



EPC | European Publishers Council

Response from the European Publishers Council to the QUESTIONNAIRE ON CONTRACT RULES for online purchases of digital content and tangible goods

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Information about the respondent

1. Name of the organisation you represent if you are responding on its behalf: **European Publishers Council**
2. Please indicate your main country of residence: **Belgium**
3. Please indicate your main country of activity: **Belgium/Europe**
4. Contributions received will be published on the Commission's website unless it would harm your legitimate interest. Do you agree to your contribution being published along with your identity?

Yes, my contribution may be published under the name indicated.

5. Are you answering this questionnaire as a:

Organisation representing the interests of companies mainly selling digital content products – Leading European media companies.

Part 1 – Digital content (explanation provided by the European Commission)

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

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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 whole spectrum of the consumer acquis already in place – Consumer Rights Directive, Unfair Commercial Practices Directive, Consumer Sales Directive, e-Commerce Directive, Guarantees Directive, etc – is the source of the fair and clear rules regarding consumer contracts.

Regarding the digital content products, we believe that the Commission's attention should focus on the remedies and guarantees as all other aspects are well regulated.

Moreover, it should not be disregarded that the General Data Protection Regulation (GDPR), still under negotiation, is the main legislative instrument aimed at protecting consumer privacy in every environment.

Finally, we assume that the actual editorial content itself falls outside the scope of such rules, whereas any problems related to the technical delivery of the content is of course within scope.

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

Users must enjoy a similar level of protection when buying digital content to the physical ones. However, technology today has allowed the delivery of content through other means than its traditional paper format.

Publishers today offer the same level of protection and customer care irrespective of the medium of delivery of its content.

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

As previously expressed, we assume that editorial content itself cannot be subjected to appreciations of quality and principles of replacement.

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

The European Commission led by President Juncker has as its main goal the creation of a European Digital Single market. Technology has the advantage that allows publishers to reach new audiences in other member states. It is important that they do not have to face a regulatory maze with different rules in effect in different member states.

Full harmonisation of the legislation regarding the delivery of digital content –which by definition is borderless- is the preferable option.

It should be highlighted at this point that due to the nature of their activities, publishers always operate under the Country of Origin principle, which is a fundamental and necessary element of their business.

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

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

In principle we agree. It is indeed true that there is a need for a minimum harmonisation of rules in EU level. However, the fact of cross-border e-commerce penetration is not only a “rules” issue. Other factors such as proximity, language and even business reasons are not taken into account in the Commission’s assessment. Especially there is lack of evidence that companies that supply digital content do not provide it across European territory, given that they have the rights/license to do so.

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?

Every proposal of the Commission, given the better regulation principles, should be based on hard evidence.

For the moment we are not aware that the current rules in place on Consumer Protection are insufficient. Have the Commission any indication that they have not been applied properly? We would favour exploration of a voluntary model contract and how this could be rolled out.

A divisive approach (online vs offline purchase) should be avoided. The requirements for any purchase should be the same.

Finally, there is the fear among our companies that an optional model contract leads to further administrative burden and legal uncertainty, especially due to multiple interpretations from Member States.

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



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.

We firmly believe that the initiative should be limited to business-to-consumers (B2C) transactions.

Business-to-business contractual relationships should not be affected as they are regulated by other legislative instruments and they could also be based on negotiations/deals between the contracting parties. Furthermore, businesses have different needs in terms of remedies and liabilities which differ from those of consumers.

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

N/A

9. Digital content products may cover inter alia the products listed below. Which of these digital content products/services should be covered by the initiative (tick as many as apply)?

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

Please explain your choice(s).

In principle, all types of digital content should be covered. However, there might be a need for more specific/different rules for some types of content.



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).

Any legislative initiative should focus on digital content products that are offered against payment with acceptable payment methods on the market, i.e. for money.

Data collection and marketing communications are being regulated by other legislative instruments and could not in any case be part of the scope of any future instrument or even considered as an acceptable payment method.

Of course some content is offered free at the point of use by consumers, its production supported in part by advertising revenues, but this is part of the supplier's business model.

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).

Remedies for defective digital content products would be our choice. Consumers should indeed benefit from guarantees and remedies where for example the digital content is not visible. These remedies and guarantees should be in line with the existing ones for tangible goods. Indeed some exceptions should be introduced in order to ensure that there is no abuse of rights from consumers.



Quality of the digital content products

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

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

Please explain your choice(s).

The law it is not flexible enough in order to set specific criteria. Given the speed of change in technology, the legislation could never be up to date with the criteria needed.

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).

It has been recorded that sometimes users decide to press ahead with the digital purchase without first checking whether the requirements are met by their equipment. Thereafter they launch a complaint that the digital content is not working properly or it is defective. Companies are offering extensive customer help in order to sort out those problems and accommodate the users. Given that a digital product is tested before entering the market, the user should be responsible for providing evidence of the defectiveness of the digital product.

