



The Consumer Voice in Europe

Digital products: EU consumers need clear rights

BEUC position paper

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Ref.: X/2012/099 – 10/12/2012

Summary

The online purchase of digital content is a source of opportunity for both businesses and consumers as it is an important element of the Digital Single Market.

However, consumer detriment regarding the purchase of digital content is currently very high. For instance, an empirical report¹ conducted for the European Commission estimated such detriment to be in the region of €64 billion per year in the EU.

This immense consumer damage has to do to a significant degree with the fact that European consumer protection legislation is barely applicable to such transactions and national legislation has not adapted to these types of products. This has led to legal uncertainty, a lack of consumer confidence and fragmentation of the Internal Market.

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

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

Another concern relates to the conditions under which a contract for the supply of digital content can be concluded by minors.

In its 2012 Consumer Agenda², the European Commission listed as one of its objectives the adaptation of consumer law to 'the digital age'. This has been partially achieved via the 2011 Consumer Rights Directive³ (hereafter 'CRD') by the introduction of specific rules on pre-contractual information, formal requirements and the right of withdrawal. However, there are still areas in need of modernisation or clarification in the consumer *acquis* (such as legal guarantees and unfair contract terms).

Instead of continuing the modernisation process of consumer law started with the CRD, the European Commission has proposed a Regulation on a Common European Sales Law⁴ (CESL) introducing an optional legal system for consumer contracts co-existing in parallel with national laws and which contains specific rules for digital content products, such as consumer remedies for a lack of conformity.

¹ Europe Economics (2011), 'Digital content services for consumers: Assessment of problems experienced by consumers' available at:
http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm

² COM(2012) 225 final, 22 May 2012.

³ Directive 2011/83/EU, 25 October 2011.

⁴ COM(2011) 635 final, 11 October 2011.

However, this optional nature is a fundamental flaw of the proposal, as a business selling digital content online will be able to decide between modern European rules or national legislation, which is - as acknowledged by the European Commission - often unclear about the rights to which consumers are entitled in contracts for the supply of digital content. What consumers need is solid legislation applicable to *all* contracts and not dependant on an opt-in or opt-out basis.

Furthermore, despite the fact the main stakeholders are strongly opposed to or highly sceptical of the introduction of 'optional' laws, the European Commission is not ready to re-consider the idea of establishing EU parallel systems, but instead - in its recent communication on Cloud Computing⁵ - has announced another optional regime for such services.

In this paper, we provide an assessment of the different contract law related areas relevant for consumers when buying digital content products. We then propose a strategy on what legislative and other complementary measures should be undertaken at EU level in order to ensure more consumer confidence in e-Commerce transactions and less consumer detriment through a modernisation of consumer law and a uniform and appropriate application and enforcement of the existing and new rules.

What measure the European Commission should undertake in order to modernise the consumer acquis and improve consumer conditions in the digital environment?

- A legislative proposal modernising the EU rules on **legal guarantees** in order to cover digital content products. This could be done via a new Directive on digital content products or in the frame of an eventual revision of the 1999 Sales of Goods Directive⁶. The rules included in chapters 10 and 11 of the CESL could serve as a basis with the appropriate adaptations as indicated in point 5 of this paper.
- Standardisation of **key information** provided to consumers and the format in which it shall be presented to make this information comprehensible, transparent and easy to access and to read. This initiative should equally take into account the Commission's own research on consumers' behaviour towards information load and the way consumption decisions and made⁷.
- Initiatives to address the issues related to lack of **the transparency and unfairness of certain contract terms** in digital content contracts. They could include guidance on transparency requirements and unfair contract terms, which would help clarify the application of the UCT legislation to digital content contracts and include examples of terms which may be considered unfair under the 1993 Unfair Contract Terms Directive⁸.
- Support **better enforcement of EU rules against unfair commercial practices** in the field of digital content products through promoting co-ordinated enforcement actions by national consumer organisations and facilitating the co-operation for national enforcement authorities.
- Clarify under which conditions a contract for the supply of digital content can be concluded by a **minor**.

⁵ COM(2012) 529 final, 27 September 2012, page 12.

⁶ Directive 1999/44/EC, 25 May 1999.

