QUESTIONNAIRE ON CONTRACT RULES FOR ONLINE PURCHASES OF DIGITAL CONTENT AND TANGIBLE GOODS

Information about the respondent

1. Please enter your full name *OR* the name of the organisation / company / institution you represent if you are responding on its behalf: **EDiMA**

2. Please indicate your main country of residence: **N/A**

3. Please indicate your main country of activity: **EU**

4. Contributions received will be published on the Commission's website unless it would harm your legitimate interest. Do you agree to your contribution being published along with your identity?

- **X** Yes, your contribution may be published under the name you indicate
- ☐ Yes, your contribution may be published but should be kept anonymous (without name and contact details)
- ☐ No, you do not want your contribution to be published. Your contribution will not be published, but it may be used internally within the Commission.

5. Are you answering this questionnaire as a:

- ☐ Consumer
- ☐ Organisation representing the interests of consumers
- ☐ Company mainly selling digital content products / Organisation representing the interests of companies mainly selling digital content products (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- ☐ Company mainly selling tangible goods online / Organisation representing the interests of companies mainly selling tangible goods online (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- ☐ Company mainly buying digital content products / Organisation representing the interests of companies mainly buying digital content products (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- ☐ Company buying mainly tangible goods online / Organisation representing the interests of companies buying tangible goods online (if so, please indicate your business sector and whether you are a small and medium enterprise or not)
- **X** Organisation representing the interests of businesses in general

- ☐ Member State of the EU or EEA/ Public authority
- ☐ Other (for example, academics, other NGO, public authority outside the EU/EEA, trade union) (please specify)

Depending on your profile, you may decide to respond only to the questions you have a particular interest for. For example, if you are a company selling only tangible goods and do not intend to sell digital content products in the future, you may decide not to respond to Part 1 of the questionnaire dedicated to digital content products.

PART 1 – DIGITAL CONTENT

Context

Digital content products markets are growing rapidly. For instance, the app sector in the EU has grown significantly in less than five years, and is expected to contribute EUR 63 billion to the EU economy by 2018. Consumer spending in the video game sector is estimated at 16 billion EUR in 2013. In the music industry, digital revenues now represent 31% of total revenue in the EU. This economic potential should be further unleashed by increasing consumer trust and legal certainty for businesses.

However, when problems with digital content products arise (for example, the digital content products cannot be downloaded, are incompatible with other hardware/software, do not work properly, or even cause damage to the computer), specific remedies are lacking at the EU level (namely a right of the user against the trader when the digital content is defective). In addition, the user cannot influence the content of the contracts on the basis of which digital content products, which are 'off-the-shelf' products, are offered because these are 'take it or leave it' contracts. For instance, contracts may limit the user's right in case the digital content products do not work properly. They may also exclude the user's right to receive compensation if the digital content products caused damage (for example by damaging the computer), or limit compensation solely to so-called 'service credits' (extra credits for future service).

In addition, contracts for the supply of digital content products may be characterised differently in the Member States for example as service, lease or sales contracts. Such different treatment may result in different sets of remedies, some of them in the form of mandatory rules, others not. This may cause legal uncertainty for businesses about their obligations – and for users about their rights- when selling digital content products both domestically and cross-border.

A number of Member States have enacted or started work to adopt specific legislation on digital content products (namely the UK, the Netherlands and Ireland). This could further increase the differences between national rules that businesses would have to consider when providing digital content products throughout the EU.

Legal background at EU level

Certain aspects of contract law for online supply of digital content products are already covered by EU law. For example, the Consumer Rights Directive provides uniform rules on the information that should be provided to consumers before they enter into a contract and on the right to withdraw from the contract if they have second thoughts; the Unfair Contract Terms Directive provides rules against unfair standard contract terms in consumer contracts. However, there are no EU rules on other aspects of contracts for digital content products (such as what remedies are available if the digital content product is defective).

Section 1 –Problems

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

EDiMA recognises that digital content product markets continue to grow rapidly both within the EU and globally, allowing ample opportunities for job growth, economic development, diversity and

pluralism. At the same time, we see that the Internet has empowered users by providing them better access to information (e.g. by user reviews and price comparison websites) and access to a much larger variety of e-commerce stores. Innovation benefits from a dynamic market where users are increasingly in control.

