Ecommerce Europe

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

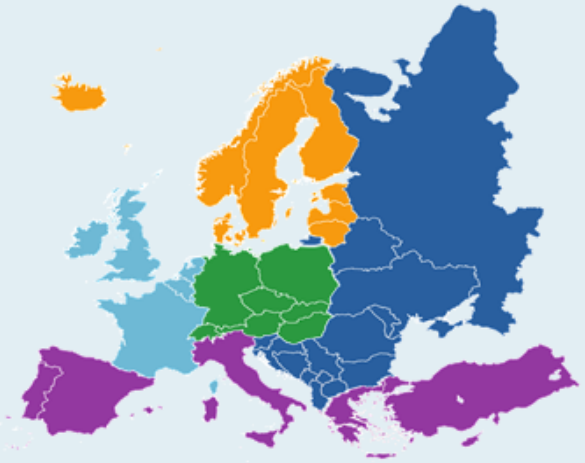
November 2015

www.ecommerce-europe.eu

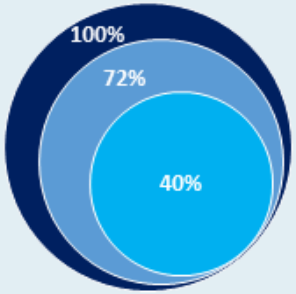
ECOMMERCE EUROPE

Europe

2014 Key B2C E-commerce Data of Goods & Services at a Glance



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

Europe
€423.0 bn 13.6%
EU28
€368.8 bn 13.4%

2.5% eGDP

€ 17.1 trn GDP 2014

Estimated share of online goods in total retail of goods

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

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

Top emerging countries

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

2,475,+ jobs directly or indirectly via E-commerce

715,000+ estimated online businesses

4 billion+ number of parcels annually (f)

UK, Germany, France account for 61% of total E-commerce sales in Europe

"457 million social media users"

Executed by: Ecommerce Foundation

Powered by: globalcollect | ingenico GROUP; ASENDIA BY LA POSTE & SWISS POST

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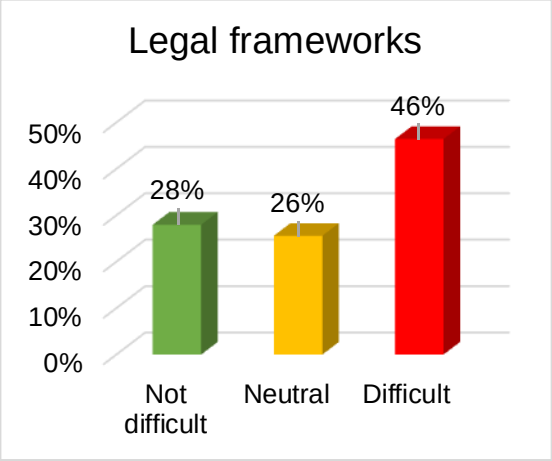
ECOMMERCE EUROPE'S RECOMMENDATIONS FOR A MORE BALANCED APPROACH TOWARDS CONSUMER AND CONTRACTUAL POLICIES

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. Ecommerce Europe's main objective is to work with the European Commission, the European Parliament and the Council of the EU towards flexible policy frameworks that are facilitating growth and competitiveness. The word "flexible" is essential because the sector is growing fast, and reviews and updates on a frequent basis are needed.

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



Description: Perceived level of difficulty for companies selling cross-border.
Source: Ecommerce Europe results survey Barriers to Growth, 2015.

The full potential of the European e-commerce market has not been reached yet. Today only 15% of consumers shop online from another EU country[1]. The legal framework is one of the most difficult barriers to overcome for 46% of the companies that sell cross-border. Dealing with 28 different sets of rules for consumer and contract law does turn out to be burdensome for online merchants.

[1] European Commission's Consumer Conditions Scoreboard 2015

GENERAL REMARKS ON CONSUMER POLICIES IN EUROPE

1. 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 consequence, 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 shop would be confronted to the undesirable and very complex result that it has to treat customers from abroad differently than domestic buyers, and online buyers differently than offline buyers.

2. Simplify consumer rules

Consumers and merchants are often not fully aware of the legal aspects of their contractual relation, because the applicable legal framework on consumer rights is too complex and uneasy to access to be fully understood by others than 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.

3. Develop a simple, standard information form on consumer rights and obligations

Ecommerce Europe advocates for transparency and an easy contracting that allow the parties involved to focus on the main characteristics of the contract. Explicit information obligations before and at the time of the conclusion of the contract should be restricted to the 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 overflow 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 Commission to develop a standard information form on consumer rights and obligations that is also recognized as compliant with the mandatory information obligations by European and national authorities supervising consumer protection. Such standard information should preferably be (online) accessible 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 an easy

way 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 in the differences on national level for traders as well as consumers trading cross-border, thus avoiding differences in explanation and lowering compliance costs in a practical way.

