despite the recent extension of the digital remit of the non-broadcast advertising code in the UK by the Committee of Advertising Practice (CAP code) and changes made to improve advertising on brands own websites. The CAP code still does not cover sponsorships, competitions and marketing communications from a foreign media.

Understanding their key audiences has always been important for advertisers, driving them to develop new practices for the identification of consumers' preferences and consumption habits. With the advent of the internet and the growth in computer processing and storage capacity, advertisers have the tools to collect and analyse unprecedented amounts of data to help target their ads. Advertisers can now obtain a clear view of internet users' interests by analysing their online searches, surfing behaviour and the information they post about themselves.

The revenue that web sites can earn through this kind of advertising ensures that consumers are not charged for content. But this does not mean that consumers are getting web content for free. Web users are paying for content indirectly through the data that they, often unknowingly, supply to advertisers. For instance, figures from online publishers show that advertising space sold to behavioural marketing ad serving companies is worth six to ten times more than if the space was sold to traditional online advertisers⁵⁸. It is even a business in its own right: online data brokers and other companies openly advertise that they

sell consumers' data. Consumers' data quite clearly has a significant value that must be treated carefully.

Privacy notices fail to provide clear information to consumers as regards the collection and processing of their personal data or the purposes of use of the data collected. Furthermore, consumers rarely read through the terms of service due to their length and complexity. Privacy notices are drafted in order to comply with legal requirements, rather than to inform consumers.

⁵⁶ Online advertising is increasing in importance not only for online commerce but also offline shopping, as many consumers who do not intend to purchase online use the internet for product search and price checks. For example 58% of online advertising in the UK is done on search engines and search comparison sites, 'Internet Shopping, An OFT Study', 2007.

⁵⁷ 'A Tangled Web: Marketing to Children', Consumer Focus October 2010 (forthcoming).

⁵⁸ From Reed Elsevier, publishing group.

Although BEUC is not inherently opposed to consumers entering such an exchange for a 'free' service, or other tangible benefit, we strongly believe that it should be made absolutely transparent from the outset that this exchange is taking place, that the data is being collected, what it will be used for and how long it will be retained.

Privacy notices need to be easily accessible and clearly displayed in plain and intelligible language, while online targeting and profiling practices should fully respect **data protection rules**, when these techniques collect and use data on tastes and behaviours that can be linked to an identified or identifiable person. It is equally important to ensure that consumers give **meaningful consent** i.e. "free, informed and specific consent" for online targeting and profiling⁵⁹.

51. In your view, is it necessary to ensure more transparency on the origin of the contents presented by news aggregators of information? If so, by which mean(s)?

N/A

Issue 5: Interpretation of the provisions concerning intermediary liability in the Directive

52. Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which?

BEUC is of the view that overall the ISPs' liability regime of the e-commerce Directive provides for a balanced framework which clarifies the obligations of service providers, while protecting the interests of potentially aggrieved parties. It has contributed significantly to the development of new business models and information society services over the last decade.

BEUC endorses the conclusion of the Commission's study that the implementation and interpretation of the provisions on the liability of mere conduit (Art. 12) and caching (Art. 13) have not raised any problems. In contrast, the scope of Art. 14 on hosting has proven more problematic, with diverging national rules and case law across the EU. The main question relates to the development of new types of services that do not consist exclusively of the storage of information as included in the definition of hosting providers. This is the case of online commerce platforms, online auctions, as well as Web 2.0 services, search engines and hyperlinks. A clarification is therefore needed from the European Commission as to the scope Art. 14 vis-à-vis these new services.

⁵⁹ For further comments, please see BEUC Discussion Paper on data collection, targeting and profiling of consumers online, X/010/2010 – 15/02/2010.

Overall, BEUC does not consider a revision of the provision of the e-commerce Directive on internet intermediaries necessary. On the contrary, the European Commission should aim to clarify the scope of Article 14 and its application to new information society services providers.

53. Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? Are you aware of any situations where this criterion has proved counter-productive for providers voluntarily making efforts to detect illegal activities?

54. Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information?

55. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law?

56. What practical experience do you have regarding the procedures for notice and take-down? Have they worked correctly? If not, why not, in your view?

57. Do practices other than notice and take down appear to be more effective? ("notice and stay down", "notice and notice", etc)

The e-commerce Directive did not provide for a definition of what constitutes "actual knowledge", thus opening the door to considerable divergences in national legislations and court practices. This is also the conclusion of the European Commission study on ISPs liability, which refers to the different interpretation of what constitutes "actual knowledge" and the notification procedures presumption of actual knowledge, that have been established either by national legislation or by case law⁶⁰.

The Portuguese Implementation Act states clearly that an ISP shall not be requested to remove the disputed content or disable access to information only because of the fact that a third party is arguing an infringement⁶¹. Similarly, the Italian Implementation Act requires providers to act only upon notice from the relevant authorities⁶². On the contrary, Finnish and Hungarian law have established detailed formal procedures, but their scope is limited on IPR infringements.

BEUC is concerned about the intention of the European Commission to promote the development of a self-regulatory approach. In 2009, two stakeholders groups were established with the aim of developing voluntary agreements for online infringements of Intellectual Property Rights. Among the issues addressed, figures the development of common principles for notice and take down. BEUC is

⁶⁰ Study on liability of internet intermediaries, page 37.

⁶¹ Law-Decree No. 7/2004 of 7 January 2004, Article 16.

⁶² Article 16 Legislative Decree No. 70.

concerned about the intention of the European Commission to establish voluntary codes of conduct, enabling right holders to notify any material that is likely to infringe their rights and remove it from online platforms.

However, such a procedure does not foresee the possibility for the user to provide counter-evidence and prove the legitimacy of the material, thus raising concerns as to its compliance with the fundamental right to due process. Furthermore, such systems open the door to abusive notifications and move the burden to providers who will have to decide whether to take down the content or face the risk of litigation. There is a greater likelihood that providers would take down content in order to avoid the risk of being sued or prosecuted.

BEUC would advocate the requirement of a formal notification by a court as a precondition for the assumption of knowledge by the service providers. A simple notification by right holders in cases of IPR infringement should not suffice. Furthermore, the actual knowledge should also refer to the illegal character of the content or product.

Information service providers should by no means be asked to assess the lawfulness of content on the basis of a private notice. They should replace the judge in assessing complex legal matters. The obligation for ISPs to act “expeditiously” upon receipt of the notification, regardless of whether the

unlawfulness of the content has been proven increases, the risk of lawful content being removed, under the threat of litigation. In order to ensure that unlawful material can be removed expeditiously, rapid preliminary review proceedings should be introduced at national level.

As regards the burden of proof on whether a provider has acquired actual knowledge and acted expeditiously, it should lie with the plaintiff, who will have to demonstrate that the conditions of Articles 12-14 have not been met.

58. Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations?

67. Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why?

Despite the prohibition to impose a general monitoring obligation on internet service providers (Art. 15), the e-commerce Directive allows Member States to require hosting providers to apply duties of care in order to detect and prevent certain types of illegal activities⁶³. BEUC is concerned that an extensive ‘duty of care’ on hosting providers runs contrary to Art. 14 and 15 and may prove detrimental to the freedom of expression and the flow of information on the internet.

⁶³ Recital 48.

This problem is also linked to the issue of notification of unlawful material and the means by which actual knowledge of the provider can be obtained (see response to questions 53-57). In order to comply with the duty of care, host service providers would be extremely cautious and apply screening technologies in order to remove the material that it is likely to be unlawful upon a slight suspicion. The implications for freedom of speech and freedom of information are significant, while hosting providers will replace courts in deciding about the illegality of material.

BEUC would like to reiterate that internet service providers provide for technical facilities and do not have the skills, knowledge or personnel necessary to evaluate whether any particular material is infringing or illegal. Moreover, such a task may prove impossible for the small ISPs who do not have the necessary financial and human resources. It should only be for the court to decide that a material is illegal in line with the fundamental right to due process and the right to fair trial.