Unlike problems that consumers encounter when purchasing tangible goods, issues encountered when purchasing digital content, for example that the digital content products cannot be downloaded, do not comply with the advertised conformity, are incompatible with other hardware/software, or do not work properly, are already being addressed by the industry and involve either the replacement or refund of the content. There is no need for additional remedies for digital content, as in doing so, would have a direct impact on the overall cost to both consumers and businesses, as the cost of handling a customer's request when there has been a problem with the download is very high.

EDiMA is committed to continue working with the Commission and national consumer authorities to address concerns relating to the protection of consumers. Previous cooperation, for instance regarding in-app purchases, instils confidence in the effectiveness of such dialogues.

Indeed, there is no evidence that suggests that consumer and contract law variations are the real barriers to EU cross-border trade. The existing law, both EU and Member State laws, already cover the issues addressed in Commission's analysis.

Rather, it seems that there are a number of reasons why certain digital content is not offered in every EU Member State, or vary between the Member States. Local market differences (e.g. language and price sensitivity) and differences in the cost of doing business in the different markets (e.g. copyright clearance and delivery costs) are rightly identified by the Commission as stumbling blocks for the realisation of the DSM.

We recognise that harmonisation of EU law for online purchases of digital content can provide further confidence and consistency across the DSM. However, we are still unclear as to why there is a need to introduce new rules and why there is not more focus on promoting existing rules first in the spirit of the Better Regulation agenda. Suggestions to use a wide and untested definition of digital content and services that fails to recognise the complexity of software based products and how they evolve to provide new features over time, will make it more difficult for businesses, especially small and micro businesses, to grow and compete within and outside the EU – without necessarily providing any benefit to consumers.

In the digital world, developments regarding the delivery of services in its many formats is ever evolving. This innovation should not only be allowed to continue, but should be fostered. Similarly, some of the views on the right of return, remedies and conformity, appear to be overly complex, prescriptive and restrictive and therefore a cause of concern. We therefore favour a Europe-wide light-touch approach, as is already implemented and successful in the UK and the Netherlands today. In both cases, the specific nature of how digital products are provided and enjoyed by consumers is taken into account. Such an approach will create stability and promote growth and the interests of consumers alike.

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

A number of Member States have recently adapted consumer laws1 that address digital content products, and in this regard, further change in the short term would present needless disruption. It would be beneficial to have more information as to the perceived benefit of this type of change, and particularly, more clarity on the perceived problem(s) facing users and if further rules are needed.

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

A number of Member States have already implemented consumer rules addressing contract rules, with a number Member States that cover the quality of digital content products specifically, which with proper implementation can aim to adequately address the concerns that may arise in the absence of any specific EU contract law rules on the quality of digital content products.

The difficulties and costs that would inevitably arise out of new EU contract law rules on the quality of digital content products would cause greater fragmentation and create additional barriers to innovation within a market that continues to evolve and develop.

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

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

5. The European Commission has explained in the Digital Single Market Strategy[2] that it sees a need to act at EU level. Do you agree? Please explain.

EDiMA would disagree, the Consumer Rights Directive 2011 (CRD) regulated most contractual rights of customers for physical and digital products, such as their rights to pre-contractual information, their right to withdraw within 14 days and their post-contractual rights. The CRD came into force only one year ago and entailed costs for traders which had to adapt their means to distance selling to the legal requirements. Consequently, overregulating in this field is likely to cause further costs for traders at no extra benefit for consumers, as there is already a level of harmonisation.

6. The European Commission has announced in the Digital Single Market Strategy that it will make a proposal covering harmonised EU rules for online purchases of digital content. Other approaches include, for example, the development of a voluntary model contract that consumers and businesses could use for their cross-border e-commerce transactions or minimum harmonisation. What is your view on the approach suggested in the Digital Single Market Strategy?

Section 3 – Scope of an initiative

7. Do you think that the initiative should cover business-to-consumers transactions only or also business-to-business transactions? Please explain.

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[1] UK Consumer Rights Act 2015, http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf; Ireland Competition and Consumer Protection Act 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0029/

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

EDiMA is of the opinion that new rules should only be limited to business-to-consumers (B2C) transactions. We believe professional traders including SMEs have an understanding of their environment they operate in which is usually higher than the average consumer. Imposing regulation on business-to-business (B2B) contracts can only increase the regulatory burden on businesses, preventing competition and hindering innovation.

