

Response to the Questionnaire on Contract Rules for Online Purchases of Digital Content and Tangible Goods

ZVEI – Zentralverband Elektrotechnik- und Elektronikindustrie e. V.
German Electrical and Electronic Manufacturers' Association
Lyoner Straße 9 - 60528 Frankfurt am Main, Germany
<http://www.zvei.org>

EU Transparency Register ID: 94770746469-09

Contact:
Karin Kersebaum, LL.M.
Rechtsanwältin
E-Mail: kersebaum@zvei.org

Jan Paul Marschollek, Executive M.B.L.-HSG
Rechtsanwalt
E-Mail: marschollek@zvei.org

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:

*ZVEI – Zentralverband Elektrotechnik- und Elektronikindustrie e.V.
ZVEI – German Electrical and Electronic Manufacturers' Association*

2. Please indicate your main country of residence: *Germany*

3. Please indicate your main country of activity: *Germany*

ZVEI (German Electrical and Electronic Manufacturers' Association) promotes the German electrical and electronic industry's joint economic, technological and environmental policy interests on a national, European and global level. ZVEI represents more than 1,600 companies, mostly SMEs. The sector has 845,000 employees in Germany plus more than 680,000 employees all over the world. In 2014 the turnover was approximately Euro 172 billion. The electrical and electronics industry is the most innovative and the second largest industry sector in Germany. Every third innovation in Germany's manufacturing sector stems from solutions of this sector. More than 20 percent of all industrial R+D spending comes from this industry.

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?

- Yes, your contribution may be published under the name you indicate
- Yes, your contribution may be published but should be kept anonymous (without name and contact details)
- No, you do not want your contribution to be published. Your contribution will not be published, but it may be used internally within the Commission.

5. Are you answering this questionnaire as a:

- Consumer
- Organisation representing the interests of consumers
- Company mainly selling digital content products / Organisation representing the interests of companies mainly selling digital content products (if so, please indicate your business sector and whether you are a small and medium enterprise or not)

- Company mainly selling tangible goods online / Organisation representing the interests of companies mainly selling tangible goods online (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- Company mainly buying digital content products / Organisation representing the interests of companies mainly buying digital content products (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- Company buying mainly tangible goods online / Organisation representing the interests of companies buying tangible goods online (if so, please indicate your business sector and whether you are a small and medium enterprise or not)

Organisation representing the interests of businesses in general

- Member State of the EU or EEA/ Public authority
- Other (for example, academics, other NGO, public authority outside the EU/EEA, trade union) (please specify)

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.

PART 1 – DIGITAL CONTENT

Context

Digital content products markets are growing rapidly. For instance, the app sector in the EU has grown significantly in less than five years, and is expected to contribute EUR 63 billion to the EU economy by 2018. Consumer spending in the video game sector is estimated at 16 billion EUR in 2013. In the music industry, digital revenues now represent 31% of total revenue in the EU. This economic potential should be further unleashed by increasing consumer trust and legal certainty for businesses.

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, the user cannot influence the content of the contracts on the basis of which digital content products, which are 'off-the-shelf' products, are offered because these are 'take it or leave it' contracts. For instance, contracts may limit the user's right in case the digital content products do 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 limit compensation solely to so-called 'service credits' (extra credits for future service).

In addition, contracts for the supply of digital content products may be characterised differently in the Member States for example as service, lease or sales contracts. Such different treatment may result in different sets of remedies, some of them in the form of mandatory rules, others not. This may cause legal uncertainty for businesses about their obligations – and for users about their rights- when selling digital content products both domestically and cross-border.

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.

ZVEI acknowledges and supports the European Commission's approach of creating an optimized framework in order to foster a Digital Single Market thus increasing consumer trust and legal certainty for businesses alike with regard to digital content products.

However, we can only in part agree with the findings of the aforementioned analysis.

Even though the consumer may in case of "off-the-shelf-products" not be able to influence every content detail of the contract, the ever-increasing competition between suppliers of digital content generally allows consumers to choose the offer which is over-all the most attractive to them. In addition, the current requirements of the Unfair Contract Terms Directive (93/13/EEC) which protects against unfair clauses which have not been individually negotiated in B2C contracts apply to both, tangible goods and digital content contracts.

Moreover, most national legislations, including Germany, already provide a sufficient level of consumer protection regarding digital content contracts including remedies for a defective product. In this respect, it may even be advisable to take a step back at the European level and first to evaluate the practical application and impact of any newly adopted national legislation specifically on digital content products in Member States, such as the UK Consumer Rights Act that will come into force on 1 October 2015. The experiences of these Member States with the new legislation could thus be taken into consideration when drafting any new EU instrument.