⁷ SWD(2012) 235 final, 19 July 2012.

⁸ Directive 1993/13/EEC, 5 April 1993.

I – INTRODUCTION AND GENERAL COMMENTS

Problem description – Consumer detriment when purchasing digital content

Digital content includes a wide range of products such as computer software; music; audio-visual material; mobile 'apps'; video games; e-books and ringtones, which are accessible in physical media (e.g. CD, DVD, Blu-Ray) and/or in intangible form by internet downloading or streaming for monetary compensation or in exchange for the use of consumers' personal data and/or advertising.

The recent Consumer Market Scoreboard reveals that the main products purchased online (57%) are digital content⁹. This is also confirmed by a recent survey commissioned by our UK member Consumer Focus which shows that in the UK almost half of consumers (48%) bought digital products or services via digital download in the past year, with music (26%), computer software (18%) and e-books (16%) being the most common purchases¹⁰. This same survey also revealed that more than 50% of consumers who bought digital content believed that they were entitled to the same remedies as in case of defective goods.

In stark contrast to this increase in online digital content sales, an empirical report¹¹ conducted for the European Commission reveals that consumer detriment in this field amounts to an estimated €64 billion per year in the EU. This immense consumer damage is linked to a large degree to the lack of an effective and comprehensive legal framework capable of dealing with the most prominent consumer problems when it comes to digital products¹².

Problems with accessing content e.g. service interruptions at the supplier end (33%), the lack of information (24%) or unclear/complex information (18%) and poor quality (14%) were reported as the main sources of trouble for consumers when purchasing digital content.

Additionally, the study reports problems related to suppliers excluding any type of liability arising from problems with the digital content; suppliers amending or removing content without prior notice or preventing consumers switching to an alternative provider¹³.

The consumer *acquis* in relation to digital products was partially updated by the 2011 Consumer Rights Directive¹⁴. It introduced to European legislation a definition of digital content as well as specific rules on pre-contractual information, formal requirements and the right of withdrawal (see below points 1-4). Nonetheless there are other contract law related areas in the *acquis* relevant for digital products which still need to be adapted or clarified such as legal guarantees and unfair contract terms. This gap in the legislative framework leads to consumer detriment due to the legal uncertainty and/or lack of consumer rights.

⁹ Consumer Market Scoreboard 7th Edition - May 2012, page 19;

¹⁰ Consumer Focus response to the Department for Business Innovation and Skills consultation on Enhancing Consumer Confidence by Clarifying Consumer Law, October 2012;

¹¹ Europe Economics (2011), "Digital content services for consumers: Assessment of problems experienced by consumers" available at:
http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm

¹² Lack of information: €18,775m; unclear/complex information: €15,042m; quality €7,498m; access €10,273m; unfair terms and conditions €1,969m.

¹³ See Europe Economics' study, page 76.

¹⁴ Directive 2011/83/EU, 25 October 2011.

BEUC strongly believes that digital content should be treated as tangible goods in terms of consumer protection¹⁵. The purchase of digital products has the same characteristics as a sales contract. The format in which a product is presented or purchased (digital or tangible) should not matter in terms of consumer protection. Consumers should be equally protected online and offline. It would be extremely unfair if two consumers buy the same product with the same defect and have different rights under the law, for the sole reason that they do not use the same support.

Additionally, e-Commerce is characterised by a **lack of enforcement of consumer law** and in particular of the legislation on unfair commercial practices (Directive 2005/29/EC)¹⁶.

Making the right policy choices: consumers need solid rights, not optional regulation

The CRD was a first step towards the modernisation of consumer law by way of standardising contract laws relevant to business-to-consumer (b2c) contracts for the supply of digital content. However, instead of continuing this harmonisation process the European Commission proposed a Regulation on a Common European Sales Law¹⁷ introducing an optional, parallel, legal system for consumer contracts co-existing with national laws¹⁸.

This is a fundamental flaw of the proposal which becomes even more prominent in digital content contracts as an online business selling digital content across borders will be able to decide between modern European rules or national legislation which is - as acknowledged by the European Commission in recital 17 of the proposal¹⁹ - often unclear in terms of consumer rights in this sector. As a result, businesses may well avoid the specific obligations of the CESL as traders will not be obliged to apply these standards and consequently consumers will not benefit from the modern rules that are so urgently needed.