4. 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 legal consumer law systems lies in a clarification of the meaning and consistent application of article 6.2 of the Rome I Regulation. This Regulation can also help to answer the question which national provisions are applicable on 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 authorities and/or courts explaining 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 the consumer has in his/her country of residence. This would mean that the merchants' home country law will most often be applicable and that the contract has to be compliant with that national law system.

Respect for the mandatory rights should thereby explicitly not mean that the contract has to be in compliance with the national law system of the consumers' 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 consumers' residence which give the consumer more contractual rights than under the applicable law system and on which the consumer appeals. It should also explicitly not mean that legislation on labelling, safety information, technical and other information of the country of destination should be applicable for 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 these kinds of legislation one of the biggest barriers to sell 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.

THE ECOMMERCE EUROPE TRUSTMARK SCHEME

1. 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. Starting from 30 September 2015, 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.

2. 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 will include 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.ecommerce-europe.eu/ecommerce-europe-trustmark-code-of-conduct

3. More harmonization on European level

At this moment, Ecommerce Europe is in the first phase of the roll-out of its Trustmark, where the Ecommerce Europe Trustmark is connected to a membership of participating National Associations. This means that more than online shops in Europe which are certified by a National Association can already carry the Ecommerce Europe Trustmark next to the national trustmark. The final goal is to reach more harmonization on a European level, and this will be performed in a second phase by upgrading the Trustmark set of criteria in all countries.

4. Advanced Dispute Resolution and Online Dispute Resolution

Ecommerce Europe welcomes the involvement of online merchants in the testing process of the forthcoming European ODR system and pleads for a fast rollout. With its own Trustmark, Ecommerce Europe has already developed an

online handling system of disputes which complies with current EU legislation. The upcoming ODR system should be comprehensive, easily accessible, transparent, fast, easy to handle, low cost like the Ecommerce Europe's handling system and should build upon the existing national systems of Alternative Dispute Resolution.

RECOMMENDATIONS ON THE CONSUMER RIGHTS DIRECTIVE

1. Evaluate the Consumer Rights Directive rapidly

Ecommerce Europe recognizes and welcomes the big steps made by the introduction and implementation of the Consumer Rights Directive (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 a full harmonization of consumer protection.

2. Provisions in the CRD in need of revision

In the 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 time. 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 praxis in the B2C e-commerce sector 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 which goods do not have any connection or relation;
- 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 product during withdrawal period;
- 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.

RECOMMENDATIONS ON THE COMMISSION'S PROPOSAL ON CONTRACT RULES FOR THE ONLINE PURCHASES OF 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 publication of the Commission's proposal(s) on contract rules for the online purchase of digital content and tangible goods. In this legislative

process, it is essential for all relevant stakeholders to work together in order to rapidly remove remaining barriers in cross-border e-commerce.

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 mandatory contract law could create confusion and legal uncertainty for consumers and businesses, and would be too complex and expensive to provide real practical value or to be a solution for the problem of the remaining legal diversity across the EU.

On the other hand, Ecommerce Europe welcomes the newest proposals as announced by in the draft preliminary texts on contract rules for the sale of tangible goods and for the supply of digital content, seen by Ecommerce Europe in occasion of the last Stakeholder Consultation Group meeting of October 2015, set up by the Commission's DG Justice and Consumers. Ecommerce Europe has therefore developed in-depth recommendations on the above mentioned preliminary texts of the Commission.

Recommendations on the upcoming DSM proposal on the sale of tangible goods:

1. Maximum harmonization on the Unfair Contract Terms Directive

Due to the minimum harmonization character of the Directive on Unfair Contract Terms in consumer contracts (1993/13/EEC), 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 and/or services 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 law system. Therefore, Ecommerce Europe pleads 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 seen the contract, the interest of both parties and the special circumstances of the transaction in stake (grey list). This can be achieved either by reviewing and reshaping the minimum

harmonized Unfair Commercial Practices Directive in consumer contracts in a maximum harmonized directive or by completing the CRD on this issue.

On 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 having 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 than agreed without the consumer having a right on 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 on Directive on the sale of consumer goods and associated guarantees

Due to the minimum harmonization character of the Directive on the Sale of consumer goods and associated guarantees (1999/44/EC), 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 height of refund in case the consumer has been using the good during the withdrawal period for more than to assess 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 on 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 with 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;
- Access to ADR/ODR as provided for by the Regulation on ODR and the Directive on ADR.