The possibility of injunctions against ISPs also entails risks to the prohibition of a general monitoring obligation. Both the copyright⁶⁴ and the IPR enforcement Directives⁶⁵ foresee the possibility for right holders to apply for injunctions against internet service providers. Injunctions have been used widely for IPR infringements. The main problem consists of the fact that injunctions cannot only impose the termination of the infringement, but also the prevention of future infringements. However, the prevention of future infringements may lead to a *de facto* general monitoring obligation for the hosting provider and therefore a conflict with Art. 15 of the e-commerce Directive.

National courts in Member States have followed a different approach when dealing with injunctions. Some courts seem openly sympathetic towards the plaintiff right holder, going as far as requiring internet service providers to install filtering software to prevent illegal downloading of copyright-protected material⁶⁶ or cut-off users' internet access⁶⁷. However other courts consider the injunctions to be disproportionate⁶⁸.

Divergences exist as regards the required conditions and the extent of injunctions to prevent future infringements⁶⁹. In Germany, the Federal Court of Justice decided that a provider should not only remove unlawful content of which it was informed, but should also take all technically feasible and reasonable precautions to prevent future infringements⁷⁰. In the Italian Google case⁷¹, the Italian court

⁶⁴ Article 8.3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁶⁵ Article 11 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

⁶⁶ *Sabam v Tiscali/scarlet* cases, the Brussels Court of First Instance ordered the internet service provider Tiscali/Scarlet to install filtering software to prevent copyright infringing songs from being downloaded. Similarly, the Court of Copenhagen in the *Tele2* case.

⁶⁷ The Court of Hague ordered the internet access provider KPN to cut-off customers' access to the internet due to copyright infringements (5 January 2007).

⁶⁸ UK Queens's Bench Division, 10 March 2006, (2006)EWHC 407(QB); (2006) 3ALL ER 336, (2006° emlr526? BuntV Tilley and Others.

⁶⁹ EU study on the legal analysis of a Single Market for the Information Society.

⁷⁰ BGH, 11/03/2004, ZE 304/01, MMR 2004, 668

⁷¹ *Zading Productions V. Google Inc*, juris-data num. 2007-344344, RDLI 2007/32

obliged the service provider to take measures to prevent that videos that had previously been removed would not be uploaded again.

The legal basis upon which injunctions can be brought is also problematic. Only a few Member States have adopted specific provisions for injunctions against intermediaries, most member States require plaintiffs to rely upon general procedural rules. However, such general procedures can have far-reaching effects, given that they may establish accessory liability, according to which all parties involved in a wrongdoing activity can become subject to the injunction⁷².

59. From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering?

60. Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse?

BEUC is strongly opposed to the application of technical measures, including filtering, in order to fight against IPR infringements. The rejection of technical measures is justified on technical, legal, economic and societal grounds.

First, filtering technologies are, by design, unable to distinguish between authorised and unauthorised copyright protected content, public domain works or content freely distributed by the author. Similarly, technical measures may result in bandwidth reduction and the slowing down of traffic, thus causing problems to the use of time sensitive applications and interfering with the neutrality of the network.

From an economic point of view, obliging ISPs to deploy such measures would require a complete reconfiguration of their networks and an increase of their operational costs, which will be passed on to consumers. As a result, ISPs and consumers will have to bear the cost of protecting private rights of and business models of the content industry.

The use of specific technologies, such as Deep Packet Inspection, whereby ISPs inspect every bit of information passing over their networks, raises serious privacy concerns and runs contrary to the fundamental right to the confidentiality of communications.

Lastly, the impact on innovation and freedom of expression will be significant. The internet is an important vehicle for citizens to get access to knowledge, information and services, while enabling their participation in public debates. Blocking and filtering every piece of information will seriously undermine the character of the internet as a commons.

