JOINT GSMA - ETNO RESPONSE

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: GSMA (Transparency Register Number: 30988577529-37) and ETNO (Transparency Register Number: 08957111909-85)

2. Please indicate your main country of residence:

3. Please indicate your main country of activity: Global and EU-wide

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
- ☐ 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 Your contribution will not be published, but it may be used internally within the Commission.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)
- X 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

The assessment above is correct but only considers a part of the picture.

Consumer protection has grown in a piecemeal way since the implementation of the Unfair Contract Terms Directive in 1993. Since then, there has been a number of Directives which address consumer protection in different ways; the E-Commerce Directive, the Directive on Consumer Sales and Guarantees, the Consumer Rights Directive, the Directive on Consumer Alternative Dispute Resolution and many others. Some simplification has begun with the Consumer Rights Directive, which replaced two Directives – Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises. This simplification needs to continue in order to reduce the regulatory burden for companies and help consumers understand their rights.

Given the way in which the legislation has organically developed, overlaps, gaps and inconsistencies have emerged. This is also due to fundamental changes in the economics of service industries as new, often global, e-business models emerge, blurring the lines between digital products, communications and services. Consequently, the current regime is overly prescriptive and fragmented. Additionally, consumers are confused since businesses often have to provide more information than needed to make an informed choice.

In the light of the Digital Single Market objectives, consumer regulation needs to be holistically reviewed, taking into account not only digital content but also services. The review's objectives need to focus on providing better access to digital services and content, creating the right conditions for digital services and content to flourish and maximising the growth potential of the whole digital economy.

In order to achieve the Digital Single Market policy objectives, a new approach is required. We believe that there is a need for fundamental principles which should be guaranteed for consumers of all digital products and services. These principles are the following: products should meet consumers' expectations, be delivered on fair and transparent

terms, privacy should be protected under the same conditions, no matter the status of the service provider and consumers should have a right of redress if something goes wrong.

There are new digital products and services today which were not even in existence when some of the current regulation was implemented. One particular category is digital communications services provided by other than telecommunication companies – voice over IP, instant messaging, social networks and many other services which compete with the more traditional voice and text services. Despite the similarity of these services, the fact that they do not fall within the outdated definitions of an "electronic communications service" (ECS) as described in the regulatory framework for telcos means that they are subject to less regulation. Traditional voice and text services are required to comply with additional consumer regulations, as prescribed e.g. in the Universal Services Directive: information requirements, dispute resolution procedures, requirements in relation to bills, contractual requirements and marketing requirements. Often, telcos are also required to comply with these additional sector-specific rules when providing other digital services than ECS.

Given the convergence of communications services and the increase in competition between telcos and other providers, sector-specific service regulation must be reviewed in parallel to general service regulation, in order to ensure consistent consumer protection standards. This includes a need to carry out an overall assessment of the current definitions and requirements, encompassing all digital products and services regardless of the provider and of the way by which they are provided to the customers. Where proportionate and appropriate, regulation should either be removed if outdated or adapted to address new risks. The principle of proportionality implies to avoid costs for the industry which create significant barriers for business activities. Otherwise, growth of innovation that we have seen over the last decade is at risk. In essence, this will require both modernisation and simplification of consumer rules. This updated horizontal consumer regulation then needs to be applied consistently to all service providers, to truly establish consumer trust for the digital age and legal certainty for businesses.

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

The rapid growth of the digital market has meant that the legislation, which predates much of the internet, does not cover many aspects of the digital offerings which are available today. Digital content in particular is an area where the applicable requirements are highly unclear and fragmented, with no specific rules at EU level.

There are essential rights which the customer should be able to rely on for all "lawfully acquired" services: knowing who the supplier is; price transparency; conformity with the contract; transparency as to the nature of the content/product delivered; information in

relation to any restrictions or compatibility requirements; transparency as to consent requirements and no unfair terms. At the same time, care should be taken not to impose overly prescriptive requirements, particularly for low-value services, as this could inhibit innovation. An example of an overly prescriptive requirement may be: limitations on the duration of contracts, which may inhibit new business models; requirements to return data which may be irrelevant to the end user in practice; onerous redress obligations and termination rights arising as a result of any changes to terms and conditions even if it does not impose a disadvantage for the consumer. A proportionate response is required to take account of low value goods and services while also including services paid for via data or other non-monetary considerations.

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

Yes, as set out above. The key point is that the consumer legislation has not been drafted with either the current or future products and services in mind. A more principles-based approach, protecting essential rights in a proportionate way which applies equally to similar services and products, is needed. This requires a holistic reform and alignment of current sector-specific and general consumer legislation.

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

ETNO and GSMA believe that European consumers and businesses will generally be best served by common and proportionate European rules which are consistently applied in a technology-neutral way in all Member States. Diverging consumer protection laws give rise to legal uncertainty for cross-border service provisioning, as well as additional compliance costs. An EU-wide harmonisation of rules can therefore facilitate cross-border e-commerce. However, this is only true if fully harmonised EU-wide rules come at proportionate costs for businesses and do not create new obstacles.
Besides this, it has to be noted that barriers to cross-border trade go far beyond the issue of consumer protection. Series of other obstacles do exist such as national copyright laws; national cultures and languages; the cost of providing customer care and customer complaints in several languages; the need for the adoption of open standards for content delivery; tax regulations; the risk of fraud and non-payments; regulation of private copy and the diverse economic realities which make a single price impossible.