¹⁵ See BEUC's position paper "Digital Products, how to include them in the proposal for a Consumer Rights Directive", Ref: X/060/2010 – 06/09/10, available at www.beuc.eu

¹⁶ In this regard, consumer organisations can play a very important role through the co-ordination of enforcement actions against companies that operate in different Member States. In current (Consumer Justice Enforcement Forum, 2011 - 2013) and previous (Consumer Law Enforcement Forum, 2007-2009) projects managed by BEUC secretariat, national consumer associations have launched several co-ordinated actions to tackle unfair practices of businesses that infringe European and national consumer law. For example, eleven consumer organisations have recently taken up action against the IT company Apple for the misleading promotion and sale of the AppleCare Protection Plan. The European Commission should continue financially supporting these types of initiatives in order to facilitate the cross-border enforcement of consumer rights. COM(2011) 635 final, 11 October 2011.

¹⁷ See BEUC's preliminary position paper, Ref.: X/2012/014 - 21/03/12 available at www.beuc.eu

¹⁸ Recital 17: "In order to reflect the increasing importance of the digital economy, the scope of the Common European Sales Law should also cover contracts for the supply of digital content. The transfer of digital content for storage, processing or access, and repeated use, such as a music download, has been growing rapidly and holds a great potential for further growth but is **still surrounded by a considerable degree of legal diversity and uncertainty**. The Common European Sales Law should therefore cover the supply of digital content irrespective of whether or not that content is supplied on a tangible medium." (emphasis added).

Despite the fact that the majority of affected stakeholders are strongly opposed to or highly sceptical of the introduction of 'optional' laws and that the proposed CESL is currently delayed in the Council of the European Union²⁰, the European Commission has not expressed willingness to re-consider the idea of establishing parallel EU systems. On the contrary in its recent communication on Cloud Computing²¹ it announced another optional regime for Cloud Computing services.

The European Commission's vision of enhancing consumer confidence in the Digital Single Market would seem to be based on the assumption that businesses should take over the role of the EU legislator: according to the European Commission's strategy, current shortcomings in mandatory national and EU consumer legislation should now be overcome by the **voluntarism of industry**: namely by business choosing to offer better and more efficient protection to European consumers than provided for by national laws.

Against this background and in order to encourage a more balanced approach, one which truly meets the needs of EU consumers, BEUC proposes below a strategy on how the EU *acquis* should be modernised to satisfactorily meet the challenges of the digital Single Market.

We first identify areas of contract law relevant for the purchase of digital products. Some of them are covered by the CRD, while others have not yet been regulated at EU level; in particular legal guarantees or their application is uncertain as is the case of unfair contract terms.

II – SPECIFIC COMMENTS

1) Definition of digital content

The CRD introduced the first **definition** of digital content in the consumer *acquis*: "*data which are produced and supplied in digital form*" (Article 2(11)). Recital 19 of the same Directive clarifies this concept by providing several examples of digital products such as computer programs; applications; games; music; videos or texts, irrespective of whether they are accessed by download or streaming, from a tangible medium - except DVD or CD in which case it should be considered goods within the meaning of the Directive - or other means. This definition is replicated in the CESL²².

²⁰ See BEUC response to the public consultation on the Commission's Green Paper on 'European Contract law, Towards a European Contract Law for Consumers and Businesses?', (Ref.: X/2011/008 - 31/01/11); letter sent to Mrs Françoise Le Bail, DG Justice Director General, on 27 October, 2010 (Ref.: X/088/2010 - 21/12/10), letter addressed to Mrs. Paraskevi Michou, Director, DG Justice, on 30 March, 2011 (Ref.: X/2011/080 - 06/07/2011); BEUC's response to the European Commission Expert Group's Feasibility Study for a Future Instrument in European Contract Law (Ref.: X/2011/072 - 28/06/2011); letter sent to the Permanent Representatives to the EU on 12 July, 2011 (Ref.: X/2011/083 - 13/07/11); available at www.beuc.eu and BEUC's contribution to the European Parliament Legal Affairs Workshop 'The proposal for a Common European Sales Law: unfair contract terms' of 31 May 2012, available at www.europarl.europa.eu

²¹ COM(2012) 529 final, 27 September 2012, page 12.