The application of technical protection measures is an inappropriate response the problem of unauthorised use of content on the internet. BEUC has repeatedly called upon the European Commission to adopt measures targeted at the

⁷² EU study on the legal analysis of a Single Market for the Information Society

development of functional legal market for content online. BEUC regrets the fact that the European Commission has so far been focusing on the adoption of stronger enforcement rules for the protection of out-dated business models for distribution of content online.

61. Are you aware of cooperation systems between interested parties for the resolution of disputes on liability?

N/A

62. What is your experience with the liability regimes for hyperlinks in the Member States?

63. What is your experience of the liability regimes for search engines in the Member States?

As clearly pointed out in the study on liability of internet intermediaries, the e-commerce Directive did not touch upon the liability of search engines and hyperlinks, thus opening the door to highly divergent national rules and case law. For example, some Member States have introduced the same liability provisions for search engines as for host providers⁷³, others qualify such services as mere conduit (Austria), whereas in most case Member States have not adopted specific legislation but apply general principles of law, as is the case in the UK, France and Germany.

The lack of harmonisation seems problematic in view of the important function performed by information location tools and their impact in the flow of information in the online world. As national governments are following different approaches in relation to the liability of hyperlinks and search engines, therefore hindering the development of a uniform approach, the European Commission should clarify the liability of location tools to ensure the coherence of national legislations across the EU. Legal certainty is crucial for the emergence of new business models that will foster the development of the information society and will benefit consumers.

BEUC supports the extension of the provisions regarding host providers to search engines and hyperlinks. First, search engines do not exercise any effective control over the information itself and they are not in a position to remove or block access to the information. Secondly, they are performing a critically important task in the digital information environment, by ordering, categorising and valuing the abundant information on the Web⁷⁴. Without the operation of search engines, the practical application of the informational abundance on the World Wide Web would not be possible⁷⁵.

⁷³ Hungary, Portugal, Spain.

⁷⁴ 'Legal space for innovative ordering: on the need to update selection intermediary liability in the EU', Joris van Hoboken International Journal of Communications Law and Policy, Issue 13, Winter 2009.

⁷⁵ Oberlandesgericht (OLG) Hambourg (Court of Appeals Hambourg) February 20, 2007, AZ. 7U 126/06.

When considering the extension of the liability provisions to search engines and hyperlinks, the European Commission should carefully consider the social benefits of information location tools as enablers of internet use and their role as promoters of the freedom of expression and information. Such an approach has been followed by the German Federal Court⁷⁶.

As regards search engines and the distinction between natural and sponsored search results, BEUC welcomes the clarity provided by the recent ruling of the European Court of Justice⁷⁷, which has introduced the criteria of "*merely technical, automatic and passive nature*" of information transmission by search engines. For further comments on the ECJ ruling, please see our response to question 66.

64. Are you aware of specific problems with the application of the liability regime for Web 2.0 and "cloud computing"?

The focus of the liability provisions on three specific types of services has resulted in an increasing number of new types of services being excluded from the scope of Articles 12-15. As a result, online service providers, users and third parties face **legal uncertainty** as regards services that do not qualify as the "traditional internet access, catching or web hosting services" envisaged by the E-commerce Directive.

The problem is due to the lack of clarity as to the definition of hosting providers and namely the application to new information society services.

First, according to Art. 14 a hosting service "*consists of the storage of information provided by the recipient of the service*". However, this criterion does not correspond to services, such as cloud computing and Web 2.0 services where the storage is just one aspect of the entire package. As a result, national courts have adopted different interpretations. For instance, the Court of Paris did recognise the video platform You Tube as a hosting provider⁷⁸, whereas refused to apply the liability provisions to MySpace⁷⁹. In the latter case, the Court ruled that Myspace did not limit itself to hosting information provided by its users, but also acted as an editor by offering a presentation structure via frames and by displaying banners during each visit from which it drew profits. On the contrary, German and Italian courts have focused on the question of whether the provider has adopted the third party content or has instead distanced itself from the content⁸⁰.

