

QUESTIONNAIRE ON CONTRACT RULES FOR ONLINE PURCHASES OF DIGITAL CONTENT AND TANGIBLE GOODS

Information about the respondent

1. Please enter your full name *OR* the name of the organisation / company / institution you represent if you are responding on its behalf:

The European NGO Alliance for Child Safety Online – eNACSO
Transparency Register Id No: 68951559498-60 (Registered since 24/9-2012)

2. Please indicate your main country of residence:

eNACSO is a European network, consisting of 23 NGOs from across Europe. Our Secretariat is based in Italy.

3. Please indicate your main country of activity:

All Member States of the European Union

4. Contributions received will be published on the Commission's website unless it would harm your legitimate interest. Do you agree to your contribution being published along with your identity?

X Yes, your contribution may be published under the name you indicate

5. Are you answering this questionnaire as a:

X Organisation representing the interests of consumers

Depending on your profile, you may decide to respond only to the questions you have a particular interest for. For example, if you are a company selling only tangible goods and do not intend to sell digital content products in the future, you may decide not to respond to Part 1 of the questionnaire dedicated to digital content products.

We have marked questions which do not fall under our remit with N/A.

Date of Response: 3 September 2015

The European NGO Alliance for Child Safety Online is a network consisting of Children's rights NGOs from across Europe working for a safer online environment for children

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PART 1 – DIGITAL CONTENT

Context

The markets for digital content are growing rapidly. The app sector in the EU is expected to contribute EUR 63 billion to the EU economy by 2018. Consumer spending in the video games sector was estimated at 16 billion EUR in 2013. In the music industry, digital revenues now represent 31% of total revenue in the EU. The economic potential of these sectors could be further enhanced by measures which increase consumer confidence and trust and legal certainty.

However, when problems with digital content products arise (for example, the digital content products cannot be downloaded, are incompatible with other hardware/software, do not work properly, or even cause damage to the computer), specific remedies are lacking at the EU level (namely a right of the user against the trader when the digital content is defective).

In addition, realistically the consumer cannot influence or negotiate the content of the contracts which form the basis for the sale of digital products. They are sold using 'take it or leave it' contracts. This means it is extremely important that there is an overarching set of rules which reflect and impose reasonable standards that conform with consumer expectations of fair trading practices. Currently that is often not the case.

For instance, contracts may limit the user's rights even where digital content product in question does not work properly. They may also exclude the user's right to receive compensation if the digital content products caused damage (for example by damaging the computer), or they may limit compensation solely to so-called 'service credits' (extra credits for future service).

Contracts for the supply of digital content products may be characterised differently in Member States meaning the mechanisms for seeking redress within national jurisdictions can also be different or even be non-existent. There ought to be a greater degree of uniformity.

The situation can be further complicated by or seem even more anomalous where consumers have different rights or mechanisms for redress for what is essentially the same product or service, the difference being determined solely by where the consumer bought it i.e. online as opposed to offline.

A number of Member States have enacted or started work to adopt specific legislation on digital content products (namely the UK, the Netherlands and Ireland). This could further increase the differences between national rules that businesses would have to consider when providing digital content products throughout the EU.

Legal background at EU level

Certain aspects of contract law for online supply of digital content products are already covered by EU law. For example, the Consumer Rights Directive provides uniform rules on the information that should be provided to consumers before they enter into a contract and on the right to withdraw from the contract if they have second thoughts; the Unfair Contract Terms Directive provides rules against unfair standard contract terms in consumer contracts. However, there are no EU rules on other aspects of contracts for digital content products (such as what remedies are available if the digital content product is defective).

Section 1 –Problems

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

We agree with the broad sweep of the analysis contained in the “Context”. However, we note that there is no reference to the position of children (defined by the UN Convention on the Rights of the Child as persons under 18 years of age). This is a major deficiency in the Commission’s paper. Children and young people under the age of 18 are significant economic actors in their own right yet their legal capacity typically is limited and constrained in most jurisdictions. This fact too is not acknowledged or referenced.

Moreover there is no mention of the fact that the sale or consumption of certain classes of digital products and services are legally restricted by age and the rules governing these are not the same in every EU Member State.

General Remarks from eNACSO

eNACSO needs no convincing in relation to the potential economic benefits which are associated with the achievement of a Digital Single Market. Improved cross border trade is likely to improve competitiveness which, in turn, would be likely to work to the advantage of all types of consumers.

However, not all consumers are equally well equipped to engage with commerce, whether online or off. That said, it is widely accepted that an extra layer of difficulties or complications can arise where commerce is being transacted online, where for practical purposes there is no opportunity to ask questions of the vendor. This, in turn, suggests a need for greater vigilance or support in the online space.

Against this background it will therefore be important for the Commission to be mindful of its responsibilities to every class or type of consumer, but perhaps above all to younger consumers.