Regarding the rules on e-commerce, the European Consumer Rights Directive (2011/83/EC) grants further protection to consumers when buying digital content online.

2. Do you think that users should be more protected when buying digital content products? Please explain why by giving concrete examples.
3. Do you perceive difficulties/costs due to the absence of EU contract law rules on the quality of digital content products? Please explain.
4. Do you think that upcoming diverging specific national legislations on digital content products may affect business activities? Please explain.

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.

With reference to our answer to question 1, our industry strongly believes that achieving the Commission's objectives under the Digital Single Market Strategy does not require any modification of the existing and/or the creation of any additional contract rules on a European level. Especially in business-to-business transactions, domestic and cross-border contracts are conducted between parties according to their particular business needs. We

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

have no indication from our industry, that sales and other transactions are hindered by a lack of mandatory European legal requirements. Quite the contrary is the case: business and growth are promoted where the business parties of a contract have the possibility and liberty to define their B2B-relationship autonomously.

With regard to business-to-consumer transactions, the European Consumer Rights Directive (2011/83/EC) already provides for a set of fully harmonised rules (including a fully harmonized right of withdrawal) governing the e-commerce sector. Since the sale of digital content usually takes place online and digital content usually is consumed shortly after its purchase, the Directive already breaks down a major barrier to cross-border online sale of digital content.

The Consumer Rights Directive has only recently been transposed into national law. Its review is scheduled for 2016. Any revision of the contract law as envisaged by the current initiative would anticipate the review of the Consumer Rights Directive. The outcome of its impact assessment should therefore be awaited before taking any further legislative steps.

Moreover, the sale and non-conformity of tangible goods is already sufficiently covered by the Consumer Sales and Guarantees Directive (1999/44/EC). Based on a minimum harmonization approach, it enables the Member States to go beyond the European level of consumer protection in favour of their national consumers. Thus, despite some national divergences the resulting level of consumer protection is high. Regarding the online sale of tangible goods, consumers are sufficiently protected by the safeguards of the Consumer Rights Directive which governs the specifics of online sale (as opposed to offline sale) for both types of goods, tangible and digital.

ZVEI therefore strongly advocates that the scope of any new initiative, should it be deemed necessary, shall be limited to (online purchases of) digital content in B2C-relationships only. Tangible goods, however, should be left outside the intended scope altogether.

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?

ZVEI believes that a new initiative is currently not justified by a need to act on a European level in a regulatory manner.

However, should the Commission feel that there is a current need for a binding legal instrument, we would assume that only a limited set of key harmonised rules for online purchases of digital content in B2C transactions would enable the Commission to realize its objectives.

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.

The scope of any initiative should be strictly limited to business-to-consumer sales. The B2B sector should fall outside its scope. Contracts covering digital content in the B2B sector are usually very complex and specific and therefore need to be governed by highly detailed contractual agreements. Here, freedom of contract should prevail.

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

None, since B2B-transactions should not fall within the scope of any initiative.

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)?

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

Please explain your choice(s).

ZVEI takes the view that only digital content provided online or in digital form should be subject to a new initiative. Digital content/software embedded in electronic appliances or devices should however explicitly be excluded from any new initiative on digital content. The contract law applicable to tangible goods should govern embedded software or digital content as such software or digital content is strictly related to the functioning of the tangible appliance or device.

However, it would be a prerequisite of any new initiative to find distinct definitions of the concepts of “digital content” on the one hand and “tangible goods” on the other hand.

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

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

Please explain your choice(s).

Section 4 –Content of an initiative

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

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

Please explain your choice(s).

Any new initiative should strike a fair balance between consumer and business interests thereby taking into account the specifics of digital content. The areas already covered by existing EU law regarding tangible goods in the Consumer Sales and Guarantees Directive (1999/44/EC) could be used as a parameter.

Quality of the digital content products

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

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

Please explain your choice(s).

The criteria should be defined in such a way as to strike a fair balance between consumer and business interests thereby taking into account the specifics of digital content. The criteria already provided for by existing EU law regarding tangible goods (see Art. 2 Consumer Sales and Guarantees Directive (1999/44/EC)) could be used as a parameter.

13. When users complain about defective products, should:

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

Please explain your choice(s).

The general rules governing the burden of proof should apply. Therefore, if a user would like to bring a claim against a trader on the grounds that the product is defective, the former has to substantiate his claim and to provide evidence for all circumstances (including the defect) giving rise to the claim.

Remedies for defective digital content products

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

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

Please explain your choice(s).