3. Scope of the upcoming DSM proposal on the sale of tangible goods

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

4. Conformity and reversal of burden of proof of non-conformity

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 view, conformity should be established on the base of an open norm like used for (non-)conformity in the Directive on the Sale of consumer goods and associated guarantees (1999/44/EU) 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 for, 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 makes 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.

In the production of evidence, Ecommerce Europe supports a mechanism as provided for by Article 5 of the Directive on the Sale of consumer goods and associated guarantees (1999/44/EC). In principle, the non-conformity has to be proved by the consumer and notified to the trader within due time after the consumer gets aware of the non-conformity.

Ecommerce Europe supports 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 is not caused by the producer, provider or (re)seller nor is caused by the consumer nor by circumstances which are on the consumers' risk, shall be on the producer, provider or (re)seller. After this period this proof shall be on the consumer.

5. Notification period, prescription period and legal guarantee and traders' guarantee

The buyer 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 right to cure a non-conformity, the non-conformity needs to be notified to the seller by the consumer as soon as reasonably possible. 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 period should not depend on the country of residence of the consumer or the chosen applicable national law system. Ecommerce Europe therefore pleads for maximum harmonization of the notification period. In case the buyer does not notify the trader in due time, the buyer should lose all his remedies on this particular lack of conformity. According to Ecommerce Europe, a notification period of 2 months after the detection of the non-conformity - as provided for in the Directive on the Sale of consumer goods - is for as well online as offline B2C e-commerce far too long.

Ecommerce Europe is convinced that thanks to the modern and digital communication facilities, the notification period should not be longer than 1 month after discovery of the lack of conformity, with a reasonable prescription period of maximum 2 years starting at the moment of notification of the lack of conformity. During this period the consumer can exercise his/her remedies in court or 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. The liability of the seller for non-conformity should be limited 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 to the discretion of the actor in the commercial chain offering tangible goods to consumers. That is why Ecommerce Europe only sees a need for rules on commercial guarantees providing for transparent communication to the consumer on the character and content of the offered commercial guarantee and the obligation to the trader to make clear to the consumer that the commercial guarantee does not affect the consumer's mandatory legal rights and remedies in case of a lack of conformity.

6. Remedies and free choice for 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 costs for the consumer.

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). The consumer in that view in principle is not allowed to freely choose one of the possible remedies to repair the non-conformity.

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 should be entitled to the refund of the amount he paid for the good and the delivery costs.

The consumer always should have a right of compensation for proven damages caused by non-conformity. The prescription period should be limited to a reasonable period of two years after the notification of the non-conformity (in due time after discovery of the non-conformity) to the seller and the liability of the seller for non-conformity should be limited to a period of two years after delivery of the tangible good.

7. Liability and compensation

Ecommerce Europe is convinced that the current rules on liability for damages to consumers caused by a sold tangible good as laid down in the Product Liability Directive (85/374/EEC) and the Directive on the Sale of goods and associated guarantees form a balanced system on liability for non-conformity. The minimum requirements and the rules for liability of these directives should preferably be fully harmonized for as well tangible goods, services and digital content services at the 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 is conform the reasonable expectations of the consumer or that the non-conformity is not caused by the producer, provider or (re)seller or is caused by the consumer himself or by circumstances which are on the consumer's risk.

The trader should only be liable for damages in the private sphere of the 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 is only limited liable 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 of redress on the provider or the producer of the non-conform good.

Recommendations on the upcoming DSM proposal on the supply of digital content:

8. Digital content

The sale of digital content and digital content services are up to now mostly seen as a service on which the Unfair Commercial Practices and the Unfair Contract Terms Directives are applicable. In that view, 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 with 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 notices 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 perspective, 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 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 view, Ecommerce Europe welcomes the initiatives of the European Commission to come to a general and harmonized legislation for digital content, as recently announced in the draft preliminary text on contracts on the supply of digital content seen by Ecommerce Europe in occasion of the last Stakeholder Consultation Group meeting of October 2015, set up by DG Justice and Consumers of the European Commission.

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 they are for tangible goods under the Directive on the Sales of consumer goods and associated guarantees. Please refer to the list of key contractual rights at pages 9-10, point 2.

9. Scope of the upcoming DSM proposal on the supply of digital content

According to Ecommerce Europe, the scope of a regulation on the sale of digital content should cover all digital content services whether on a durable medium or not, and that are not provided for free. This means also digital content services provided for a counter performance of the consumer which has a clear economic value and is regarded as an asset and, thus, can be seen as a form of payment. This should however not mean that the provider of a free digital service cannot be held liable for this free digital service in case of non-performance.