It can only harm the longer term prospects of the Digital Single Market if ecommerce becomes identified with sharp practice or unfairness to any group, perhaps particularly children.

Aside from anything else children have parents or guardians who are also would-be or actual online customers. If they see their offspring being abused or misused by online businesses it is unlikely to instil in them the sense of trust and confidence which will allow for optimal growth and use of the medium.

In the event of problems arising with a sale or purchase it is often difficult for consumers to avail themselves of adequate redress or remedies in the context of transactions conducted wholly in the physical world within a single jurisdiction. The arrival of a Digital Single Market is likely and is intended to increase cross border trade conducted via the internet and in that context it will be absolutely vital that resolution mechanisms are demonstrably and

easily accessible to every class or type of consumer, including children. The country of origin principle is unlikely to be workable or acceptable in the context of ecommerce at least insofar as it affects children.

The Commission should ensure it is fully appraised of and should publish information about the laws and regulations within each Member State which have a bearing on the sale or consumption of different types of good and services to children.

If, for example, in Country A, it is legal to sell fireworks to persons aged 15 or above but in country B the law specifies 18 as the minimum age at which fireworks can be bought it should not be possible for a vendor domiciled in Country A to sell fireworks to anyone in Country B without first establishing that they meet Country B's age requirement.

It would not be acceptable, in effect, for the Commission to turn a blind eye to or ignore this dimension e.g. by saying that this is entirely a matter for local law enforcement in Country B. By the very act of stimulating transnational trade the Commission itself is becoming an actor and it must therefore ensure that its actions are not encouraging or promoting greater risks to children e.g. because local law enforcement mechanisms lack the capacity to enforce age related laws where there is a transnational dimension.

We appreciate that such a proposal may anticipate or require an EU-wide system of age verification, the creation of which is a major undertaking – but the alternative, as we see it, is simply to ban all cross border trade in age restricted goods over the internet until a time when such a system exist. This could be done on a rolling basis, country by country.

Children make up a substantial proportion of internet users within the EU. They are significant economic actors in their own right. Thus companies should be required to do two things:

- A. Ensure that their consumer-directed information is published in child-friendly or child accessible formats. This should be particularly the case in respect of sites or services likely to be used by children
- B. The right to change your mind and return a product should be extended to the digital space, especially in respect of items which are most likely to be consumed by children.

More generally the EU should recognise children and young people as economic actors in their own right and consider formulating regulations or codes which recognise this fact.

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

In principle, ceteris paribus, the offline world and online world ought to be governed by the same laws and practices.

Offline, consumers have a right to return defective physical products or send back items to vendors for a variety of reasons. This can be accomplished relatively easily and straightforwardly. Why should consumers be deprived of similar if not identical rights simply because they purchase a digital product or service, a fortiori where the consumer in question is a child?

Obviously with digital products or services the potential for a “right of return” is open to misuse or abuse in ways which do not arise with physical products bought in the real world but online businesses should have to factor that in as part of the price of doing business rather than, as now, insisting the consumers carry all or most of the risk.

***Caveat emptor* is a well-established legal principle which is widely accepted. Perhaps, in the online space it now needs to be complemented by a doctrine of *caveat vendor*.**

If such a position were to be established it would create incentives for businesses to innovate to minimise their exposure to abusive or fraudulent claims e.g. by taking extra care that their products and services were correctly described and worked properly.

This is particularly important in respect of the type of digital content children and young people are likely to buy where the risk of them making an ill-informed purchasing decision is higher or where they might have been unduly influenced into making the initial purchase. Businesses selling such products would have additional incentives to make sure they were not unfairly exploiting children and young people.

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

See below – answer to question 4

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

Yes. Unless there is a degree of uniformity as between the regulatory regimes in respect of sales to children and young people, the rights of legal minors will be put at greater risk through any emerging increase in transnational trade.

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

5. The European Commission has explained in the Digital Single Market Strategy¹ that it sees a need to act at EU level. Do you agree? Please explain.

The potential economic advantages for Europe and its citizens/consumers are clear but there are manifest risks to younger consumers which must be addressed.

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

We are happy with the broad approach providing issues affecting young consumers are properly addressed. We appreciate that there will be substantial challenges but that is not a reason for avoiding or delaying finding acceptable solutions.

Section 3 – Scope of an initiative

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

Certainly it should cover business to consumers.

8. What specific aspects in business-to-business transactions, if any, should be tackled? Please explain. N/A
9. Digital content products may cover inter alia the products listed below. Which of these digital content products/services should be covered by the initiative (tick as many as apply)?