Here also, the Consumer Sales and Guarantees Directive (1999/44/EC) could be used as a general guideline. The hierarchy of remedies as laid down in its Art. 3 is a general principle of EU consumer contract law and should be preserved. However, the trader should have the right to choose between the remedies. In particular, he should be given the opportunity to remedy any defect so that the digital content meets the quality promised in the contract in the first place (right to cure). In the light of resource efficiency and the reduction of environmental impact, it may even be advisable that repair should always take precedence over replacement unless this would be disproportionate or impossible.

National law only should cover the aspect of damages. Any new initiative should be limited to the mere remedies for defect or non-conformity.

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.

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.

In order to ensure legal certainty for both parties and to enable the trader to assess his risk of liability and build up corresponding reserves there should be one specific limitation period starting after delivery of the digital content products during which time limit the user would have to exercise his remedies.

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.

Please, see above (answer to question 16).

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

We believe that there should only be one time limit, the length of which ought to strike a fair balance between consumer and business interests thereby taking into account the specifics of digital content, in particular its fast-moving nature. Therefore, any time limit should be rather short, at any rate, no longer than the current two-year limitation period for tangible goods (see Art. 5 Consumer Sales Directive (1999/44/EC)).

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)?

National law only should cover any aspects of damages. Any new initiative should be limited to the mere remedies for defect or non-conformity. Notwithstanding this, any liability of the trader must depend on fault. The legal principle of strict liability does not strike a fair balance between the contractual parties.

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

National law only should cover the aspect of damages.

Additional rights

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

- Yes
 No

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

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

Please explain your choice(s).

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

- Yes
- No

Please explain your choice.

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

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

Please explain your choice(s).

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

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

Please explain your choice(s).

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

- Yes
- No

Please explain your choice.

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

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

Please explain your choice(s).

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

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 above analysis shows that European consumers already benefit from a high level of protection. Hence, ZVEI believes that the existing legal framework of contract law in the EU is a sufficient foundation for the promotion of growth of the economy and better access for consumers and businesses to goods and services across Europe.

We are convinced that the barriers that might hinder further growth are more of a factual nature rather than a legal. Evidence gathered by the Commission shows that consumers have less trust in cross-border e-commerce than shopping online nationally and that this "home bias" can be attributed to a large extent to cultural and proximity factors such as language and brand recognition. In addition, 72 % of Internet users in Europe are worried that they have to provide too much personal data online (European Commission, Special

Eurobarometer 359, “Attitudes on Data Protection and Electronic Identity in the European Union”, 2011). Serious consumer concerns about purchasing products online are linked to data protection and payment security, to delivery costs, high return shipping costs, and long delivery times, and therefore to a large extent to barriers of a factual nature rather than a legal.

Correspondingly, firms that have experience in selling online cross-border identified the high delivery costs as the most important obstacle to online cross-border sales. Improving security of payment and language skills for dealing with foreign countries would also considerably increase the likelihood of firms purchasing online across borders. In addition, more than one third of these firms (37 %) stated that lack of knowledge on the rules that have to be followed presents a barrier to selling online cross-border and almost two thirds of firms (63 %) that have no experience with selling online cross-border state that lack of awareness of the applicable rules may present a barrier (European Commission, Flash Eurobarometer 413, 2015). This shows that the perceived barriers are significantly higher than the real barriers. Better communication and more transparency would help to remove these barriers.

Against this background, we take the view that there is currently no need for a revision of existing consumer rights regarding the online cross-border sale of tangible goods.

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

We consider that users already benefit from uniform rights when buying tangible goods online insofar as the specifics of online sales - as opposed to offline sales - are dealt with by the Consumer Rights Directive which provides for fully harmonised rules (including a fully harmonized right of withdrawal) governing the e-commerce sector.

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.
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.

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.

With reference to our answer to question 29, our industry strongly believes that achieving the Commission’s objectives under the Digital Single Market Strategy does not require any modification of the existing and/or the creation of any additional contract rules on a European level. Especially in business-to-business transactions, domestic and cross-border contracts are conducted between parties according to their particular business needs. We

have no indication from our industry, that sales and other transactions are hindered by a lack of mandatory European legal requirements. Quite the contrary is the case: business and growth are promoted where the business parties of a contract have the possibility and liberty to define their B2B-relationship autonomously.

With regard to business-to-consumer transactions, the European Consumer Rights Directive (2011/83/EC) already provides for a set of fully harmonised rules (including a fully harmonized right of withdrawal) governing the e-commerce sector. Thus, the Directive already breaks down a major barrier to cross-border online sale of tangible goods.

The Consumer Rights Directive has only recently been transposed into national law. Its review is scheduled for 2016. Any revision of the contract law as envisaged by the current initiative would anticipate the review of the Consumer Rights Directive. The outcome of its impact assessment should therefore be awaited before taking any further legislative steps.

