

# Ecommerce Europe

**Policy and market solutions to stimulate consumers' trust and cross-border e-commerce in Europe**

March 2016

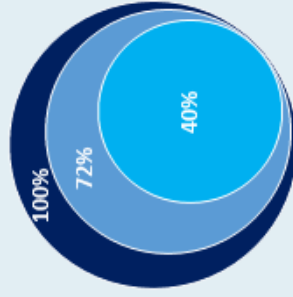


[www.ecommerce-europe.eu](http://www.ecommerce-europe.eu)



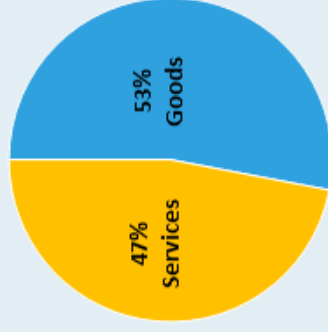


**West** €209.9 bn +13.3%  
**Central** €106.6 bn +12.9%  
**South** €47.3 bn +15.4%  
**North** €34.7 bn +13.6%  
**East** €24.6 bn +16.8%



**817 million** people live in Europe  
**491 million\*** people use the internet  
**274 million\*** people are e-shoppers  
 \*excluding people aged 0-14

Forecast 2015  
**€477 bn** Turnover E-commerce Goods & Services



Average spending per e-shopper

**6.4%**

Europe

€423.0 bn 13.6%

EU28

€368.8 bn 13.4%



**2.5% eGDP**

€17.1 trn GDP 2014



**2,475,000+**

jobs directly or indirectly via E-commerce



**715,000+**

estimated online businesses



**4 billion+**

number of parcels annually (f)

Top 5 mature E-commerce countries in turnover (billion)

	UK	€127,200
	Germany	€71,200
	France	€56,800
	Netherlands	€13,961
	Switzerland	€12,717

	Russia	€19,947
	Spain	€16,900
	Italy	€13,278
	Poland	€6,541

Estimated share of online goods in total retail of goods



"457 million social media users"

Executed by:



Powered by:



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@ Ecommerce Foundation (October 2015)  
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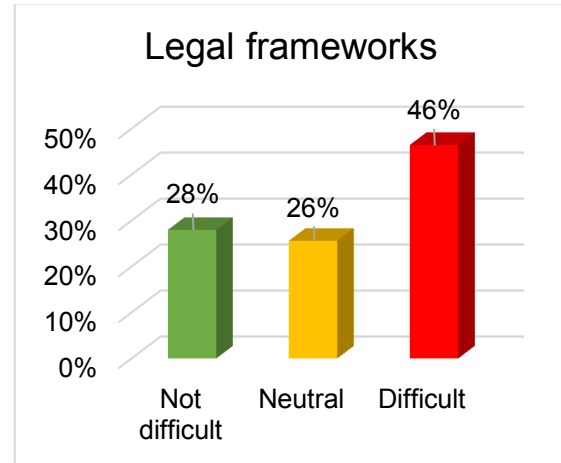
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## ECOMMERCE EUROPE CALLS FOR A MORE BALANCED APPROACH TOWARDS CONSUMER AND CONTRACTUAL POLICIES

Ecommerce Europe is the association representing 25,000+ companies selling goods and/or services online to consumers in Europe. Founded by leading national e-commerce associations, Ecommerce Europe is the voice of the e-commerce sector in Europe. Its mission is to stimulate cross-border e-commerce through lobbying for better or desired policy, by offering a European platform bringing the European e-commerce sector and other stakeholders together, and by providing in-depth research data about European markets. Moreover, Ecommerce Europe provides more than 10,000 certified online companies across Europe with a European Trustmark label, with the aim of increasing consumers' trust in cross-border purchases.

Digital changes the way consumers shop and the way consumers wish to receive their purchases. Nearly all growth in retail comes from e-commerce. The e-commerce sector is booming. However, the full potential of the European e-commerce market has not yet been reached. Today 65% of European internet users shop online, but only 16% of SMEs sell online - and less than half of those sell online across borders (7.5%). Also, only 16% of consumers shop online from another EU country<sup>1</sup>. The legal framework is one of the most difficult barriers to overcome for 46% of the companies that sell

cross-border<sup>2</sup>. Dealing with 28 different sets of rules for consumer and contract law turns out to be burdensome for online merchants.



*Description: Perceived level of difficulty for companies selling cross-border.*

*Source: Ecommerce Europe results survey Barriers to Growth, 2015.*

Ecommerce Europe wants to ensure that the upcoming legal framework for consumer policies will be fit for the future challenges of this dynamic sector and will stay at the disposal of European and national institutions for any further clarification on the content of this position paper.

Ecommerce Europe also assumes an active role in promoting consumer trust. It does so by providing a trustmark scheme for online merchants and consumers all over Europe. This position paper explains the Ecommerce Europe Trustmark scheme, before presenting general remarks on European consumer policies and the detailed perspective of the e-commerce sector on the Digital Contracts Proposals<sup>3</sup> published by the European Commission in December 2015. The paper will end with

<sup>1</sup> European Commission's Digital Scoreboard 2016

<sup>2</sup> Ecommerce Europe's Survey Barriers to Growth (2015)

<sup>3</sup> COM(2015) 635 final - 2015/0288(COD) and COM(2015) 634 final - 2015/0287(COD)

general remarks concerning the review of the Consumer Rights Directive<sup>4</sup>.

## THE ECOMMERCE EUROPE TRUSTMARK SCHEME

### Support for industry-led Trustmark schemes for B2C e-commerce

Ecommerce Europe believes that a pan-European Trustmark scheme is a powerful tool to stimulate trust in online cross-border transactions and that, in a landscape with multiple trustmarks being developed, it is important that European legislators give their support to the most reliable and accessible schemes, such as the Ecommerce Europe Trustmark.