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 Strategy[1] that it sees a need to act at EU level. Do you agree? Please explain.

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

Yes – there is a need for a European approach in order to achieve a Digital Single Market, reduce the burden on businesses who aim to provide European products and services at scale on a cross-border basis, and also to provide more clarity to consumers who purchase services and products cross-border.

As mentioned above, equally important is (1) that consumer protection rules come at proportionate costs for industry and for the society as a whole, which requires an impact assessment, and (2) that these rules are consistently applied to all similar services in a technology-neutral way.

Only if both conditions are met, a harmonisation of member states' legislation can positively affect all providers' cross-border business activities and lead to an added value for consumers.

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 supportive of harmonised EU rules for digital content – provided that these are proportionate and future-proof, and that, at the same time, sector-specific requirements for telco operators are removed where appropriate. This will at the same time, provide a level playing field for competing services and support simplification and investment for the future.

In relation to a voluntary contract model, our view is that this has been tried before and there would need to be further analysis of why this has not succeeded in the past.

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 initiative focus should be restricted to B2C contracts. Business customers do not require an equally high level of protection as consumers. General contract law already provide adequate protection and business customers are free to individually negotiate contractual provisions. Additionally, business customers are better prepared than consumers to prevail their interests towards suppliers.

Only as far as consumer protection rules are also applicable to business customers in telco-specific regulation and have proven to be urgently required, these rules should be

considered in a new horizontal set of rules applied to telcos and other providers of digital services.

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

As stated in our answer to question 7, the main focus should be on B2C contracts.

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 services below

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

Please explain your choice(s).

For the purpose of this initiative and to ensure consistent consumer protection online, the definition of digital content products and services should be encompassing, covering all products and services provided online. Thanks to the availability of connectivity services, today an increasing number of voice, text, photo and video messaging services have become substitutes of the traditional Electronic Communication Services (hereinafter ECS) creating the need for a cross sector harmonization of contracts rules. The need for the so-called level playing field has been recognised in the DSM strategy and harmonising contracts is a fundamental factor.

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)?

- X Money

- [X] Personal or other data actively provided by the user (for example, by registration)
- [X] Data collected by the trader (for example, the IP address or statistical information)
- [X] 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).

Wherever possible and proportionate, rules should be applied consistently to all "lawfully acquired" digital content and services and regardless of the underlying business model. Irrespective of the type of remuneration, providers should not be absolved from meeting the basic consumer protection rules such as transparency, contract withdrawal/termination, dispute regulation, warranty, etc, provided that the transaction has a commercial nature (synallagmatic relationship).

Therefore, the submission of a consumer's personal data, in exchange for providing a service or product to the consumer, should be qualified as a counter-performance (remuneration).This should not be limited to data which are actively submitted by the consumer, but should also include personal data which are collected through the service provider for commercial use by the provider of the content or services (i.e. search results, online games, apps). However, collecting personal data solely for the purpose to maintain, improve or provide the service does not qualify as being a counter-performance (remuneration). This approach is also supported by the OECD, who has recommended in the context of its draft Recommendation on E-Commerce, that regulation should apply to commercial practices related to both monetary and non-monetary transactions for goods and services.

Any new rules should be applied in a horizontal way to all equivalent products/services, on the basis of proportionality criteria, so as not to inhibit innovation in dynamic markets and enabling all players equally to establish innovative business models.

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
  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).

The most important element in our view will be quality and remedies, as these are essential to build trust and confidence in the Digital Single Market. Disproportionate or overly prescriptive restrictions, which impose high costs on the industry without adding clear value for consumers, need to be avoided. This applies, in particular, when restrictions prevent the development of new business models, e.g. through too prescriptive rules on the duration of contracts, modification of contract details, overly onerous data protection obligations or similar requirements. The respective rules in the telco-specific regulation are much stricter than those applied to other players in the digital market. As such, there should be alignment across the rules for ECS and OTTs in respect of fundamental consumer protection. In any case, the necessity of such restrictions should be justified with adequate impact assessments.

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

Please explain your choice(s).

A mixed approach should be sought, relying first on the subjective approach. However, in case the contract is silent, the objective approach would apply.

Digital content is not a uniform category. Each type of digital content has its specificities and this has to be taken into consideration. This heterogeneity prevents from the establishment of very detailed objective criteria by law.

In addition, any initiative on the assessment of quality of content has to be future-proof and take future innovation into consideration. Establishing objective criteria only would go against this necessary flexibility.

13. When users complain about defective products, should:

X 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).

After delivery of digital content, the supplier is generally unable to prove that the delivered content is e.g. not defective. The consumer is in a better place to provide evidence.

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)
- [ ] Damages
- [ ] Other (please specify)

Please explain your choice(s).

In relation to digital products, resolving the issue is the most appropriate remedy. Additional remedies such as termination or price reduction should only apply if the supplier is unable or unwilling to resolve the problem because it is impossible or disproportionate.