Moreover, the sale and non-conformity of tangible goods is already sufficiently covered by the Consumer Sales and Guarantees Directive (1999/44/EC). Based on a minimum harmonization approach, it enables the Member States to go beyond the European level of consumer protection in favour of their national consumers. Thus, despite some national divergences the resulting level of consumer protection is high.

ZVEI therefore strongly advocates that the scope of any new initiative, should it be deemed necessary, shall be limited to (online purchases of) digital content in B2C-relationships only. Tangible goods, however, should be left outside the intended scope altogether.

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?

ZVEI believes that a new initiative is currently not justified by a need to act on a European level in a regulatory manner.

However, should the Commission feel that there is a current need for a binding legal instrument, we would assume that only a limited set of key harmonised rules for online purchases of digital content in B2C transactions would enable the Commission to realize its objectives.

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.

With reference to our answer to question 33, we take the view that the scope of any initiative should be strictly limited to business-to-consumer sales. The B2B sector should fall outside its scope.

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

None, since B2B-transactions shall not fall within any initiative.

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

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

Please explain your choice(s).

The existing legal framework provided by the Consumer Sales and Guarantees Directive (1999/44/EC) already sufficiently covers all relevant legal aspects.

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.

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;

(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.

No, Article 2 of the Consumer Sales and Guarantee Directive (1999/44/EC) offers sufficient protection as it already covers both subjective as well as objective criteria.

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.

We believe that the current rule on the reversal of the burden of proof for a period of six months after delivery of a tangible good as provided by the Consumer Sales and Guarantees Directive (1999/44/EC) already strikes a fair balance between the interests of the trader and the consumer.

Remedies³

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

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

Please explain your choice(s).

The remedies of the consumer in case of a defective tangible good should be limited to those already existing under the Consumer Sales and Guarantees Directive (1999/44/EC).

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.

Art. 3 of the Consumer Sales and Guarantees Directive (1999/44/EC) is a general principle of EU consumer contract law and should be preserved. Therefore, there should be a hierarchy of remedies. In particular, the trader should be given the opportunity to remedy any defect so that the tangible good meets the quality promised in the contract in the first place (right to cure) as is currently the case.

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.

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.

In order to ensure legal certainty for both parties and to enable the trader to assess his risk of liability and build up corresponding reserves there should be one specific limitation period starting after delivery of the digital content products during which time limit the user would have to exercise his remedies. The current two-year limitation period for tangible goods (see Art. 5 Consumer Sales and Guarantees Directive (1999/44/EC)) strikes a fair balance in this respect.

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.

Please, see above (answer to question 42).

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

We consider the current two-year limitation period for tangible goods (see Art. 5 Consumer Sales and Guarantees Directive (1999/44/EC)) to be appropriate.

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

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)?

National law only should cover the aspect of damages. Any liability of the trader must depend on fault. The legal principle of strict liability does not provide a fair balance between the contractual parties.

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

⁴ *Idem.*

⁵ *Idem.*

⁶ *Idem.*

or, rather, from when he could be expected to have discovered the defect? How long should the period be? Please explain.

We believe that the buyer should be obliged to notify the defect within a reasonable period of time from the moment he/she notices the defect as provided for (optionally) by Art. 5 paragraph 2 of the Consumer Sales and Guarantees Directive (1999/44/EC).

Commercial guarantees

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

No, there should be no additional rules on commercial guarantees. However, if such rules were to be implemented they should always be optional and not mandatory, as commercial guarantees are an essential factor of customer service and therefore of competition between companies.

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

Commercial guarantees shall not be subject to mandatory rules. This would oppose the voluntary character of commercial guarantees and – de facto – declare a commercial guarantee to an equal status of a mandatory legal warranty.

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.

No. The current requirements regulated in the Unfair Contract Terms Directive (93/13/EEC) which protects against unfair clauses which have not been individually negotiated in B2C contracts and which relates to both tangible goods and digital content suffice.

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.

No. The current requirements regulated in the Unfair Contract Terms Directive (93/13/EEC) which protects against unfair clauses which have not been individually negotiated in B2C contracts and which relates to both tangible goods and digital content suffice.

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.

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?

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

Specific questions for traders

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

a) To which you sell on-line?

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

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

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

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

Specific questions for consumers

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

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

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

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

Section 3 – Content of a possible initiative

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

a) Difficulties related to different product specifications at national level

Yes / No

b) Difficulties related to different packaging rules at national level

Yes / No

c) Difficulties related to different labelling rules at national level

Yes / No

d) Other issues, if so, please explain