All of the below, as well as: games, including online games; media (music, film, sports, e-books) for download and media (music, film, sports) accessible through streaming

- social media**
- storage services**
- on-line communication services (for example, Skype)**
- any other cloud services**
- applications and any other software that the user can store in its own device**
- any software that the user can access online**
- any other service that is provided solely online and result in content that the user can store in its own device (such as translation service, counselling)**
- any other service that is provided solely online**

¹ A Digital Single Market Strategy for Europe COM(2015)192 final

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

Section 4 –Content of an initiative

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

X Quality of the digital content products

X Remedies and damages for defective digital content products

X How to exercise these remedies, like who has to prove that the product was, or was not, defective (the burden of proof) or time limits for exercising these remedies

X Terminating long term contracts

X The way the trader can modify contracts

Quality of the digital content products

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

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

13. When users complain about defective products, should:

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

Remedies for defective digital content products

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

X Resolving the problem with the digital content product so that it meets the quality promised in the contract

X Price reduction

X Termination of the contract (including reimbursement)

X Damages

Please explain your choice(s).

Each of the above could have a place, depending on the circumstances. It will be particularly important to be mindful that certain classes of content are restricted by age but these rules are not the same in every country. See comments the general remarks under question 1.

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

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

Intuitively a time limit seems reasonable but this should be the subject of research, particularly in relation to how it would be likely to affect children and young people.

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

This is probably variable depending on the product or service.

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

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

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

Additional rights

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

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

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

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

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

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

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

28. Which information should the notification of modification include? Please explain. **N/A**

PART 2 – ONLINE SALE OF TANGIBLE GOODS

Context

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

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

Legal background at EU level

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

Section 1 – Problems

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

The Unfair Contract Terms Directive and the Consumer Rights Directive make no mention or reference to the position of legal minors in relation to the purchase of goods and services, either online or offline. Moreover there is no mention of the fact that certain classes of tangible products are restricted by age or that these rules are not the same in every country. See comments the general remarks under question 1 in part 1.

In the context where the emergence of a Digital Single Market anticipates an increase in transnational trade the failure to address the position of minors is a major weakness that needs to be addressed.

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

It is outside the scope of our expertise to take a view on that, however the potential difficulties in relation to children and young people are manifest.

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

It is hard to answer this question without knowing the relevant differences. See comments in the general remarks under question 1.

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

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

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

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

Section 3 – Content of the initiative

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

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

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

Quality

38. Which should be the criteria for establishing the quality of the tangible goods? Should there be any additional/different criteria in addition to those already provided by Article 2² of the Consumer Sales and Guarantees Directive? Please explain. **N/A**

² Article 2 (Conformity with the contract)

1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.

2. Consumer goods are presumed to be in conformity with the contract if they:

(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

(c) are fit for the purposes for which goods of the same type are normally used;

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

Remedies³

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

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

Time limits to exercise remedies⁴

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

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

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

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

Damages⁵

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

Notification⁶

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

Commercial guarantees

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:

- shows that he was not, and could not reasonably have been, aware of the statement in question,
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

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

³ Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.

⁴ *Idem.*

⁵ *Idem.*

⁶ *Idem.*

48. Commercial guarantees are voluntary commitments by the trader to repair, replace or service tangible goods beyond their obligations under the law. Do you think uniform rules on the content and form of commercial guarantees are needed? Please explain. **N/A**
49. Could these requirements on the content and form of commercial guarantees be modified contractually or should they be mandatory rules? Please explain. **N/A**

Unfair terms

50. Should there be a list with contract terms which are always to be regarded as unfair? If yes, which terms should always be regarded as unfair? Please explain. **N/A**
51. Should there be a list of standard contract terms which are presumed to be unfair? If so which terms should be on such a list? In particular, how to treat advance payment which is very frequent in the online world? Please explain.

Probably there should be and allied to it there should be a description of specific provisions affecting legal minors.

ANNEX

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

Context

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

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

This situation means that online suppliers of goods and services who wish to serve a pan-European market may potentially need to know about, and comply with, 28 differing sets of national regulations. Finding out which regulation applies in which case may be difficult. 37% of firms in the EU that have experience with selling online to other Member States stated that lack of knowledge of the rules that have to be followed is a barrier to selling online cross-border. Moreover, 63% of firms that have no experience with selling online cross-border stated that they believe that lack of awareness of which rules have to be followed may constitute a barrier⁷. This shows that the perceived barriers are significantly higher than the real barriers and that there is space for better communication and transparency. This situation creates information and compliance costs for online traders, especially for small and medium-sized enterprises, and in particular when the value of the transaction remains low.

Section 1 – Problem

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

⁷ European Commission, Flash Eurobarometer 413, 2015

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

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

Specific questions for traders N/A

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

a) To which you sell on-line?

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

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

a) How did you obtain this information and at what cost?

b) How did you address the need to comply with Member State-specific requirements?

Specific questions for consumers N/A

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

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

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

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

Section 3 – Content of a possible initiative N/A

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

a) Difficulties related to different product specifications at national level

Yes / No

b) Difficulties related to different packaging rules at national level

Yes / No

c) Difficulties related to different labelling rules at national level

Yes / No

d) Other issues, if so, please explain