²² Article 2, 1(j).

BEUC supports the CRD's definition of digital content. A broad definition is necessary in order to encompass all types of digital products to ensure legal certainty of the applicable legal regime while not precluding future technological developments and the emergence of new methods of purchasing digital products.

However, it is necessary to clarify that this definition shall fully apply to digital content not provided in exchange for monetary compensation. Consumers are often offered 'free' content (e.g. apps, Beta versions, audio and video samples). Though consumers do not pay monetary compensation, in most cases they give away personal data (new 'e-Currency'), as many business models are based on monetising the secondary use of consumers' data.

2) Pre-contractual information

The Commission's empirical study identified problems with pre-contractual information as one of the main consumer concerns about purchasing digital content. Mainly this is the lack of information on key elements of the contract and the provision of unclear and complex information, both common contract law-related problems²³.

The CRD introduces specific rules on pre-contractual information for digital content contracts. Once the Directive is transposed by Member States, businesses supplying digital content will have to inform consumers about functionality issues like the application of Technical Protection Measures (TPM) and the interoperability of digital content with hardware and software that the trader is aware or can reasonably be expected to have been aware of²⁴.

Additionally, the CRD obliges traders to inform consumers about the possibility of recourse to an out-of-court complaint and redress mechanism (e.g. ADR/ODR), to which the trader has subscribed and the methods of accessing it²⁵.

BEUC welcomed these provisions. However, when it comes to the features of digital products, consumers do not receive enough information as to what they are entitled to do with the digital product. All these aspects could be covered by the general obligation to inform about the 'main characteristics' of the product. In the CRD this obligation surprisingly does not apply to digital content but is limited to 'goods' and 'services'²⁶. This lacuna poses serious problems and should be addressed by the implementing national authorities.

Likewise, it seems that the traders' obligation to pre-contractually inform on the total price is inapplicable to a digital product²⁷.

In the 2012 Consumer Agenda, the European Commission indicated that it will take up initiatives to ensure consumer information requirements in the digital area are applied consistently. This will be done via "guidelines by 2014 to help enforcers correctly implement EU rules and the newly adopted Consumer Rights Directive" and include "standardising key information given to consumers to facilitate comparisons"²⁸.

²³ The Europe Economics study indicates that lack of information on the characteristic of the digital product (e.g. quality) and on the complaint policy and redress are among the most prominent, together with transparency concerns like the accessibility to pre-contractual information, page 75.

²⁴ Article 6(1) r) and s).

²⁵ Article 6 (1) t).

²⁶ Article 5(1)(a) and 6(1)(a).

²⁷ Article 5(1)(c) and 6(1) e).

²⁸ COM(2012) 225 final, 22 May 2012.

BEUC emphasises that clarification is required as to what would be the impact of such guidelines on problematic gaps described above.

In relation to the standardisation of key information, this action should bring more certainty to the information consumers must receive before purchasing digital content. It is important to highlight that this initiative should take into account:

- All the relevant pre-contractual information of Article 5 and 6 of the CRD, in particular the definition of the ‘functionality’ of digital content, in order to ensure consumers are informed about the main features of the product, including what they are entitled to do with the digital content.
- The way this information shall be presented to consumers while fully respecting the new rules introduced in the CRD on formal requirements (see point 3).
- The results of research in behavioural economics and consumer empowerment, which highlight the need for consumer-friendly lay out of information, the importance of information architecture and the risks related to information overload²⁹.
- A clear and practical definition of what products would be covered by this initiative, and its extension to ‘free’ digital content.

The participation of consumer organisations to the Commission’s work on this initiative is essential to ensure consumer needs and expectations are satisfactorily addressed.

3) Formal requirements

The CRD covers certain elements regarding the form in which the information shall be provided to consumers. Article 8 establishes that the pre-contractual information stipulated in the Directive (Article 6(1)) shall be made available to the consumer “*in a way appropriate to the means of distance communication used in plain and intelligent language*”. It also includes a specific rule on pre-contractual information to be provided by way of distance communication means, which allow limited space or time to displace the information (Article 8 (4)).