That is why Ecommerce Europe decided to develop its own pan-European Trustmark (see above) together with its national associations. The Ecommerce Europe Trustmark is non-profit and based upon self-regulation, and has been developed in close cooperation with national consumer organizations. Over 10,000 certified online shops in 11 countries can join the Ecommerce Europe Trustmark for free. The objective of the Ecommerce Europe Trustmark is to stimulate cross-border online sales through better protection for consumers and merchants, by establishing one European set of rules and by ensuring clear communication on these rules.

The Ecommerce Europe Trustmark is the only pan-European trustmark with its own consumer-friendly complaints handling system and that is free for members of participating national associations.

### Transparency before, during and after the sale

The Ecommerce Europe Trustmark has a clear and recognizable label. By clicking on it, the consumer will be led to the Code of Conduct and a clear explanation of his or her rights and the commitments of the merchant. The Code of Conduct includes, for instance, the commitment of the merchant to be clear and transparent on the offer and prices before the consumer enters the order process, and the commitment of the merchant to offer the client transparent, easily acceptable and safe payment methods. The Ecommerce Europe Trustmark Code of Conduct is available at:

<http://www.ecommercetrustmark.eu> .

### More harmonization on European level

The Ecommerce Europe Trustmark is connected to a membership of participating National Associations. This means that all online shops in Europe which are certified by a National Association can directly already carry the Ecommerce Europe Trustmark for free next to the national trustmark. The final goal is to reach a higher level of consumer protection and more harmonization on a European level, and Ecommerce Europe achieves this by - together with its National Associations and their members - constantly upgrading the set of criteria and level of consumer protection with which merchants have to comply.

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<sup>4</sup> Directive 2011/83/EC

## **Advanced Dispute Resolution and Online Dispute Resolution**

Ecommerce Europe has been closely involved in the development process of the European Online Dispute Resolution (ODR) system which is now accessible for both consumers and traders at the website [ec.europa.eu/odr](http://ec.europa.eu/odr). With its own Trustmark, Ecommerce Europe has already developed an online complaints handling system in the language of the consumer, the “Trustmark Service Center”, which complies with current EU legislation. Ecommerce Europe hopes that the ODR system, that has been accessible since 15 February 2016, will provide for a comprehensive, easily accessible, transparent, easy to handle and low cost handling system that can be adopted and referred to in the Ecommerce Europe Trustmark system.

## **GENERAL REMARKS ON CONSUMER POLICIES IN EUROPE**

### **Full harmonization and a real Single Market for all cross-border sales**

Ecommerce Europe strongly believes in full harmonization of legal frameworks for cross-border sales in Europe and does not see any need for different provisions for online and offline shops as this would only lead to more confusion. A real Single Market needs uniform regulation for all distance cross-border sales, be it online or offline, including the sale of tangible goods, services and digital content. Any legislative proposal only applicable to the online cross-border sale of tangible goods or digital content would lead to a fragmented landscape of different applicable legislation. As a result, this would increase costs for sellers that use

multiple sales channels (online and offline, cross-channel, etc.), offer domestic and cross-border sales or offer in their stores tangible goods and/or services and digital content. In a modern retail sector, all combinations can and will be potentially offered by a shop. Such a shop would be confronted with the undesirable and very complex result that it has to treat customers from abroad differently than domestic customers, and online customers differently than offline customers.

Although Ecommerce Europe has some strong concerns about certain provisions (see here after), it welcomes the recent proposals for a Directive on certain aspects concerning contracts for the online and other distance sales of tangible goods<sup>5</sup> and for a Directive on certain aspects concerning contracts for the supply of digital content<sup>6</sup>, bringing an almost uniform legal regime for the sales of tangible goods all over Europe and a uniform regime for the supply of digital content. We miss, however, a similar approach and proposals for the sale of services other than digital content, leaving this part of B2C business still ruled by 28 different national regimes and with differing rules on the assessment of conformity, the legal guarantee period, notification period and remedies. Ecommerce Europe also does not see any valid reason for excluding stationary sales (brick & mortar shops) from the scope of the proposal for the distance sales of tangible goods. Please see point 3 on pages 10 for a more detailed explanation.

### **Simplify consumer rules**

Consumers and merchants are often not fully aware of the legal aspects of their contractual

<sup>5</sup> COM(2015) 635 final - 2015/0288(COD)

<sup>6</sup> COM(2015) 634 final - 2015/0287(COD)

relationship, because the applicable legal framework on consumer rights is too complex and tends to be only fully understood by legal specialists. The mandatory legal framework should enable the parties to focus on the main and basic characteristics of the contract, such as the identity of the trader and the consumer, the characteristics of the product or the service, the price, delivery time, method, costs and place, payment, after sales services, complaint system, ADR/ODR and redress.

### **Develop a simple, standard information form on consumer rights and obligations**

Ecommerce Europe advocates for transparency and an easy contracting between the parties involved. Explicit information obligations before, and at the time of the conclusion of the contract, should be restricted to information relevant to a proper and transparent conclusion of the contract. The current rules oblige merchants to provide large amounts of information to the consumer at an inconvenient or irrelevant time for the consumer. This leads to an information overload that does not contribute to the interest and protection of the consumer. The information obligations are also widespread throughout national and supranational legislation, and therefore not easily accessible to merchants and consumers.

Ecommerce Europe wants to work with European Consumer Organizations and the European Commission to develop standard information forms on consumer rights and obligations for the sale of tangible goods, the sale of services and the supply of digital content, that are also recognized as compliant

with the mandatory information obligations by European and national authorities supervising consumer protection. Such standard information should preferably be accessible online for both traders and consumers on a centralized European platform. Information should be provided in an up-to-date version and in any language of the EU. This will create, in a straightforward manner, awareness, guidance, clearance, knowledge and general acceptance of the mandatory rules, rights and obligations for both parties in the contract. The standardized information will also provide an easy, objective insight into the differences on a national level for merchants trading as well as consumers buying cross-border, thus avoiding differences in explanation and lowering compliance costs in a practical way.