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

EDiMA would suggest limiting the initiative to B2C, to the extent that any change is required at all, as extending the scope of the initiative to B2B transactions will result in a very broad and ill-defined scope.

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

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

Please explain your choice(s).

In the context of this consultation, the proposition of establishing a new definition of "digital products" risks extending the definition beyond products to also include services such as cloud storage, sharing and other processing of data and user generated content services.

Greater consideration should be given to complex software, as opposed to more static digital content, due the complex environment in which it operates. For that reason, we recommend not to include digital services such storage and sharing services, as well as services processing data and user generated content. The upcoming rules (to the extent that any are required) should be limited to digital content such as music, videos, etc. which are consumables, as opposed to the above mentioned services.

We believe a definition of "digital content" already exists and was agreed with great difficulty at the time of the revision of the Consumer Rights Directive in 2011. Traders and consumers can only benefit from legal certainty and in this sense we urge the Commission to keep the existing definition and not come up with a new one. Digital content should mean data produced or supplied in a digital form, such as programmes, applications, games, music, videos, irrespective of whether they are accessed through downloads or streaming.

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

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

Please explain your choice(s).

It should be up to the service provider and its users to determine the terms of a contract, subject, of course, to consumer protection laws and other legal obligations. Freedom of contract is a fundamental precept of the Internal Market. For example, if the parties elect to make the provision of user data counter-performance under their contract, then it should be. If they elect not to, then the parties' freedom to make that choice should be respected.

There are clear policy rationales for not changing the current position. First, user data is, by its very nature, different from monetary consideration. It is not finite. It is not exclusive. Second, user data is covered by its own extensive regulatory regime. Extending European consumer protection law to data subject / data controller relationships would only serve to duplicate and complicate existing legal regimes.

This would be an especially strange step for the EU to take at the present time, in any event, given the recently implemented Consumer Rights Directive, which required extensive implementation efforts by service providers at considerable costs. As well, discussions on the General Data Protection Regulation (GDPR) are already advanced and data protection laws are currently undergoing review and changes. A second major upheaval to European consumer law in such a short time period, and seeking to impact privacy relationships through a parallel channel to the GDPR, would be inconsistent with a predictable, coherent and stable legal regime, which is essential to the proper functioning of and investment in a true EU Digital Single Market.

Section 4 –Content of an initiative

11. Among the areas of contract law below, which ones do you think are problematic and should be covered by an initiative (tick as many as apply)?

- ☐ Quality of the digital content products
- ☐ Remedies and damages for defective digital content products
- ☐ How to exercise these remedies, like who has to prove that the product was, or was not, defective (the burden of proof) or time limits for exercising these remedies
- ☐ Terminating long term contracts
- ☐ The way the trader can modify contracts
- ☐ Other (please specify)

Please explain your choice(s).

Quality of the digital content products

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

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

Please explain your choice(s).

13. When users complain about defective products, should:

- ☐ Users have to provide evidence that the digital content products are defective
- ☐ Traders have to provide evidence that the digital content products are not defective if they consider the complaint to be unfounded

Please explain your choice(s).

Unlike problems that consumers encounter when purchasing tangible goods, problems encountered when purchasing digital content, for example, the digital content products cannot be downloaded, do not comply with the advertised conformity, are incompatible with other hardware/software, or do not work properly, are already being addressed by the industry and involve either the replacement or refund of the content. There is no need for additional remedies for digital content, as in doing so, would have a direct impact on the overall cost to both consumers and businesses, as the cost of handling a customer's request when there has been a problem with the download is very high.

Remedies for defective digital content products

14. What are the key remedies that users should benefit from in case of defective digital content products (tick as many as apply)?

- ☐ Resolving the problem with the digital content product so that it meets the quality promised in the contract
- ☐ Price reduction
- ☐ Termination of the contract (including reimbursement)
- ☐ Damages
- ☐ Other (please specify)

Please explain your choice(s).

In the cases where consumers are faced with defective digital content, EDiMA proposes that consumers should only be entrusted with a right to terminate the contract against reimbursement of the full price paid for the content. The Commission rightly points out that the entitlement to have digital products brought into conformity only applies to the extent possible and only if it is not

disproportionate. Bringing digital content into conformity within a reasonable period of time seems impossible, as the content is usually delivered by the supplier's licensors.