In particular for contracts concluded via electronic means (e.g. internet) which imply the obligation for the consumer to make a payment, traders shall make the consumer aware “in a clear and prominent manner, and directly before the consumer places his order” of the information related to the characteristics of the product, price, duration of the contract and of the consumer’s obligations (Article 6(1) a), e), o) and p)).

Additionally, the CRD complements the e-Commerce Directive³⁰ when it comes to the formal requirements for the valid conclusion of the contract. Article 10 of the Directive provides for pre-contractual information on how to conclude the contract and identify and correct errors before placing the order and Article 11 describes the minimum necessary steps to follow for a valid order placed via technological means.

²⁹ SWD(2012) 235 final, 19 July 2012.

³⁰ Directive 2000/31/EC, 8 June 2000.

As indicated above, all these aspects should be taken into account in any initiative aiming at standardising pre-contractual information requirements.

4) Right of withdrawal

The CRD (Article 16) applies the right of withdrawal to digital content contracts. However, this right does not apply after the commencement of the performance provided that the trader has obtained the consumer's express, prior consent and their acknowledgement that the right will be lost. This means that consumers purchasing digital content can withdraw from the contract only before the downloading has started.

Considering that this takes place almost simultaneously with the conclusion of the contract, the rule is of no value for consumers as the aim of the right of withdrawal is to examine the product being purchased at distance and with the approach adopted in the CRD this will not be possible in digital content contracts.

Taking into account that the CRD was adopted only one year ago, it is unlikely that this rule can be revised in an eventual legislative proposal for digital content contracts in the near future. However, the practicality of this rule should be carefully assessed in the report on the implementation of the CRD foreseen for 2016.

5) Legal guarantees

There are no common rules at EU level harmonising the provisions which apply to defective digital products (e.g. a lack of functionality, inter-operability problems, poorer quality than expected, etc). The CRD does not include any rule on legal guarantees and conformity for digital content and the 1999 Sale of Goods Directive³¹ applies only to tangible goods.

The 2012 European Consumer Agenda³² indicated that before 2014 the Commission may take "*initiatives to assess the need to ensure adequate EU-wide remedies for the purchase of faulty digital content*". This statement is rather surprising as the European Commission's studies³³ already provide sufficient evidence on consumer detriment in the different contract-law related areas to take action and come up with the appropriate initiatives.

Instead of ensuring, according to its obligations under the Treaties and the Charter of Fundamental Rights, that all European consumers are properly protected, the Commission has postponed the necessary modernisation process of the EU consumer law acquis.

³¹ Directive 1999/44/EC, 25 May 1999.

³² COM(2012) 225 final, 22 May 2012.

³³ Europe Economics (2011), "Digital content services for consumers: Assessment of problems experienced by consumers" available at: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm
University of Amsterdam (2011), "Study on Digital content services for consumers: Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts" available at http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

Likewise, in any other type of contract, in case of a defect in the digital content, the contracting party should be entitled to the remedies granted under consumer law. This is in line with the main consumer expectations when purchasing digital content: For example, in a survey carried out by our member Consumer Focus 55% of consumers who bought a digital product in the last 12 months (2011-2012) in the UK thought they were entitled to a replacement if a digital download was faulty and 52% believed they were entitled to a full refund³⁴.

Contrary to these legitimate consumer expectations, it has been argued that contracts for the purchase of digital content are special types of licensing agreements, given that what is sold to the consumer is not a good but the use of content. Therefore it has been claimed that sales law would not be fit to apply. However, research and national case law³⁵ have clearly demonstrated that sales law can apply to these products, as in the approach followed in the CESL proposal.

This is an important acknowledgement by the European Commission about the need to eliminate the legal fragmentation between the offline and online market-places for goods and digital products. BEUC welcomes this approach which would make consumer protection legislation future-proof and technology neutral, by removing the current differentiation between physical and digital content products.