### **Stimulate the use of Rome I as a last resort and safeguard for consumers**

As long as full harmonization is not realized, a solution to the differences between national consumer legal systems lies in a clarification of the meaning and consistent application of Article 6.2 of the Rome I Regulation<sup>7</sup>. This Regulation can also help to answer the question of which national provisions are applicable to cross-border B2C contracts.

Rome I should serve as a last resort for consumers purchasing cross-border, as it grants them at least the same protection and rights as in their own country and it ensures that the merchant will respect their mandatory rights. That is why the Rome I consumer regime should be used more frequently. Merchants cannot, however, rely on national supervisory

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<sup>7</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations

authorities and/or courts to explain Rome I in a consistent and uniform way. This creates legal uncertainty and a compliance risk which discourages many merchants from trading cross-border. The clarification of the meaning of Article 6.2 Rome I should lead to the conclusion that under Article 6.2 the applicable law is the law that parties have chosen in the contract, with respect for the mandatory rights that the consumer has in his/her country of residence. This would mean that the law of the merchant's home country will most often be applicable and that the contract must be compliant with that national legal system.

Respect for the mandatory rights should thereby not explicitly mean that the contract has to be in compliance with the national legal system of the consumer's country of residence, because this system is not chosen and thus not applicable. It should only mean that the merchant has to respect those national mandatory provisions of the country of the consumer's residence which give the consumer more contractual rights than under the applicable legal system and on which the consumer appeals. It should also not explicitly mean that legislation on labeling, safety information, technical and other information of the destination country should be applicable to the goods and/or services sold cross-border.

A true single market needs a free cross-border flow of goods and services and traders see differences in this kind of legislation as one of the biggest barriers to selling cross border. That is why Ecommerce Europe supports the mechanism of mutual recognition. A good or service that is compliant with the legislation on labeling, safety information, technical and other

information of the (EU) country of origin, should automatically be recognized as compliant with the legislation of all other EU countries.

## **RECOMMENDATIONS ON THE EUROPEAN COMMISSION'S "DIGITAL CONTRACTS PROPOSALS" ON TANGIBLE GOODS AND DIGITAL CONTENT**

Ecommerce Europe welcomes the progress made by the Commission on the Digital Single Market Strategy and looks forward to the discussion on the European Commission's Digital Contracts Proposals published in December 2015. In this legislative process, it is essential for all relevant stakeholders to work together in order to rapidly remove remaining barriers to cross-border e-commerce and to optimize the proposed directives on the sale of tangible goods and the supply of digital content.

The Consumer Rights Directive provides for an almost fully harmonized legal framework for the online B2C sale of goods, services and digital content. However, the CRD does not cover all issues and uniformity on a national level is still lacking on important issues such as legal guarantees, unfair contract terms, notification of the lack of conformity, remedies, product/service liability and digital content.

Ecommerce Europe strongly believes that remaining gaps in the European consumer protection legislation for cross-border e-commerce should be solved by full harmonization through mandatory instruments. Ecommerce Europe considers that any optional binding contract law could create confusion and legal uncertainty for consumers and businesses, and would be too complex and

costly to provide real practical value or to be a solution to the problem of remaining legal differences across the EU.

In that sense, Ecommerce Europe welcomes the newest Digital Contracts Proposals as they are not based on an optional binding contract legal system but on overall working mandatory provisions that will provide for the necessary uniformity in B2C e-commerce. Although Ecommerce Europe welcomes the proposals and generally supports their approach, it also sees room for improvement and therefore has developed in-depth recommendations on the above mentioned proposed directives.

### **Recommendations on the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of tangible goods<sup>8</sup>:**

#### **1. Maximum harmonization under the Unfair Contract Terms Directive**

Due to the minimum harmonization character of the Directive on unfair contract terms in consumer contracts<sup>9</sup>, the unclear status of the indicative and non-exhaustive list of terms which may be unfair in the Annex of this Directive, and the gold plating by national legislators during the implementation phase, online shops selling goods, services and/or digital contents abroad are confronted with different levels of consumer protection and different rules on their contract terms in the different EU Member States. There is no single market on unfair contract terms and the fairness or lawfulness of the same consumer contract term for the same product or service varies across the EU.

Ecommerce Europe is strongly convinced that for a fully operational Digital Single Market the rules on (un)fair B2C contract terms should be uniform all over the EU and should not depend on the country of residence of the consumer or the chosen applicable national legal system. Therefore, Ecommerce Europe calls for maximum harmonization of the rules on fair and unfair contract terms, a clear and non-indicative list of contract terms which will always be considered as unfair (black list) and a list of contract terms which will be considered as unfair unless the merchant proves that the clause is not unfair or unbalanced in view of the contract, the interest of both parties and the special circumstances of the transaction at stake (grey list). This can be achieved either by reviewing and reshaping the minimum harmonized Unfair Contract Terms Directive in a maximum harmonized directive or by completing the CRD on this issue.

In the lists, which should be restricted and short and only dealing with key contractual rights and obligations, it should (always) be considered as unfair terms and conditions that:

- Restrict or exclude the liability of the producer, provider or (re)seller for non-conformity;
- Give the producer, provider or (re)seller the right to provide for another performance than initially agreed on without giving the consumer the right to withdraw from the contract;
- Give the producer, provider or (re)seller the right to extend the agreed delivery period or to deliver the digital content service later

<sup>8</sup> COM(2015) 635 final - 2015/0288(COD)

<sup>9</sup> Directive 1993/13/EEC

than agreed without the consumer having a right to compensation;

- Limit the rights of withdrawal of the consumer in case of non-conformity of the digital content service;
- Prolong a long-term contract on digital content automatically without any confirmative action of the consumer or advanced notification to the consumer.

## **2. Maximum harmonization under the Directive on the sale of consumer goods and associated guarantees**

Due to the minimum harmonization character of the Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>10</sup>, the different interpretation and the gold plating by national legislators, online shops are confronted with different rules in the EU Member States on many issues: the assessment of non-conformity, the reversal of the burden of proof, the period for notification of non-conformity, the prescription and the legal guarantee period, the remedies on non-conformity and the compensation of damages or loss. This means that there are different levels of consumer protection for the same product across the EU.