Secondly, the liability exemptions do not apply when the recipient of the service is acting "*under the authority or the control of the provider*". However, such a requirement does not correspond to the operation of blogs, discussion forums and social community websites which may slightly modify the information stored on their website. For instance, the community encyclopaedia Wikipedia is permanently monitored by a team of content managers to ensure that the information being published is accurate⁸¹.

⁷⁶ Bundesgerichtshof [BGH][Federal Court of Justice] Jul 17, 2003, I ZR 259/00.

⁷⁷ Joined cases C-236/08 and C-238/08.

⁷⁸ T.G.I de Paris 3^{ème} chambre, 2^{ème} section, 10 July 2009, Bayard Press/ YouTube LLC.

⁷⁹ T.G.I; Paris, réf. Eé June 2007, Lafesse V Myspace.

⁸⁰ EU study on the legal analysis of a Single Market for the Information Society.

⁸¹ Idem.

A comparison with the US is necessary. US courts have consistently extended the application of the Communication Decency Act by using a broad definition of "interactive computer services", which encompasses hosting services, email service providers, auctions, what rooms and internet access points. These parties are allowed to make minor alterations to the information, while benefiting from the liability protection⁸².

BEUC calls upon the European Commission to address the legal uncertainty regarding Web 2.0 services and ensure that they are also included in the scope of the liability provisions of the e-commerce Directive (Art. 14). When clarifying the scope of application, due consideration of the impact on freedom of expression and communication is necessary.

65. Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain?

N/A

66. The Court of Justice of the European Union recently delivered an important judgement on the responsibility of intermediary service providers in the Google vs. LVMH case. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way?

BEUC welcomes the decision of the European Court of Justice, which has clarified the conditions under which an internet service provider can benefit from the liability exemptions of Art. 14 of the e-commerce Directive and therefore no general monitoring obligation can be established. The ruling also extends the scope of Art. 14 to search engines and therefore constitutes a landmark judgment.

Nevertheless, the criteria of "merely technical, automatic and passive nature" cannot be used as a general benchmark against which the liability of service providers will be evaluated. As already mentioned before, a number of Web 2.0 services may also involve a degree of control over the information or material posted online. The same applies to online commerce platforms which already use specific technologies to identify obviously illegal material and have it removed. Therefore, further clarification on this point is necessary.

68. Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service?

⁸² Idem.

As indicated above, the implementation and interpretation of the provisions on mere conduit and caching has not been problematic. The main difficulty concerns Art. 14 on hosting providers. However, the current uncertainty should be alleviated by means of an interpretative communication from the European Commission rather than by revision of the Directive. In a dynamic and fast changing ICT environment, a possible revision of the current categorisation might turn out to be detrimental to the development of new business models and innovative services, let alone that it is highly unlikely that a new categorisation would encompass new services. On the contrary, an interpretative Communication and a clarification of the scope of the current provisions will ensure a coherent interpretation across Europe, thus providing legal certainty to both providers and users.

69. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer.

BEUC does not share the opinion that further investment in enforcement measures is the most appropriate response to the problem of IPR infringements on the internet. On the contrary, we are concerned that the European

Commission, under the pressure of rights holders, focuses exclusively on enforcement, while ignoring the current failure of the content industry to adapt their business models to the digital environment and respond to consumers' needs.

As a starting point, the European Commission should clearly distinguish between different types of IPR infringements. Counterfeiting of physical and often dangerous goods needs to be tackled differently than copyright infringements on the internet. BEUC regrets that the European Commission has repeatedly failed to identify the sources of each of the problems and adopt targeted action to respond to them.

BEUC is particularly concerned about ongoing policy discussions at national, European and multi-lateral level which aim to strengthen enforcement measures for IPR infringements. National governments, under the pressure of rights holders and on the basis of unreliable and non-independent data, are ready to adopt enforcement measures which fail to distinguish between criminal entities operating for profit and individual consumers, while raising serious doubts as to their compliance with the European Charter of Human Rights⁸³ and the interpretation of the European

Court of Justice⁸⁴. In particular, such measures do not always respect the right to the presumption of innocence, the right to a fair trial, the right to privacy and the right to the confidentiality of communications.