However, these rules on legal guarantees for digital content products must be granted to all consumers, not only to those who are “opted” for by business, as would be the case with the CESL. Consequently, **the European Commission should make a legislative proposal introducing remedies for defective digital content. This could be done by proposing a specific Directive on digital products or in the frame of a revision of the 1999 Sales of Goods Directive.**

In either case, the substantive provisions of the CESL on legal guarantees could serve as a basis, although there are important points which must be considered:

First, as in sales contracts the **conformity requirements** for digital content should be mandatory: It is surprising that Article 99(4) CESL makes these requirements mandatory only for sales contracts when they should apply also to digital content contracts, especially when it is common practice among suppliers of digital products to include clauses limiting their liability as to the conformity of these types of products in the general terms and conditions (see below point 6).

Furthermore, it is not clear why the CESL regulates third parties’ rights or claims (Article 102) in the same section as conformity, thereby making the seller’s obligation to provide the digital content in conformity with the contract depend on fault³⁶, when in typical consumer sales contracts it is sufficient to prove the existence of the defect in the product (strict liability)³⁷.

³⁴ Consumer Focus response to the Department for Business Innovation and Skills consultation on Enhancing Consumer Confidence by Clarifying Consumer Law, October 2012.

³⁵ For example, the application of sales law has been the prevailing opinion in Germany and of the Swiss Federal Court. German and Austrian courts have also treated the purchase of software as sale of goods.

³⁶ Article 102 contains a rule on third parties claims which applied to B2C: the digital content must be clearer of any right or not obviously unfounded claim of a third party under the law of the contract or, in case of absence of such agreement, under the law of the buyers residence **provided that the seller knew or could be expected to have known** of at the time of the conclusion of the contract.

³⁷ H. Micklitz – N. Reich, ‘The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too broad or not broad enough?’, EUI Working Papers, Law 2012/04, p. 74

Secondly, in relation to the **remedies**, no distinction should be made between remedies for tangible goods or digital products. The CESL has adopted this approach; however, in relation to digital content not provided for exchange of a price ('free' digital content), Article 107 of the CESL limits the consumer remedies only to damages for loss or damage caused to the consumer's property, including hardware, software and data, by the lack of conformity of the supplied digital content. This limitation is unjustified considering consumers supply personal data or accept being exposed to advertising in order to access such content. It would be unfair to let suppliers keep and process the consumer's information for commercial purposes when they cannot benefit from the provided content. Consequently, even in these types of 'gratuitous' contracts, the consumer should be entitled to ask for:

- Repair or replacement of the defective content, or;
- Termination of the contract and the withdrawal of his or her personal data from the supplier's records.

6) Passing of risk

The CESL includes a specific rule on the passing of risk in digital content contracts. Article 142, paragraph 2 establishes that the risk passes to the consumer when they or a third party designated by them has obtained the *control* of the digital content. This is also in line with the policy suggestion of the University of Amsterdam's study.

BEUC supports these rules which should serve as a model for a legislative proposal on digital content products, however, it is necessary to analyse in greater detail how this rule would apply to digital content not supplied on a one-time basis (e.g. cloud-computing services). As highlighted by academic findings, this concern could be addressed by a provision indicating the trader must ensure the digital content remains in conformity with the contract throughout the contracting period³⁸.

7) Unfair contract terms

Current business models for the distribution of digital content raise a number of concerns from the consumer's perspective regarding the compliance of End-User Licence Agreements (hereafter 'EULAs') with legislation on unfair contract terms.

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

From the consumer point of view there is no difference between the purchase of a book or an e-book: in both cases they are supplying something in return to the digital content which can be monetary (price) or non-monetary (personal data, advertising). As much as any other consumer contract, the purchase of a digital product should respect the transparency requirement contained in consumer legislation and contract clauses should be subject to the unfairness test.

³⁸ M. B. M. Loos - C. Mak, 'Remedies for buyers in case of contracts for the supply of digital content', briefing note prepared for the Legal Affairs committee of the European Parliament, May 2012.

A. *Transparency of terms & conditions*

When purchasing digital content, consumers are very often confronted with a flood of disclaimers, contractual terms and mentions which are difficult to access and understand. The length and complexity of legal jargon makes it almost impossible for the consumer to understand the real implications of the contract.

It is essential that Terms and Conditions are drafted in plain and intelligible language and are easy to find on the trader's website so consumers can understand what they are agreeing to.