Accordingly, Ecommerce Europe firstly supports full harmonization of the European contract law on the B2C sale of tangible goods. The key contractual rights which consumers should benefit from in relation to the sale of tangible goods are:

- 14-day right of withdrawal from the contract for all B2C distance contracts, starting on

the day of the delivery of the tangible good, with a clear, easy and fair rule for the refund amount in case the consumer has been using the good during the withdrawal period for more than assessing whether he or she will keep it or not, as already (and including the exemptions on the withdrawal right) provided for by the CRD;

- Conformity, on-time delivery and passing of the risk at the moment of delivery of the good;
- Right of withdrawal from the contract and refund in case of non-conformity or partial refund in case the consumer has had clear benefits from the good before withdrawal.
- Clear rules on how to exercise remedies and on notification, notification period and prescription period for remedies;
- Compensation of damages in the private sphere caused by non-conformity of the delivered tangible good;
- Right to withhold the payment of the price until the defect is remedied;
- A two-year legal guarantee period;
- Access to ADR/ODR as provided for by the Regulation on ODR and the Directive on ADR to easily solve disputes on (non-) conformity and remedies.

## **3. Extend the scope of the proposed Directive on the online and other distance sales of tangible goods to stationary sales**

The scope of an EU law on the sale of tangible goods to consumers should cover all B2C sales contracts where the goods are not provided for free. Like all consumer policies, it should cover online and offline, domestic and cross-border, stationary and distance sales. Not provided for

<sup>10</sup> Directive 1999/44/EC

free means that the tangible good is provided for in exchange for a counter performance of the consumer, that it has a clear economic value and is regarded as an asset and thus can be seen as a form of payment. However, this should not automatically mean that the trader who provides tangible goods for free cannot be held liable in case of non-performance or non-conformity.

Accordingly, Ecommerce Europe welcomes the full harmonization as sought for in the proposed Directive for the online and other distance sales of tangible goods. As already mentioned above, Ecommerce Europe does not see any valid reason for excluding the offline stationary sales of tangible goods (brick & mortar shops) from the scope of the proposal, since the goods will provide for the same characteristics, features and expectations, irrespective of the way they are sold.

Total uniformity on the sale of goods regardless of whether they are offered to the public online, at distance or in stationary format, also demands a widening of the scope of the proposal to stationary (offline) sales.

#### **4. Remarks on conformity, reversal of burden of proof of non-conformity and passing of risk**

Conformity depends on the nature of the tangible good, the description of and information about the quality of good provided by the producer, provider or the (re)seller of the good, the contractual stipulations, terms and conditions and the notion that the consumer may expect the tangible good to be fit for normal

use. In that respect, conformity should be established on the basis of an open norm like the one used for (non-)conformity in the Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>11</sup> and which is a balanced mixture of subjective and objective criteria. A non-conform tangible good would accordingly be a good that - taking into account its nature and the information the producer, provider or the (re)seller has provided - does not meet the performance, qualities and features the consumer may reasonably expect, based on the contract. The consumer may expect the good to meet the performance, qualities and features that make it fit for normal use, except when there is a clear indication that the good will not meet this performance and features, and that it will be fit for special use agreed on in the contract. With this open conformity norm, the quality of second-hand goods can be assessed easily on the same basis and does not need any special provisions. Regarding the production of evidence, in principle, the non-conformity has to be proved by the consumer. In that respect, Ecommerce Europe supports a similar mechanism as provided for by Articles 4, 5, 6 and 7 of the proposed directive on tangible goods.

Ecommerce Europe always supported the presumption that the lack of conformity was already existent at the moment of delivery of the tangible good, when the lack of conformity occurs within 6 months from the delivery. During this period, the proof of the non-conformity shall be on the consumer and the proof that the non-conformity of the good was not existent at the moment of delivery or is not caused by the

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<sup>11</sup> Directive 1999/44/EU

producer, provider or (re)seller, nor caused by the consumer or by circumstances which are at the consumer's risk, shall be on the producer, provider or (re)seller. After this period, this proof shall be on the consumer. In the proposal for a new directive the period for the reversal of proof is extended from 6 months to 2 years (Article 8 Section 3). Ecommerce Europe can only support such an extension to 2 years if the consumer has an obligation to notify any non-conformity within a reasonable period after he/she becomes aware of the non-conformity.

Ecommerce Europe objects to the provision in Article 8 Section 2 stating, in case of installation of a good by a consumer, that the risk passes from the trader to the consumer at the moment when the consumer has installed the good and in any case not later than 30 days after delivery. Ecommerce Europe believes that normally, and logically, the passing of risk should be at the moment when the consumer acquires physical possession of the good. Where traders have absolutely no influence on the way the consumer handles and stores the goods after delivery and before and during installation, Ecommerce Europe does not see any objective or reasonable justification for the passing of the risk on the good to a moment after its delivery. Any wear and tear of the not yet installed good that has been brought into the physical possession of the consumer, and which is due to circumstances at the consumer's risk, should not be seen as a non-conformity of the good and should not be at the risk of the trader. Therefore, Ecommerce Europe sees absolutely no need in changing the passing of risk provision in Article 20 CRD.

## **5. Remarks on notification period, prescription period, legal guarantee and traders' guarantee**

The consumer should only be entitled to ask for remedies in a limited time after notification of the non-conformity. In order to have the trader exercise his/her right to cure a non-conformity, the consumer needs to notify the seller of the non-conformity as soon as reasonably possible after discovery or assessment of the non-conformity. Ecommerce Europe is strongly convinced that consumers and traders going cross-border will benefit from a simple and uniform European rule for the period in which the consumer has to notify a lack of conformity to the trader. This existence of a notification obligation or the period for it should not depend on the country of residence of the consumer or the chosen applicable national legal system, as is unfortunately now the case. Ecommerce Europe therefore advocates for maximum harmonization of the notification period and introduction of such a notification period in the proposed directive. In case the consumer does not notify the trader in due time, the consumer should lose all his/her remedies on this particular lack of conformity. According to Ecommerce Europe, a notification period of 2 months after the detection or assessment of the non-conformity - as provided for in the Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>12</sup> - is too long for online as well as offline B2C commerce.