10. Supply of the digital content

It seems logic 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 need for a provision dealing with the period in which the seller has to supply the digital content when parties did not provide for a delivery time in their contract. In that view, Ecommerce Europe favors a provision that states 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 and for digital content on a durable medium within 14 days after the conclusion of the contract.

Ecommerce Europe supports in general the idea that the consumer should have the right to immediately terminate the contract when the provider fails to supply in time for the digital content. However, in in the assessment of the right to terminate should be taken 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 whenever in a long term contract on digital content not on a durable medium, the trader fails to supply only a short moment. For those contracts other remedies, like compensation, seems to be more appropriate. That is why Ecommerce Europe pleads for a limitation of such a right to terminate to those situations where this immediate termination is seen the kind of digital content contract 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 and reversal of burden of proof of non-conformity of tangible goods can also apply to digital content. However, concerning the length of the period for the reversal of the burden of proof, Ecommerce Europe considers that a 6-month term as provided for by Directive 1999/44/EC for tangible goods is far too long with respect to digital content. Therefore, Ecommerce Europe suggests a period of maximum 2 months after delivery of or access to the digital content service. All other Ecommerce Europe's recommendations on conformity applicable to tangible goods also apply to digital content. Please refer to page 10, point 4.

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

The immense variety in "life cycle" of digital content services makes in practice impossible to have a regulation that offers the same legal guarantee period for all these different digital content services with their different "life" spams. In that view, one size does not fit all at all. Also taking in account the diffuse and unclear legal character of a guarantee period, Ecommerce Europe pleads for an open "legal guarantee" system for digital content services that is based on non-conformity and a limited period of 2 years after the delivery of or the access to the digital content service in which the seller/provider/producer is liable towards the consumer for non-conformity.

Based on (non-)conformity such a system will take in account the different lifespans of different digital content services and will be based on:

- limitation of the liability of the seller/provider/producer on a period of two years starting at the moment of delivery of or access to the digital content service;
- 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 ODR/ADR 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 page 11, point 5.

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. If repair of the non-conformity is not possible or reasonable the consumer should be entitled to withdraw from the contract and refund. The consumer always should have a right of 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.

Users should have the same remedies for digital content products provided for counter-performance other than money (provided 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 for the digital content service should be taken into account when assessing the (non-) conformity, the remedies and the compensation for damages

14. Liability and compensation

In case of non-conformity of the delivered digital content, Ecommerce Europe believes that the current rules on liability for damages to consumers caused by a sold tangible good as laid down in the Product Liability Directive (85/374/EEC) and the Directive on the Sale of goods and associated guarantees form a balanced system on liability for non-conformity and could as well be applicable on the sale of digital content services. Please refer to the recommendations made for tangible goods at page 12, point 7.

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

In the view of Ecommerce Europe, a general right to recover content and data that is generated by the consumer in order to transfer it to another trader, should be restricted to user generated content provided for by the consumer in the course of social media services/platforms. As regards to recover content on personal data, the right to have a copy is all-ready provided for by the Data protection directive and will be sufficiently provided for in the upcoming Data protection regulation.

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 seen the impact it has on the quality or conditions of use of the digital content service. In that view 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 is not satisfied with the modifications or when they don't meet his reasonable expectations.

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 vision of Ecommerce Europe, the standard should therefore be that, unless otherwise agreed, digital content shall be in conformity with the version of the digital content 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 contract.

18. Termination of long term contracts

Ecommerce Europe basically supports the idea 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. A termination of the contract for the supply of digital content after a period of a year, is however not always fair, reasonable or appropriate where the duration of the contract has had a clear relation to the (periodically) price the consumer has to pay for the service or other benefits for the consumer. A two-year contract will mostly be offered for a lower monthly contribution and 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 pleads for a limitation of this right to terminate the contract after one year, to those situations where this is seen the kind of contract fair and reasonable.

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

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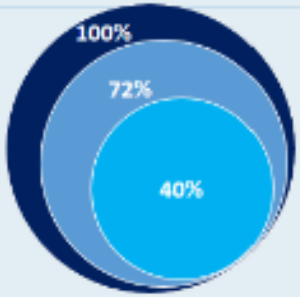

817 million
people live in Europe

491 million*
people use the Internet

274 million*
people are e-shoppers
*excluding people aged 0-14

2,475,000+
jobs directly or indirectly via e-commerce

715,000+
estimated online businesses

4.0 bn+
number of parcels sent annually (f)

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