Additionally, the contract terms should be available to the consumer before the conclusion of the contract and be presented in a place where the consumer reasonably expects to find them. In order to avoid 'surprising' terms consumers should not be bound by terms which are placed at inappropriate locations in the contract or to which reference is made but are unavailable in the contract or on the website or provided in a language different from the one used for the conclusion of the contract³⁹.

BEUC considers the European Commission should address this concern by for example giving guidance as to how content providers shall present the contract terms in order to comply with the existing legislation. This initiative could also include examples of terms in digital content contracts likely to be considered unfair, as indicated below.

B. *Common unfair terms in digital content contracts*

Many of the typical clauses included in these types of contracts could be considered unfair under the current legal framework on contract terms. This lack of enforcement leads to consumer detriment as demonstrated in the European Commission's studies.

Below we provide a non-exhaustive list of typical unfair clauses found in digital content contracts:

a) Terms which unduly restrict the use of digital content products

Consumers are often confronted with technical and contractual restrictions in the exercise of legitimate acts under the copyright legislation. These include restriction to the personal use preventing consumers from carrying out any copying for a private purpose that may be legitimate; restriction of the possibility to make copies of the content; time restriction of the use (e.g. a test period before the definitive acquisition of the digital); restriction of use on some devices or platforms i.e. lack of interoperability; restriction of transfer when the use is contractually reserved to the person having acquired the product and to the device (e.g. computer or game console) which it has been registered.

The European copyright legislation, namely the Copyright Directive⁴⁰, fails to immunise these exceptions against contractual clauses. For this reason consumers' interests must be protected by consumer law rather than copyright legislation, which focuses primarily on the exclusive rights of the authors.

³⁹ The Feasibility Study in its Article 87 included a rule which declared unfair surprising contract terms: "A term contained in standard terms supplied by one party which is of such a surprising nature that the other party could not have expected it is unfair for the purposes of this Section unless it was expressly accepted."

⁴⁰ Directive 2001/29/EC, 22 May 2001.

Regarding **private copying**, consumers should be given a clear and enforceable right to make private copies when done for non-commercial purposes. Currently however, private copying is defined as an exception to exclusive rights in the Copyright Directive, while its non-imperative and optional character further restricts the use of content by the consumer. When transposing this Directive into national law, only Belgium, Portugal and Ireland have given an imperative status to the exceptions by immunising them against contractual overrides. Whereas this might be legitimate it leads to consumer detriment for example when consumers cannot make a copy of the content for private use or are unable to transfer and play it in another device.

In relation to **interoperability**, the consumer interest relies heavily on the ability to use digital products on the device of their choice. However, they may not be able to play content on a electronic device (such as a computer or a car radio), or to transfer a file from one format to another, while in some cases they have to buy an updated version of the digital product in order to be able to use it.

As indicated above the CRD introduced the obligation to inform consumers about any relevant interoperability of digital content with hardware and software. This is an important improvement, however this pre-contractual obligation does not prevent the supplier from introducing contractual terms enforcing TPMs or the so-called bundling clauses requiring the consumer to purchase an additional product (e.g. hardware, software or additional service such as maintenance) in order to use digital content.

All these restrictions should be scrutinised under the general clause of the 1993 Unfair Contract Terms Directive as such contract terms would create a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

b) Terms excluding the trader's liability for lack of conformity or damage

A common clause found in digital content contracts are those exempting the content provider from any liability emerging from the lack of functionality of the digital content or from damages caused to the hardware, software or data of the consumer.

For example, Apple states in the Terms and Conditions of iTunes that Apple does not warrant that the use of the service will be "uninterrupted or error-free" or that the service will be "free from loss, corruption, attack, viruses, interference, hacking, or other security intrusion (...)"⁴¹ Similarly, clause 15 of the contract terms of Adobe indicates that the service and material are provided "without warranty of any kind, expressed, implied, statutory or otherwise, including the implied warranties of title, non-infringement, quiet enjoyment, merchantability, or fitness for a particular purpose (...)"⁴² The same type of clauses are found in the general contract conditions of Skype⁴³.