Ecommerce Europe is convinced that, thanks to modern and digital communication facilities, the notification period should not be longer than one month after discovery of the lack of conformity,

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<sup>12</sup> Directive 1999/44/EC

with a reasonable prescription period of 2 years maximum, starting at the moment of notification of the lack of conformity. During this period the consumer can exercise his/her remedies in court. He/she may also exercise his/her remedies in an applicable Online Dispute Resolution (ODR) / Alternative Dispute Resolution (ADR) system, as provided for by the Regulation on ODR and the Directive on ADR. Such a notification and prescription period is not foreseen in the proposed directive, which will have as a result that notification and prescription periods will be determined by national legal provisions and will differ all over Europe. To avoid such an undesirable and varied legal landscape, Ecommerce Europe strongly suggests introducing a uniform prescription period of two years after notification of the non-conformity in the proposed directive.

Ecommerce Europe did always support a uniform legal guarantee period for the sale of tangible goods limited to 2 years after delivery of the good. It therefore welcomes the provision in Article 14 of the proposed directive limiting the liability of the seller for non-conformity to a period of 2 years after the delivery of the tangible good.

Based on the principle of freedom to contract, the content and character of commercial guarantees offered by producer, importer or seller should be fully at the discretion of the actor in the commercial chain offering the commercial guarantee on tangible goods to consumers. That is why Ecommerce Europe only sees a need for rules on commercial guarantees providing for transparent communication with the consumer on the character and content of the offered commercial

guarantee. The trader should likewise have the obligation to make clear to the consumer that the commercial guarantee does not affect his or her mandatory legal rights and remedies in case of a lack of conformity. In that respect, Ecommerce Europe welcomes Article 15 and the proposal expressing, on the one hand, the freedom for the commercial guarantor to offer it on the conditions he/she prefers and, on the other hand, the obligation to be transparent and clear about the conditions of the commercial guarantee and about the fact that the commercial guarantee is not affecting the mandatory legal rights of the consumer in case of non-conformity. Ecommerce Europe opposes, however, the obligation on the guarantor to provide a clear statement of the legal rights of the consumer, as provided for by Article 15 Section 2a of the proposed directive, since according to the Consumer Rights Directive this information has to be provided by the seller of the good. To avoid information overload and to reduce information costs for the guarantor, Ecommerce Europe suggests refraining from this obligation.

## **6. Remedies and free choice for the trader**

In case of non-conformity of a tangible good delivered in a B2C sale, the consumer should be entitled to repair, delivery of the missing parts or good, or replacement of the good whenever economically feasible for both the trader and the consumer, and in due time after the notification of the non-conformity to the seller and with no cost to the consumer. If repair of the non-conformity (repair, delivery of the failing parts or replacement) is not possible or reasonable, or not performed within a reasonable time, the consumer should be entitled to withdraw from the contract and to the

refund of the amount he or she paid for the good and delivery costs. In that respect, Ecommerce Europe supports the provisions in Article 9, 10, 12 and 13 of the proposal, granting the consumer a right to have the non-conformity fixed by either replacement or by repair, and a right to price reduction or termination of the contract when the repair of the non-conformity has (partly) failed or is simply impossible.

In the view of Ecommerce Europe, the seller should always be entitled (if possible and reasonable) to repair the notified non-conformity and so to the “right to cure”. The trader should basically have a free choice of the remedies to repair the non-conformity (repair, delivery of the failing parts or replacement). In that sense, the consumer, in principle, is not allowed to freely choose one of the possible remedies to repair the non-conformity. That is why Ecommerce Europe opposes the provision of Article 11 of the proposal giving the consumer the choice between replacement and repair. Ecommerce Europe prefers a provision that gives the initial choice to the seller and a right for the consumer to oppose this choice when it would have disproportional negative effects for the consumer.

Ecommerce Europe favors a limited period in which the consumer can exercise his/her rights on non-conformity in court or in ADR/ODR systems. As already mentioned above (point 5 on pages 11-12), the proposal does not provide for a notification or prescription period and leaves the regulation of these periods to national legal provisions which will differ across Europe, and this is a situation that Ecommerce

Europe strongly opposes.

## **7. Liability, compensation and legal guarantee period**

The consumer should always have a right to compensation for proven damages caused by non-conformity and, in the view of Ecommerce Europe, the seller should be liable towards the consumer for these damages. In that respect, Ecommerce Europe welcomes a uniform legal guarantee period of two years starting from delivery of the good as provided for by Article 14 of the proposal.

Ecommerce Europe is convinced that the current rules on liability for damages to consumers caused by a sold tangible good, as laid out in the Product Liability Directive<sup>13</sup>, the Directive on the Sale of goods and associated guarantees<sup>14</sup>, form a balanced system on liability for non-conformity. The minimum requirements and the rules for liability of these directives should preferably also be fully harmonized for tangible goods, services and digital content services at the minimum level the directives are providing for, thus avoiding gold plating and differences in national legal systems.

Liability of the trader for non-conformity should be based on strict liability with the possibility for the trader to prove (and avoid liability) that the delivered good conforms to the reasonable expectations of the consumer or that the non-conformity is not caused by the producer, provider or (re)seller but by the consumer himself, or by circumstances which are at the consumer’s risk. The trader should only be liable for damages in the private sphere of the

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<sup>13</sup> Directive 85/374/EEC

<sup>14</sup> Directive 1999/44/EC

consumer that have been sufficiently proven by the consumer to be caused by the defective good. The producer and importer in the EU of the good shall be liable for damages regarding personal injury and death and for material damages in the private sphere of the consumer caused by an unsafe or harmful good (as it is provided for under the Product Liability Directive). The producer/importer will also be liable up to a certain limit and above a certain threshold (franchise) for material damages in the private sphere of the consumer caused by the unsafe good and the (re)seller has only limited liability for the material damages in the private sphere up to this maximum amount (franchise). For other damages in the private sphere of the consumer, caused by other forms of non-conformity of the good than unsafe or harmful (as meant in the Product Liability Directive), the seller shall be held liable towards the consumer for his/her proven damages with a possibility for the seller to seek redress from the provider or producer of the non-conform good.