Further, taking into account the low average value of digital products (in majority around 0,99 cents), bringing the product into conformity would always be disproportionate considering the costs for traders for the manual handling of customers' complaints. In practice, we would almost automatically provide a refund to customers.

In addition, we would like to highlight that in many cases customers can always get in touch with the trader in order to report a problem or request a refund. This usually takes the form of webforms or a link to a "report a problem" box.

We believe refunds should be made via the same payment method used to make the payment to avoid additional costs. Refunds provided via different means than the one the customer used could incur unreasonable costs for the service provider, particularly for SMEs.

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

A clear distinction needs to be made between two separate relationships between the user of an Information Society Services ("ISS") (as defined in the E-Commerce Directive (2000/31/EC)) and the provider of that service. On the one hand, the contractual relationship between the user and service provider and, on the other hand, the "data relationship" between those two parties.

The contractual relationship between the user and the service provider is, by definition, primarily governed by contract law and the terms agreed between the parties. When dealing with consumers, the user also enjoys additional consumer law protections under the Consumer Rights Directive (2001/83/EU) and other such instruments.

The provision of user data could be agreed (by the parties to a contract) to be counter-performance under that contract by the parties to a contract. For example, a user could agree to enter a competition, a condition of which is the right to use the user's name and image in publicity if they win. There is a clear bargain, of which the provision and use of user data forms counter-performance by the user for the chance to win.

Conversely, the provision of user data may not be contractual counter-performance. For example, if a user buys a product from an online retailer and provides that retailer with credit card details and delivery information, the provision of such data is not part of counter-performance by the user, but rather is simply a necessary step for the service provider to perform its obligation under the contract to deliver the product purchased. The counter-performance by the user is payment of the price of the product.

The data relationship between the parties is governed by the Data Protection Directive (95/46/EC) and related instruments. Article 7 of the Data Protection Directive sets out a series of bases upon which a service provider may lawfully process user data provided as part of the user's use of the service provided. Consent is only one of them. The others are where processing is necessary:

- for the performance of the contract
- in order to take pre-contractual steps at the request of the user
- for compliance with a legal obligation
- in order to protect the vital interests of the user
- for the performance of a task carried out in the public interest or in the exercise of official authority vested in the service provider (if data controller) or in a third party to whom the data are disclosed
- for the purposes of the legitimate interests pursued by the service provider (if data controller) or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the user's fundamental rights and freedoms

Deeming the provision of user data to be counter-performance for contract law purposes, whether that is what is agreed by the parties to the relevant contract or not, would directly undercut Art 7 of the Data Protection Directive. It would have the effect in practice of making consent the only lawful basis for processing user data, contrary to the express legislative intention set out in the Data Protection Directive and against which background the e-commerce ecosystem has developed to date.

16. Should users be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after they have acquired the digital content products or discovered that the digital content products were defective? Please explain.

For digital content, the defect should be notified very early on to avoid abuses and minimise harm. Digital content is often consumed almost immediately after the completion of the download, therefore we would recommend a 'reasonable' timeframe from the point that the content was downloaded. This ensures that content providers can ensure that the digital content products are always in line with the most updated versions and software.

17. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which users have to exercise the remedies? Please explain.

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

Digital content is often consumed almost immediately after the completion of the download, therefore we would recommend a 'reasonable' timeframe from the point that the content was downloaded.

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

In the rare cases where consumers are faced with a problem when purchasing or accessing digital content products, a number of remedies are already in place. The Commission is proposing a new liability regime in respect to the liability of the suppliers in the context of delivery of digital content. It is however important to distinguish the making available of the content, which falls onto the trader, and its delivery which is largely controlled by the telecom providers. Industry has enforced mechanisms to ensure the supply of digital content is as flawless as possible. For example, on certain platforms bigger files can only be transferred while on a wifi connection (as opposed to a normal cellular

connection) and should the connection to the network be lost, the transfer would resume automatically when the device connects to a wifi network again.

