

Questionnaire on contract rules for online purchases of digital content and tangible goods

11/09/2015

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:

Council of Bars and Law Societies of Europe (CCBE)¹²

2. Please indicate your main country of residence:

Belgium

3. Please indicate your main country of activity:

Europe

¹ The UK delegation, for the most part, did not support the CCBE's positions on the former proposal for a Common European Sales Law. For a variety of reasons, some relating back to that file and references made to it in the CCBE's present response, it is unable to support the CCBE's response to the current consultation on digital contracts. For an insight into our respective positions, please instead refer to the individual responses of three of our member bars / law societies: The Bar Council of England and Wales (http://live.barcouncil.net/xtra.net/media/389346/bar_council_of_e_w_response_to_commission_questionnaire_on_contract_law_elements_of_the_digital_single_market_strategy_final.pdf); the Law Society of England and Wales (<http://communities.lawsociety.org.uk/brussels/news/eu-consultation-on-contract-rules-for-online-purchases-of-digital-content-and-tangible-goods/5050866.article>) and the Law Society of Scotland (<http://www.lawscot.org.uk/media/583286/obl-consultation-on-contract-rules-for-online-purchases-of-digital-content-and-tangible-goods.pdf>).

² The Austrian, Danish, Finnish, Norwegian and Swedish delegations would like to emphasize especially the following points:

- It is not obvious that a regulation would be the best instrument to deal with this matter. A regulation would de-emphasize national contract law. This would lead to further problems with harmonisation within the field of national contract law. These delegations are clearly in favour of an optional instrument. But if the European Commission strives for a regulation, it would be a good thing to include the contract rules for digital contents and tangible goods in an already existing legal framework (sales law/consumer law) and not to create another legal instrument in parallel. This development increases legal fragmentation.
- If the European Commission goes for a regulation, the scope shall be limited to b2c-transactions. If the European Commission decides to propose an (non-binding) optional instrument, we could agree on an extension of the scope to b2b-transactions. But in the case of a binding and directly applicable regulation they oppose widening the scope to b2b-transactions.
- The regulation should not be applied to national contracts (cross-border or not).
- There is no need to extend the warranty period up to three years. Two years are more than sufficient.

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?
Click on first alternative

- 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)
- Council of Bars and Law Societies of Europe (CCBE)**

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.

We fully agree with this analysis. Urgent action is needed in order to facilitate intra-union commerce with goods and services, especially with digital content.

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

The existing rules are not sufficient to protect the interests of users of digital content (issues of copy right, issues of non-conformity, hierarchy of remedies, lack of specific "examples" of unfair terms in the Directive on Unfair Terms, prescription, scope of damages etc.). The sales regime of the Consumer Sales Directive does not provide adequate consumer protection in the commerce with "digital content products". Disputes on nonconformity must be settled in a quick, practicable electronic way, not in lengthy court proceedings.

One has to take into account the Directive n. 2013/11 and the Regulation n. 524/2013 on mediation.

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

Digital content products are offered in a globalised market; national rules, because they are different and do not provide for a quick and practicable solution, do not meet the needs of consumers or the interests of traders (platforms) in the trade with digital contents. Digital content products – whether tangible or intangible – are offered in the way of mass distribution in a standardised form and in an electronic way regarding which the consumer must be able to answer in a standardised electronic manner. As far as commerce with digital contents needs protection by the courts, a harmonised (standardised) contract law must be available for both sides to provide for a high degree of transparency regarding the expected benefits and risks of the legal conflict. The rules contained in CESL were already a great leap forward and could serve of themselves as a basis for a harmonised contract law in the field of digital content products. The contracts on digital content products are well defined in Recital 19 of the Consumers Rights Directive and should be taken as a basis.

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

Diverging specific and national legislations on contracts regarding digital content products will deter consumers from using the Internet to acquire products with digital content. It may also deter small and medium-sized enterprises with a seat in one member state only from using the Internet for selling their products with digital content. Divergent national legal regimes will not meet the requirements of promoting and fostering the Single Market within the EU (Art. 114 TFEU). They will be a barrier (copy right laws, – geo-blocking).

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 Strategy³ that it sees a need to act at EU level. Do you agree? Please explain.

We agree with the Digital Single Market Strategy paper of the Commission regarding the need to act on an EU level.