In this respect, Ecommerce Europe has strong concerns about the liability provision in Article 8 Section 1. According to this provision the seller will be liable for any non-conformity, regardless of the nature of the non-conformity and the nature of the damages. Ecommerce Europe fears that the proposal will thus end the momentary balanced liability system with different regimes for damages caused by an unsafe or harmful goods and damages caused by other forms on non-conformity. Ecommerce Europe therefore calls for a clear provision that the seller generally (apart from a threshold for

damages in the private sphere) will not be liable for personal injury or death caused by an unsafe or harmful good and that, in such particular cases of non-conformity, the producer - as defined in the Product Liability Directive - will be liable.

### **Recommendations on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content<sup>15</sup>:**

#### **8. General remarks on digital content**

The sale of digital content and digital content services are up to now mostly seen as a service to which the Unfair Commercial Practices<sup>16</sup> and the Unfair Contract Terms Directives<sup>17</sup> are applicable. In that respect, Ecommerce Europe is convinced that there is no need for new EU legislation for the sale of digital content, as there is already applicable EU legislation providing for sufficient protection for the consumer against unfair limitations of the user's rights, such as compensation in case the digital content services do not work properly or cause damage.

On the other hand, Ecommerce Europe also notes several legislative initiatives on digital content in various EU Member States. Therefore, Ecommerce Europe has concerns that such national legislative initiatives will lead to a differentiation of rules across the Member States. In that respect, Ecommerce Europe supports a single and uniform EU legislation on the contractual rules for the sale of digital content that will not hamper cross-border e-commerce. In addition, legislative action for digital content should be restricted to those areas where the B2C sale of digital content

<sup>15</sup> COM(2015) 634 final - 2015/0287(COD)

<sup>16</sup> Directive 2005/29/EC

<sup>17</sup> Directive 93/13/EEC

differ significantly from the B2C sale of non-digital goods and services and the few areas where the existing rules on the B2C sale of goods and services do not provide for effective remedies and solutions.

In that sense, Ecommerce Europe welcomes the European Commission's proposal for a Directive on certain aspects concerning contracts for the supply of digital content as it will provide general and harmonized legislation for digital content.

Ecommerce Europe supports the idea that the key contractual rights that consumers should benefit from in relation to digital content should be the same as, or as much as possible similar to, their rights in relation to tangible goods under the Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>18</sup>. Please refer to the list of key contractual rights at point 2 on page 9. Ecommerce Europe thus welcomes the proposal as it brings in line the B2C provisions for the supply of digital content with the provisions for the sale of tangible goods, thereby making the legal system simpler and much easier to understand for traders as well as consumers. In this respect, Ecommerce Europe also would like to see a more holistic approach and a similar alignment for the sale or supply of services not being digital content, thus bringing the complete B2C sales and distribution system on tangible goods, services and digital content under one similar system.

## **9. Scope of the proposal on the supply of digital content**

According to Ecommerce Europe, the scope of the proposed directive should cover all digital

content services, regardless of whether they are sold online or offline, at distance or in stationary format, and on a durable medium or not, and also digital content which is not provided for free. This also means digital content services provided in exchange for a counter performance of the consumer which has a clear economic value and is considered as an asset. The counter performance can therefore be seen as a form of payment. However, this should not mean that the provider of a free digital service cannot be held liable for this free digital service in case of non-performance. Although Ecommerce Europe has serious concerns about some specific provisions, it welcomes the full harmonization sought for in the proposal, bringing uniform rules for the B2C supply of digital content, regardless of the channel through which it is sold, as it will make cross border B2C supply of digital content easier and cheaper to the benefit of consumers as well as traders.

Ecommerce Europe also welcomes the extension of the scope of the proposal to digital content that is not only provided in exchange for money (a price) but also to digital content that is provided in exchange for a counter performance other than money in the form of personal data or other data. However, Ecommerce Europe would prefer to see the scope restricted to personal data or other data that has a clear economic value. This would create a threshold which would prevent the exchange of minimal data (with no real economic value) from constituting a contractual relationship falling under the scope of the proposed directive.

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<sup>18</sup> Directive 1999/44/EC

Ecommerce Europe has some concerns about the provision of Article 3 Section 3 of the proposal (see also Article 1 Section 3 on the proposal for a Directive on the online and other distance sales of tangible goods) bringing a durable medium (which is - except for e-mail - a tangible good) used exclusively as carrier of digital content under the scope of the proposed directive. This means that the tangible medium would be subject to an unlimited legal guarantee period. CDs, videos, DVDs and other durable media, however, are tangible goods subject to the same wear and deterioration as other tangible goods. Therefore, traders should not be liable for non-conformity of the durable medium in a different way as they would have been for comparable tangible goods. That is why Ecommerce Europe calls for a clear statement in Article 3 Section 3 that the unlimited legal guarantee is not applicable to the durable medium.

#### **10. Delivery time of the digital content and termination in case of delayed delivery**

It seems logical that the starting point of the obligation to deliver the digital content shall be the conclusion of the contract on the delivery of digital content and that the digital content will be delivered at the time provided for in the contract. In the view of Ecommerce Europe, there is only a need for a provision dealing with the period in which the seller has to supply the digital content when the parties did not provide for a delivery time in their contract. In that respect, Ecommerce Europe supports the provision in Article 5 of the proposal, stating that the delivery time will be as foreseen in the contract the parties have agreed on and that, in the absence of such a provision, the supply of digital content not on a durable medium will take place

instantly after the conclusion of the contract. However, a clear provision for the time of delivery of digital content on a durable medium is missing, in the absence of a contractual agreement on the time of delivery. In view of Article 17 Section 1 of the CRD, Article 18 Section 1 of the CRD seems not to be applicable to digital content on a durable medium as it is not seen as a good, thus leaving this issue subject to diverging national provisions. For the sake of uniformity, Ecommerce Europe therefore strongly suggests introducing the provision (as already provided for in Article 18 Section 1 CRD) in Article 5 that digital content on a durable medium, in the absence of a contractual agreement on the delivery time, shall be delivered without undue delay but not later than 30 days after the conclusion of the contract.