With digital goods and services, usage is normally immediate so it is not proportionate to impose a short term right to reject.

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; again resolving the issue should be the first solution. If this fails, other remedies may need to be considered such as return of data.

Nevertheless, it is relevant to recognise that not all remedies are well suited for different forms of contracts and a remedy may differ for products which involve monetary payments from those available for other remunerations. In such cases, other forms of redress (such as product replacement) may be considered.

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.

There should be a specific time limit which allows users to test functionality, which is both reasonable for consumers but also takes into account the need for certainty for the providers of such services. Companies require legal safety particularly in the digital market with very short service and product lifecycles. Therefore, the period of time for

consumer to ask for remedies need to be limited and proportionate, given the type of service provided.

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.

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

In our view, the consumption of digital content is more immediate than for physical goods. In addition, intellectual property constraints can impact the capacity of the service provider to solve the problem on the long term (i.e. duration of the license for the digital content). Hence, shorter time limits than those applied for physical goods seem justified.

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)?

Damages claims should be limited to where there is fault by the trader. In any case, damages should never include moral loss.

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

Service credits can be a valuable option for the consumer, besides other means. Where possible, alternatives should be offered for consumers, e.g. if they cannot benefit from the service credit (i.e. the device prevents from accessing/ using the service credit).

Additional rights

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

Yes
X 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).

As to the right to terminate long term subscription contracts, telecom operators generally need to recover their investment (connection costs, promotions, subsidies of terminal equipment, etc.) by proposing fixed-term contracts with cancellation fee before the end of the fixed term. Early termination without charges reduces the possibility for operators to propose significant discounts to loyal customers, with disruptive effects for the market where there are now also, increasingly, offers with no commitments on duration for consumers who do not wish to commit to a longer-term contract.

It should be noted that additionally to the general Consumer Rights Directive, the telco-specific Universal Services Directive provides that "subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions (where such modifications are to the disadvantage of the consumer)". "Subscribers shall be given adequate notice, not shorter than one month, of any such modification".

Accordingly, in the field of contract duration, the rules applicable to telcos are currently more onerous than those provided for other players under the horizontal legislation, limiting telcos' flexibility regarding business models. Rules applicable to telcos and other service providers, particularly regarding similar services, should therefore be simplified and harmonised.

In relation to return of data, all provisions relating to the portability and return of data should be addressed within the context of the GDPR. However, we would be supportive of an end users right to require the deletion of their data if they terminate a contract with a service provider.

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?

X No

Please explain your choice.

The portability obligations in the draft General Data Protection Regulation are sufficient to address the needs of the consumer in relation to recovery and portability of their personal data. For general data, users should be informed about how they can retrieve their data.

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?

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

Please explain your choice(s).

There is no single answer to this question. For example, with video on demand content (VOD) it depends on whether the service is subscription VOD (SVOD) or VOD) or whether the content is definitively purchased (music downloading or Electronic sell-through)[2].

In case of VOD or SVOD, access is based on valid subscription. If the subscription is terminated, the service provider has to disable the user account to prevent from any further use of the service.

In case of definitive purchase, different remedies may be appropriate depending on the reasons and circumstances of termination. It has to be considered that after definitive purchases a termination usually does not impact the further use of the content by the consumer.

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?

X Yes
☐ No

Please explain your choice.

[2] EST allows consumers to download a media file after paying a fee and to store this media. This refers to content ownership, as opposed to rental.

Such a possibility should be allowed in order not to hamper the technological evolution of products/services. Accordingly, contractual information requirements must be sufficiently clear so that the consumer knows what to expect, while providing enough flexibility to modify details of the services. Accordingly, to ensure similar possibilities for providers to further develop services, contractual information requirements have to be similar for all market players.

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:

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

Please explain your choice(s).

All of the above should apply. Termination of the contract should be permitted only where such changes are to the detriment of the consumer and fall short of contractual obligations. Services consumed up to the date of termination should be paid for and any bundled content or services should not be affected.

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

Notification of the change should explain both the change and the end users' termination right. The proposed legislation should avoid overly prescriptive requirements in relation to the detail of this information.

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.

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.

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.

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?

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.

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

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 2[3] of the Consumer Sales and Guarantees Directive? Please explain.
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.

3

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.

Remedies[4]

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).

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.

Time limits to exercise remedies[5]

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.

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.

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

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

Damages[6]

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)?

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

5 *Idem.*

6 *Idem.*

Notification[7]

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.

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.

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

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.

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.

7 *Idem.*

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, Members 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 barrier[8]. 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.

8 European Commission, Flash Eurobarometer 413, 2015

Section 1 – Problem

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

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

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and Internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences. For more information, please visit the GSMA corporate website at http://www.gsma.com/.

About ETNO

ETNO has been the voice of Europe's telecommunications network operators since 1992 and is the principal policy group for European electronic communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. Its 50 members and observers in 35 countries collectively account for a turnover of more than € 600 billion and employ over 1.6 million people. ETNO companies are the main drivers of broadband and are committed to its continual growth in Europe.