Instead of focusing on the adoption of unfair and disproportionate enforcement measures, the European Union should adopt a coherent and forward looking copyright agenda.

⁸³ Charter of Fundamental Rights of the European Union, C 364/1, 18.12.2000.

⁸⁴ Case C-275/06 *Productores de Música de España v Telefónica de España SAU* (29 January 2008).

With countless new opportunities arising from the ways content is accessed and distributed, the need to rethink the European legal framework has arisen with the aim of achieving a fair balance between the different stakeholders, promoting innovation and cultural diversity. Copyright rules must evolve as the technologies that are used to create and distribute them evolve.

Copyright law should aim to establish a fair balance by recognising both the interests of creators and the interests of consumers. Just as copyright holders own some core rights and interests, consumers also hold some inviolable rights to use and disseminate protected works. A dynamically developing market requires a flexible legal framework that allows new and socially valuable uses to develop without the copyright owners' permission as long as they do not affect the normal use of copyright works.

The establishment of a harmonised, consumer-friendly and forward looking copyright framework is needed with a view to create more certainty and remove unrealistic constraints on the use of creative content by consumers⁸⁵.

Issue 6: Administrative cooperation in the Directive

70. Does a procedure to ensure notification to the other Member States and to the Commission of any restriction falling under Article 3 (4) exist in your Member State. If so, please specify this procedure and the number of notifications made to the Commission and to other Member States since 17 January 2002.

71. Do you think that the system of notification provided for in Article 3(4) is effective or should it be clarified, or strengthened by information systems such as the IMI (Internal Market Information System)?

72. Do you take the view that administrative cooperation between Member States, in particular by means of the designation of contact points, has worked satisfactorily? How could it be improved?

73. According to your information, what are the important administrative and judicial decisions relating to information society services or practices and customs relating to electronic commerce to be communicated to the Commission?

N/A

⁸⁵ For further information, please see BEUC's response to the Reflection Paper on creative content online, Reference [X/003/2010 - 05/01/10](#)

Issue 7: The resolution of online disputes

74. What knowledge do you have of on-line dispute settlement systems (legal and extrajudicial) in your Member State or in other Member States?

In tandem with the sharp increase over the last two decades of commercial transactions concluded via the internet, there has been extensive discussion regarding the use of online dispute resolution systems (ODRs) to resolve disputes which inevitably arise as part of online commercial transactions.

Although Online Dispute Resolution systems are relatively new and not widely spread, a number of ODR schemes have already been developed in EU Member States. Similar systems are available in the UK, Sweden, Germany, Austria, Italy, France, the Netherlands and since recently, in Portugal. For instance, in Spain, companies signing a specific code of conduct (www.confianzaonline.es) adhere to an ADR mechanism whereby a first mediation is overseen by the AECEM (Spanish association of e-commerce) in a maximum of 7 days after the request is made. Should the mediation be unsuccessful, the case is referred to an arbitration court whose 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 (making it unnecessary for the consumer to travel).

However, there is significant convergence as to the scope and operational proceedings. In parallel, international organisations have been engaged in the promotion of online dispute settlement systems, especially in relation to the disputes arising from e-commerce transactions⁸⁶.

75. To your knowledge, are the financial costs, the necessary processing time and the facility to solve a traditional dispute (personal data theft, non-delivery of ordered services, fraud, non-payment, misleading advertising, illegal copy etc.) equivalent if the resolution takes place on-line or off-line? If not, can you explain the reasons for any differences?

BEUC takes the view that offline dispute resolution and online dispute settlement mechanisms are not equivalent. Alternative dispute resolution online (ODR) can be more effective than traditional dispute settlement methods in terms of time, convenience and financial resources involved in dispute resolution procedure.