Ecommerce Europe generally supports the idea that the consumer should have the right to immediately terminate the contract when the provider fails to supply the digital content in time as foreseen in Article 11 of the proposal. However, the assessment of the right to terminate should take into account the kind and type of digital content, the duration of the contract and whether it is to be delivered on a durable medium or not. It should, for instance, not be possible to terminate the contract immediately when, in a long-term contract on digital content not on a durable medium, the trader fails to supply for only a brief moment. For those contracts other remedies, like compensation, seem to be more appropriate. That is why Ecommerce Europe calls for the introduction of a limitation of such a right to terminate the contract in case of delayed delivery, to those situations where this

immediate termination is - considering the kind of digital content contract concerned - not disproportionate and where no other remedies should prevail.

### **11. Conformity and reversal of burden of proof of non-conformity**

Ecommerce Europe believes that the same rules applicable for conformity, assessment of non-conformity and reversal of the burden of proof of non-conformity of tangible goods can also apply to digital content. Please refer to point 4 on pages 10-11. In that respect, Ecommerce Europe supports the open conformity norm that enables easy assessment of the quality of digital content on the same objective and subjective basis as for tangible goods as provided for by Article 6 of the proposal. There is no need for diverging provisions. In the production of evidence, in principle, the non-conformity has to be proved by the consumer. Ecommerce Europe supports a similar mechanism as provided for by Article 9 of the proposed directive.

Ecommerce Europe always supported the presumption that the lack of conformity was already existent at the moment of supply of the digital content, when the lack of conformity occurs within 6 months from the delivery. During this period, the proof of the non-conformity shall be on the consumer and the proof that the non-conformity of the digital content was not existent at the moment of delivery or is not caused by the producer, provider or (re)supplier, nor is caused by the consumer or by circumstances which are at the consumers' risk, shall be on the producer, provider or (re)supplier. After this period, this proof shall be on the consumer. In the proposal for a new directive the period for the reversal of proof is extended from 6 months

to unlimited (Article 9 Section 1). Ecommerce Europe can only support an extension that is limited to two years after delivery and only when the consumer will have an obligation to notify any non-conformity within a reasonable period after he/she becomes aware of the non-conformity. That's why Ecommerce Europe rejects an overall and unlimited in time reversal of the proof of non-conformity of the digital content on the trader, as provided for by Article 9 Section 1 of the proposal.

### **12. Notification period, prescription period, legal guarantee and traders' guarantee**

The immense variety in "life cycle" of digital content services makes it in practice impossible to have a regulation that offers the same legal guarantee period for all these different digital content services with their different "lifespans". In that respect, one size does not fit all. Also taking into account the diffuse and unclear legal character of a guarantee period, Ecommerce Europe calls for an open "legal guarantee" system for digital content services that is based on non-conformity and a flexible legal guarantee period that meets reasonable objective and subjective expectations of the consumer in view of the specific digital content service concerned, starting with the delivery of or the access to the digital content service and in which period the seller/provider/producer is liable towards the consumer for non-conformity.

Such a system will be based also on:

- A notification of the lack of conformity in due time (1 month) by the consumer (notification period);
- A reasonable prescription period in which the consumer can ask for remedies (maximum 2 years) in court or in an offered

ADR/ODR system, starting at the moment of notification of the lack of conformity.

All the other recommendations made by Ecommerce Europe on notification period, prescription period, legal guarantee and traders' guarantee applicable to tangible goods also apply to digital content. Please refer to point 5 on pages 11-12. Therefore, Ecommerce Europe does not support the fact that the proposal fails to provide for a notification period, a limited legal guarantee period and a prescription period.

### **13. Remedies and free choice for trader**

The producer, provider, (re)seller should always be entitled (if possible or reasonable) to repair the non-conformity of the digital content service by either repairing or replacing it or delivering the failing parts of the digital content service. In the same way consumers should always be entitled to have the non-conformity repaired. The choice of the remedy should, in principle, initially be with the supplier who has to repair the non-conformity. If repair of the non-conformity is not possible or reasonable, the consumer should be entitled to withdraw from the contract and to receive a refund. In that respect, Ecommerce Europe welcomes the provisions in Article 12 of the proposal since they are based on the above mentioned principles.

Users should have the same remedies for digital content products provided in exchange for a counter performance other than money (providing that this counter performance has a clear economic value) as well as for digital content services that are offered for free. However, the price or the (absence of a) counter performance paid in exchange for the digital

content service should be taken into account when assessing the (non-)conformity, the remedies and the compensation for damages. Ecommerce Europe therefore would like to see, in Article 12 on remedies, a provision explicitly dealing with the special situation where the counter performance was not in the form of money but in exchange for personal and/or other data.

### **14. Liability, compensation and legal guarantee period**

The consumer should always have a right to compensation for damages caused by non-conformity. The prescription period should be limited to a reasonable period after the notification of the non-conformity (in due time after discovery of the non-conformity) to the producer, provider or (re)seller. In case of non-conformity of the delivered digital content, Ecommerce Europe believes that the current rules on liability and compensation for damages to consumers caused by a sold tangible good - as laid out in the Product Liability Directive and the Directive on the Sale of goods and associated guarantees - form a balanced system on liability for non-conformity and could also be in a similar way applicable to the sale of digital content services. Please refer to the recommendations made for tangible goods at point 7 on pages 13-14. In that respect, Ecommerce Europe does not support Article 14 of the proposal on the right to compensation of damages that is only providing for liability of the supplier to the consumer for "any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content" and not providing for clear rules on

compensation of other damages.