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 favoured such proposal for purchases of digital content as an appropriate instrument. However, the CCBE believes that Art. 6 Rome-I should be respected and upheld for all those areas not being harmonised.

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.

Not only business-to-consumers transactions but also business-to-business transactions should be covered, this for two reasons: these different forms of transactions interrelate with each other: the business enterprise acting as a trader should not be subject to one contract model on the one side and to another contract model on the other side. Moreover, small and medium size enterprises often are in a position rather similar to that of consumers. Therefore, there is a clear need to harmonize the applicable rules for business-to-consumers transactions and for business-to-business transaction in the Digital Market on an EU level. CESL is an excellent example which could be used without substantial changes (apart from its restrictions to SMEs).

However, mandatory rules imposing information obligations before entering into the contract and the right to withdraw from the contract should be only part of consumer transactions.

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

CESL is fine in this respect.

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

³ A Digital Single Market Strategy for Europe COM(2015)192 final

- 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).

In order to avoid unnecessary fragmentation of the rules on digital content contracts we believe that the scope of such new legal regimes should be as all-embracing as possible in order not to confuse market participants. We see no practical reasons for different valid rules regarding contracts with different digital contents.

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

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

Please explain your choice(s).

We see no need and no justification for limiting the initiative to certain counter-performances.

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).

All of the areas mentioned should be covered by the initiative. They are of utmost practical importance in almost any of these contracts.

There should be an exhaustive list of those standard terms – “black” and “grey” (good example in Art. 84 and 85 CESL) that are held to be invalid in b2c-transactions. Such exhaustive list – with a view of any possible future developments – seems to be mandatory in view of Art. 114 Sec. 3 TFEU. A special problem which, however, should also be covered by the initiative but needs different legal rules are damages arising from the digital content on the side of the consumer or the enterprise acquiring the digital content. A special section should deal with this special problem.

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).

A mixture of both, subjective and of objective criteria, should ensure the quality of digital content products.

As regards objective criteria, when possible, the “name under which the product is sold” (the sales name) and, in addition, special prohibitions and obligations.

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 directive 1999/44/EC contains a presumption of non-conformity in case a defect has become apparent starting from the delivery of the product that the trader may dispute by producing counterevidence.

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).

With regard to the regime of damages, Art. 159 sequ. the CESL seems to provide for an appropriate regime.

A special regime must be established in order to adequately secure a prepayment obligation of a consumer, either by invalidating any such clauses ("black listing") or by legally securing any repayment obligation of the trader in case of restitution (reimbursement). The securing of a prepayment could be effected by technical means: the prepayment to the bank of the provider would be only conditional, the condition being that the consumer does not step back from the contract within one month.

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

Yes, we have already spoken out against a fragmentation along the lines of different models of counter-performance.

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.

The rules of CESL (Art. 178 sequ.) are adequate.

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.

The rules of CESL (Art. 178 sequ.) are adequate.

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

The rules of CESL (Art. 178 sequ.) are adequate.

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)?

The damage section in CESL is providing adequate rules (strict liability and test of foreseeability).

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

We do not believe that such remedy is adequate, unless the consumer has expressly agreed to that remedy.

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).

It seems mandatory to protect the consumer and the trader adequately: termination periods should depend on the maximum duration of the contract (no longer than six months), termination period one month (to be notified electronically); termination for cause must be provided for (rules are required); consumers and traders should be confident that the data will no longer be used (penalties on the trader/seller of the product should be provided for by legal rules in case of any breach).

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.

If technically possible any content generated by user should be secured and, if stored with the trader, be sent back to the user and being disenabled on the side of the trader so that he cannot transfer it to another trader.

Except when the content generated by the consumer, or a part of it, is a counter-performance.

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.

Any modification of digital content products features which have an impact on the quality or conditions of use of the digital content products should be allowed only to the extent as such modification is "reasonable" in view of the interests of the consumer. Here is a binding contract which cannot be modified by any unilateral action of the trader, unless there is non-conformity. Therefore, there must be a black-listed clause in the legal regime invalidating standard contract terms and this alternative then should – in case of

any modification – give the right to the consumer to terminate the contract forthwith and free of charge.

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
- x Other (please specify)

Please explain your choice(s).

See above.

Moreover, such modification should be authorised when imposed by law or by technical changes out of control of the trader.

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

Such information should describe all consequences of the modification for the use of the consumer and shall be combined with a right of termination.