⁸⁶ In December 2000, the Organisation for Economic Co-Operation and Development (OECD), Hague Conference on Private International Law (HCPIIL), and International Chamber of Commerce (ICC) jointly organised a conference entitled 'Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution' held in the Hague, Netherlands. ICC has developed in 2003 'Resolving disputes online. Best practices to ODR in B2C and C2C transactions'; UNCITRAL adopted the paper supporting the possible future work on online dispute resolution by UNCITRAL during its 43rd session on 21 June-9 July 2010 and approved its new Working Group for cross-border ODR. This group will aim to prepare ODR Rules which should be applicable worldwide.

ODR is particularly convenient and efficient where the parties are at a distance, as distance communication obviates the need for travelling and thus substantially reduces cost. In terms of convenience, parties can contact one another much faster and more often, in addition, depending on the technology available, they can do it in a number of ways. The traditional ADR systems depend essentially on an exchange of letters and oral hearings, whereas the online environment requires new methods of communication, such as data messaging, audio and video-conferencing, while it presents challenges in terms of protection and retention of personal data.

ODR may allow greater flexibility in procedure. Although in general ODR mechanisms are inspired by traditional dispute resolution, some ODR procedures, like automated negotiation do not have exact offline equivalents.

However, without direct interpersonal contact it can be more difficult for parties to convey their arguments and find a solution to the dispute. BEUC is concerned that 'writing-only' procedures may raise the pressure on the parties to use lawyers, taking into account the fact that the parties' abilities to translate factual circumstances into legal concepts will be limited.

Lastly, the digital divide between digital natives and non-natives may also constitute an important hurdle to the widespread use of ODRs, which requires all parties involved to be familiar with sophisticated web technology.

76. Are you aware of statistics or studies at national level on law enforcement on the internet by the supervisory authorities and/or the judiciary of Member States?

Consumer protection authorities have already engaged in using internet technologies for the monitoring of surveillance of the trends of such infringements and cooperation in combating them. For instance, both International Consumer Protection Network (ICPEN) and the EU Consumer Protection Cooperation Network (CPC) of consumer protection authorities are conducting yearly 'sweeps' of internet websites offering goods and services for consumers to check if they adhere to the provisions of consumer protection and e-commerce regulations. As the result of these sweeps, investigations are carried out and enforcement actions taken.

As another example, 24 members of ICPEN (including 14 EU Member States) have been involved in an econsumer.gov initiative⁸⁷, a joint effort to gather and share cross-border e-commerce complaints among public enforcers. Consumers are encouraged to submit their cross-border complaints on the public website. Public authorities use the information posted in conduct enforcement activities.

⁸⁷ <http://www.econsumer.gov/english/resources/trends.shtml>

77. Do you take the view that the services of on-line disputes settlements (judicial and non-judicial) where these exist have improved victims' rights in European society? If so, how? If not, how can these services be improved?

Despite the advantages that ODRs may provide for in terms of speed and cost-savings, a number of drawbacks need to be seriously considered. First, participation in ODRs remains voluntary while the recognition and enforcement of ODR awards by courts is problematic. Secondly, it remains questionable whether ODRs should comply with the principles embodied in the existing EC Recommendations for Alternative Dispute Resolution⁸⁸ especially regarding the independence of a third party, the impartiality of the procedure and the compliance with the fundamental right to due process.

For ODRs to be endorsed, a number of safeguards are necessary. First, the independence of ODRs needs to be guaranteed, while consumers should be fully informed about the conditions of access to the ODR system at the time the transaction is concluded (including, costs and type of ODR, i.e. negotiation, mediation, arbitration or other).

Secondly, the use of ODR should by no means be mandatory prior to other redress; otherwise it would provide an additional step in the process that might dissuade consumers from escalating their complaint. The suspension of prescription periods to take legal action is also essential to ensure that access to justice is not hindered when the parties opt for an ODR.

Thirdly, ODR providers should refer disputes to the relevant law enforcement authorities, with the consumer's permission, when they have reason to believe that there may be fraud, deceit or patterns of abuse on the part of the internet merchant. In such cases, the merchant should be informed that such action has been taken.

END

⁸⁸ Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC) and Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).