Furthermore, the term “defective” is quite abstract when applied to digital content. A more precise definition should be given.

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).

In case of a “defective” digital product the supplier makes every effort to resolve the problem and meet the quality promised, all other remedies are unjustifiable.

Another factor that needs to be taken into account relating to quality has to do with factors other than the trader or the user, such as the quality/speed of the internet network provider.

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.

As explained above, any future instrument should only focus on digital content products provided for money.

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.

Any remedies should be claimed for a specific period of time after the first use/activation of the digital product. An indefinite period of time creates uncertainty to businesses.

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.

One time limit, as it exists for the physical goods should be applied. This will be easier for consumers to remember and there is no need for any burden of proof concerning the dates. Given the “perishable” nature of the digital products, this period should not be extended.

Preferably it should vary according to the nature of the digital good. For example a daily newspaper offered online cannot have the same duration for claiming remedies as for example a cloud service.

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

The limits should be, according to the current legislation, 6 months and 2 years. Special exceptions should be applied for “perishable” digital goods where this period is clearly ineffective.

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)?

There is no need for a right to damages.

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

N/A

Additional rights

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

- [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).

To begin with, the differences between the first two choices (termination should be expressed in advance and by notice) are not clear to us.

In general, users should be able to terminate subscription contracts according to the terms and conditions of the contract.

- Given that some companies offer subsidised equipment with their contract, the user should be obligated to pay any remaining price of the equipment.
- Given that longer term contracts often offer significant price reductions, a user should not be able to terminate a long-term contract without penalty.
- Change of equipment could be a reason to terminate a digital content product subscription if it is not compatible with the new equipment of the user. However, this should be a last resort in cases where the seller is not in a position to provide for updates/alternatives.

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.

This can only be possible for interoperable services. Regrettably, given the different nature and categories of digital content products, this might not be feasible at the moment.

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).

Blocking access should be one acceptable measure.

Disabling the user account would mean that the user no longer has access to content they have paid for in the past or in case they would like to re-activate their account and retain their history.

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.

Yes, if it is for technical reasons and indeed after informing the user.

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



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

Please explain your choice(s).

28. Which information should the notification of modification include? Please explain.
[The legitimate reasons for this modification and the options available to the user, if any.](#)

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.

In general terms, it is almost the third time that questions around consumer protection are asked of relevant stakeholders. The positions are rather well known and have been expressed many times before.

In the above analysis issues such as the right of sellers' regarding the market that they would like to be active/send their products in is not taken into account. Many sellers make a conscious choice on which markets they are going to operate. Personal reasons, as well as lack of linguistic skills could play a role in it. There should be no compulsory pan-European operation.

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.

EPC supports full harmonisation at the European level as it simplifies the way businesses are operating and their costs of compliance.

Any harmonisation should however happen at an acceptable level for all (member states, consumers and businesses) and certainly not in a way or cost that will become an obstacle to the operation and compliance of the companies.

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.

N/A

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

N/A

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

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

See response at question 30.

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?

See response at question 6.

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.

As for digital supplied goods, we support a business-to-consumer application.

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

N/A

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

- 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)

Quality

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

² Article 2 (Conformity with the contract)

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

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

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

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

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

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

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



There is no need for additional criteria of conformity to article 2.

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 trader is not always in a position to prove that the tangible goods were not defective as this is the responsibility of the manufacturer.

The period should be harmonised with the existing periods in the current legislative instruments. Indeed the rules on the burden of proof are provided by the national procedural legislation.

Remedies³

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

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

Please explain your choice(s).

As is the case in the Directive 1999/44, there should be a hierarchy of remedies: the good should be replaced or repaired or refunded or rescinded in case of non-conformity.

However, refunding or rescission should be last resorts in cases where the trader cannot provide repair or replace, except if the trader offers this option.

4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:
- shows that he was not, and could not reasonably have been, aware of the statement in question,
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

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

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



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.

For legal certainty, we prefer the option of hierarchy of remedies that the trader can propose as:

- a) Repair
- b) Replace
- c) Termination of the contract

*Time limits to exercise remedies*⁴

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.

Buyers should be entitled to ask for remedies within a specific time limit as is the case currently.

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.

To avoid any confusion, there should be one single time limit. This gives more certainty to both consumers and the traders.

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

The current time limits as described by the enforced Directives.

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

N/A

*Damages*⁵

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

N/A

⁴ *Idem.*

⁵ *Idem.*

*Notification*⁶

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

N/A

Commercial guarantees

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.

The contractual freedom regarding commercial guarantees should be respected.

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

N/A

Unfair terms

50. Should there be a list with contract terms which are always to be regarded as unfair? If yes, which terms should always be regarded as unfair? Please explain.

N/A

51. Should there be a list of standard contract terms which are presumed to be unfair? If so which terms should be on such a list? In particular, how to treat advance payment which is very frequent in the online world? Please explain.

N/A



⁶ *Idem.*