On liability, Ecommerce Europe also strongly recommends a limited legal guarantee period for digital content. Although digital content as such is not subject to wear and tear, producers and traders have a legitimate interest in not being endlessly liable or responsible for the service of the digital content once provided to consumers and which has become “out of date”.

#### **15. Recovery of user generated content in case of termination of the contract**

In case of termination of the digital content contract, Ecommerce Europe supports the right of the consumer to recover content and data that is restricted to content and data generated by the consumer, as provided for in Article 13 Section 2c of the proposal.

With regard to recovering content on personal data, the right to have a copy of this information is already provided for by the Data Protection Directive<sup>19</sup> and will be sufficiently provided for in the upcoming General Data Protection Regulation. In that sense, Ecommerce Europe strongly recommends restricting the provision of Article 13, Section 2c to non-personal data.

#### **16. Modification of the digital content service**

It depends on the kind of service and the contract, terms and conditions agreed on by trader and consumer whether the trader has a right to modify digital content and under which conditions he is allowed to modify digital content features given the impact it has on the quality or conditions of use of the digital content service. In that respect, it will be obvious that the

provider of digital content on a durable medium such as music, films and video only has limited rights to alter the content features compared to digital content services like gaming, dating and social media services. Ecommerce Europe believes that this issue is sufficiently covered by Directive 93/13/EEC on unfair contract terms.

A notification of modification should include transparent information on the kind of modification, when it will come into effect, the effects it has for the use of the digital content service by the consumer and whether the consumer is entitled to withdraw from the contract when he or she is not satisfied with the modifications, or when they do not meet his or her reasonable expectations. In that respect, Ecommerce Europe welcomes the provisions of Article 15 of the proposal as they reflect the same principles on modification of the digital content.

#### **17. Updates and latest version**

Especially when selling digital content on a durable medium like games, entertainment, video and music on DVDs and CDs, but also for a lot of digital content not on a durable medium, it is common practice that consumers buy the version of the digital content which was available at the time of the conclusion of the contract and no more. In the view of Ecommerce Europe, the standard should therefore be that digital content shall be in conformity with the version available at the time of the conclusion of the contract, unless otherwise agreed in the contract. The consumer will only have a right to updated versions of the digital content service when foreseen in the

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<sup>19</sup> Directive 95/46/EC

contract. Ecommerce Europe therefore welcomes Article 6, Section 1d that provides for the same principle.

### **18. Termination of long term contracts**

Ecommerce Europe supports the idea in Article 16 of the proposal that, where the contract provides for the supply of the digital content for an indeterminate duration, or where the initial contract duration or any combination of renewal periods exceed 12 months, the consumer shall be entitled to terminate the contract any time after the expiration of the first 12-month period, without prejudice to more favorable contractual conditions for the termination of the contract. However, a termination of the contract for the supply of digital content after a period of 1 year is not always fair, reasonable or appropriate where the duration of the contract has had a clear relation to the (recurring) price the consumer has to pay for the service or other benefits for the consumer. A 2-year contract will mostly be offered for a lower monthly contribution and will offer more benefits than a one-year contract for the same service. It would be very unfair to the supplier if the consumer, who has chosen explicitly for a longer duration of the contract than one year in exchange for a lower price and more benefits, would have the right to terminate this contract after one year. That is why Ecommerce Europe calls for a clear limitation in Article 16 of this right to terminate the contract after one year, to those situations where this is considered fair and reasonable.

## **RECOMMENDATIONS ON THE REVIEW OF THE CONSUMER RIGHTS DIRECTIVE**

### **1. Swiftly evaluate the Consumer Rights Directive**

Ecommerce Europe recognizes and welcomes the important steps made by the introduction and implementation of the Consumer Rights Directive<sup>20</sup> (CRD) on the road towards one single market with fully harmonized consumer legislation. Despite the published guidance, the CRD is, however, not able to sufficiently harmonize consumer legislation throughout the EU. Interpretations of various provisions differ across Member States, and the Directive does not cover all aspects of consumer protection. Moreover, some provisions do not correspond to common practices and business models in e-commerce and need to be corrected. The CRD should therefore be evaluated as rapidly as possible with the aim of achieving a full harmonization of consumer protection.

### **2. Provisions in the CRD in need of revision**

In view of an official evaluation from the EU institutions of the CRD, Ecommerce Europe has already started to collect practical examples from its members about the issues faced by online shops when dealing with the provision of this Directive and will report to the Commission in due course. In the evaluation (and future review) of the CRD, Ecommerce Europe believes that the following provisions need rapid clarification or reconsideration, since they constitute an unnecessary and costly obstacle for daily practice in the B2C e-commerce sector

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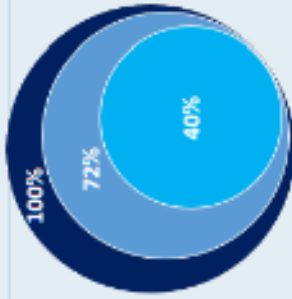
<sup>20</sup> Directive 2011/83/EU

and do not contribute to the interest or the protection of the consumer:

- Article 9.b.i CRD on the starting point of the withdrawal period in case of an order for multiple goods in one order and whose goods do not have any connection or relationship;
- Articles 13.1 and 13.3 CRD on the obligation to reimburse payment in case of withdrawal within 14 days after withdrawal before receiving back the returned goods;
- Article 14.2 CRD on the assessment of financial loss or diminished value in case of return after extended use of the product during the withdrawal period needs more clarification. Even though Ecommerce Europe supports this article, the mechanism ruled by this article is too complex. Also, it has to be explained to the consumer and that is why it needs more clarification;
- Article 19 CRD on the fees for the use of means of payment;
- Article 6.1.i CRD on the obligation to provide for a European model withdrawal form as set out in Annex 1B.

# Ecommerce Europe Association Data at a Glance 2015

West €209.9bn +13.3%  
 Central €106.6bn +12.9%  
 South €47.3bn +15.4%  
 North €34.7bn +13.6%  
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 \*excluding people aged 0-14

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**715,000+** estimated online businesses  
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