When a modification is imposed by law or technical changes out of control of the trader, the buyer should not be allowed to terminate the contract if the contract still complies with his expectations and the normal use of the product or service.

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.

Yes, we agree with the analysis of the situation made in the "Context"

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.

The impact assessment that was made in view of tabling CESL still is a reliable basis for the need of having uniform rules for sales, in principle regardless whether they are bought online or not, but especially if the bought online.

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.

Art. 6 Rome I is problematic for many traders as they have to adapt their contract to the specific legal situations. A similar problem exists in case of b2b-transactions (cost estimate € 10.000/for each Member State).⁴

⁴ The French delegation wishes to add the following point: the consumer must know that cross-border e-commerce has its proper rules. Harmonisation will make it necessary to replace national provisions that cannot be derogated from by agreement by common rules of sufficient protection in order to avoid the obstacle to the market of § 2 of article 6 of the 2008/593 Regulation. It should be a total and not a minimum harmonisation with no legal obstacles in the market and it would be a real step forward for the European legal rule and fair competition.

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.

The question was clearly answered in the affirmative by the users when the CESL was debated.

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.

It is mandatory, not only to cover digital content products, but also tangible goods, preferably in the same instrument. Fragmentation of applicable legal rules should be avoided, since there is no exact borderline between these two types of contracts. An example is a digital content sold on a CD (sale only? Copy-right issues?)

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?

The better approach would be to have both types of contracts (digital contents and tangible goods) combined providing for a complete set of contractual rights for domestic and cross-border online sales for consumers and business users as far as the contract has been concluded in a digital way. We also do believe that a voluntary stakeholders' model contract is the right solution in the Union digital market.

We are convinced that the best solution is a unique model of contract for online sales regardless of its domestic or cross-border e-commerce.

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.

See above. We favour that the EU should act also for business-to-business transactions.

However, acting for both transactions, business-to-consumers and business-to-business, does not mean that the rules are all the same.

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

Basically, there should be the same legal regime for b2b and b2c contracts, perhaps, with the exception of the regime on the validity of standard contract terms. If one would agree to that exception, Chapter 9 of CESL could be relied on since it is well drafted.

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).

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 2⁵ of the Consumer Sales and Guarantees Directive? Please explain.

No, Article 2 of the Consumer Sales and Guarantees Directive seems to be adequate and sufficient.

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.

The rules of the Consumer Sales Directive are adequate. With regard to b2b-transactions Art. 99 sequ. CESL provided a good solution which could be used.

Remedies⁶

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)

⁵ 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.

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.

⁶ Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.

- Damages
- Right to withhold the payment of the price until the defect is remedied
- Other (please specify)

Please explain your choice(s).

The provisions in CESL - Art. 106 sequ. - are appropriate and should be taken over.

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.

See above.

The Directive 99/44/EC gives the consumer the opportunity to choose between repair and replacement.

Time limits to exercise remedies⁷

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.

The time limits proposed in CESL – Chapter 18 – should be taken over.

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.

See above.

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

See above.

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

Yes, one year after delivery.

⁷ *Idem.*

Damages⁸

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)?

See Art. 159 sequ. CESL.

Notification⁹

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.

There should be no time limit for the notification of any defect in a b2c-contract, unless the defect is apparent.

In b2b-transactions the buyer is obliged to inspect the goods and to notify of any defect discovered and should be prevented from any remedy if he reasonably could have been expected to have discovered any such defect (rebuttable presumption of the buyer).

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.

Yes, the Directive on Consumer Sales is a good basis for extending these issues also to b2b-transactions. This seems to be mandatory in order to adequately protect the entire sales chain in case the manufacture has given such guarantee.

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

In view of the requirement of consumer protection there should be mandatory rules.

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.

Yes, there should be a list with contract terms which are always to be regarded as unfair. See Chapter 8 CESL.

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.

See our answer to No. 14.

⁸ *Idem.*

⁹ *Idem.*

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 barrier¹⁰. 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.

We cannot but agree with the description of the situation made above, except to point out that some of the measures which hinder exchanges have been reduced by the harmonization of some national legislations.

¹⁰ 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?

In principle, a legally marketed product in the Member State of origin must be able to circulate freely on the domestic market.

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.

On the contrary, it seems that labelling, which is a valuable source of information, rather fosters the development of cross-border e-commerce, in so far as it makes it easier to compare the different products and to promote competition.

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