⁴¹ Apple Terms & Conditions for iTunes available at <http://www.apple.com/legal/itunes/uk/terms.html#SERVICE> (accessed on 22 October 2012)

⁴² Adobe Terms & Conditions available at <http://www.adobe.com/uk/misc/terms.html> (accessed on 22 October 2012).

⁴³ Skype Terms & Conditions available at: <http://www.skype.com/intl/en-gb/legal/terms/tou/#exclusion> (accessed on 22 October 2012)

The 1993 Unfair Contract Terms Directive is clear in relation to the unfairness of exclusion of liability clauses. In this respect, Annex I of the Directive considers unfair terms “(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations (...)”

c) Terms allowing the unilateral change of terms and conditions or the features of the product at the supplier’s discretion

Usually content providers reserve the right to unilaterally change the terms and conditions after the conclusion of the contract with the consumer. Some of them even infer the tacit acceptance of the consumer by continued use of the product. This is the case of 7digital, for example, that “reserves the right, in its sole discretion, to change, modify, add, or delete portions of these terms and conditions at any time without further notice (...) and tells consumers “your continued use of the Services after any such changes constitutes your acceptance of the new terms and conditions.”⁴⁴ These clauses may also be regarded as unfair under the 1993 Unfair Contract Terms Directive (clause (j) of the Annex)

d) Exclusive jurisdiction and mandatory arbitration clauses

Many contracts for the supply of digital content contain jurisdiction clauses which aim to exclude the eventual jurisdiction of the courts of the country of the consumer’s domicile in the application of the Brussels I Regulation⁴⁵. This concern was pointed out also by the UK Law Commission who considered these types of clauses unfair and suggested that regulators should require their removal⁴⁶.

Additionally, it is a common practice among suppliers of digital products to include mandatory arbitration clauses obliging the consumer to apply to this procedure for disputes. The French and English versions of the Terms and Conditions of Spotify oblige the consumer to apply a “mandatory binding arbitration” procedure in the US, governed by the “U.S. Federal Arbitration Act”⁴⁷. This is manifestly against clause (q) of the annex to the 1993 Unfair Contract Terms Directive: “(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions (...)”

⁴⁴ 7digital Europe sarl (“7”) Terms & Conditions (as amended 11 October 2012) available at <http://www.7digital.com/termsandconditions> (accessed on 22 October 2012).

⁴⁵ Regulation 44/2001, 22 December 2000.

⁴⁶ UK Law Commission(s), Unfair Terms in Consumer Contracts: a new approach? Appendices A to D, 25 July 2012, pages 33/34, available at: http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_appendices.pdf

⁴⁷ Spotify, Terms of Use (version of 17 October 2012) available at: <http://www.spotify.com/fr/legal/end-user-agreement/> (accessed on 23 October 2012)

8) Digital content contracts concluded by minors

BEUC has previously requested that the protection of children and notably their capacity to enter into online contracts should be much better considered⁴⁸. According to an international survey done by our UK member Consumer Focus, in 76% of cases, mobile payment transactions had no age restrictions attached⁴⁹. The study also shows that mobile content marketed to youth was within easy reach of adult related content.

The CESL does not deal with the capacity to conclude a contract, including for the purchase of digital content, nor with the invalidity of a contract arising from lack of capacity (Recital 27).

The University of Amsterdam made a concrete proposal in this respect: Minors are indeed allowed to conclude digital content contracts under two conditions: first, provided that they have the permission of the legal representative and, secondly, that the contract is for a day-to-day transaction⁵⁰.

The proposed rule aims to establish the validity of a digital content contract concluded by a minor as an exemption to the general incapacity of minors to conclude contracts by themselves. In particular the DCFR does not refer to legal capacity as a ground of invalidity (DCFR II-7:101), as explained in the comment to the article it is more a matter of the law of person than of a contract proper.

However taking into account the prominence of this situation in the purchase of digital content contracts, **BEUC considers that the conditions under which a contract can be concluded by minors should be clarified**. The problem might arise when it comes to the definition of the legal age of a minor, but this can be established by reference to national law.

END

⁴⁸ BEUC e-Commerce reflection paper available at www.beuc.eu (Ref.: X/030/2010 - 06/05/10).

⁴⁹ 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>

⁵⁰ Study by University of Amsterdam, p. 240.