Remedies for the failure to supply therefore only seem appropriate if the lack of supply is caused by an instance within the supplier's control. It can reasonably be expected from the consumer to verify sufficient network coverage prior to making a purchase. Providing consumers with an automatic termination right would impose an unreasonable burden on suppliers. In this case, we would argue that the burden of proof should be on consumers and not on the trader.

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

Additional rights

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

- ☐ Yes
- ☐ No

22. If you reply yes to question 21, please specify under which conditions and following which modalities should users be able to terminate the contract (tick as many as may apply):

- ☐ Termination should be expressed in advance
- ☐ Termination should be made by notice
- ☐ Users are provided with means to retrieve its data
- ☐ The trader may not further use the users' data
- ☐ Other (please specify)

Please explain your choice(s).

When considering the termination of "long term" contracts, it must be considered that no clear definition of a "long term contract" has been proposed. Industry's practice at the moment considers a contract to be 24 months, which is standard in many services such as telecom carrier bundle deals.

The Commission should differentiate between the different types of renewals, indeed some services apply a monthly renewal and others would request consumers to enrol over a long period of time.

We believe rules applying to long term contracts for digital content should not be any different than the rules applicable to similar contracts in the physical world. When entering into a contract for a period of 12 months, consumers should be able to withdraw from it after the period agreed with them at the time of the conclusion of the contract. It is usual practice that traders either offer a trial period for free or propose a discount on an annual subscription. In those cases, consumers should not have a right to terminate the contract if a discount was applied (for example, a magazine was offered for 12 months for the price of 10). Providing consumers with the possibility to cancel their subscription while a discount has been given to them would prohibit traders from offering volume offers. In the case of

auto-renewals of the contract, consumers are de facto given the possibility to withdraw from the contract at the time of renewal.

23. In case of termination of the contract, should users be able to recover the content that they generated and that is stored with the trader in order to transfer it to another trader?

- ☐ Yes
- ☐ No

Please explain your choice.

24. If you reply yes to question 23, please indicate under which conditions (tick as many as may apply):

- ☐ Free of charge
- ☐ In a reasonable time
- ☐ Without any significant inconvenience
- ☐ In a commonly used format
- ☐ Other (please specify)

Please explain your choice(s).

25. Upon termination, what actions should the trader be entitled to take in order to prevent the further use of the digital content?

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

Please explain your choice(s).

26. Should the trader be able to modify digital content products features which have an impact on the quality or conditions of use of the digital content products?

- ☐ Yes
- ☐ No

Please explain your choice.

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

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

Please explain your choice(s).

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

PART 2 – ONLINE SALE OF TANGIBLE GOODS

Context

In 2014, 50% of EU consumers shopped online, rising from 30% in 2007. With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU-28. The Commission's Digital Single Market Strategy has highlighted that this economic potential should be further unleashed by removing barriers.

If traders decide not to sell outside their domestic market, this may limit consumer choice and prevent lower prices by lack of competition. Today, traders may be deterred from doing this by differences in contract law which may create costs for traders who adapt their contracts or increase the legal risk for those who do not. For example, depending on the Member State, consumers may have two years, five years, or the entire lifespan of the purchased product to claim their rights. In business-to-business transactions, where no specific EU rules exist, negotiation on the applicable law may also create costs.

Legal background at EU level

As for digital content products, certain aspects of contract law have already been fully harmonised for online purchase of tangible goods by consumers. In particular, the Consumer Rights Directive has fully harmonised the information that should be provided to consumers before they enter into a contract and the right to withdraw from the contract if they have second thoughts. The Unfair Contract Terms Directive provides rules against unfair contract standard terms for consumer contracts. In addition, contrary to digital content products, remedies in case of defective tangible goods are also regulated at EU level in business-to-consumers transactions (under the Consumer Sales and Guarantees Directive). Nevertheless, this harmonisation only sets minimum standards: Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility – on different points and to a different extent.

Section 1 – Problems

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

EDiMA would agree with the Commission that there is a need to unleash the economic potential of cross-border e-commerce. But, would stress that this should be accomplished through both removing barriers and making cross-border transactions more attractive to traders.

Although, companies both large and small should not be forced to provide goods and services, to develop infrastructure, or to alter their business models to serve markets that are out of their offering scope. Therefore, any potential forthcoming legislative proposals should protect the freedom to conduct business as enshrined in Article 16 of the EU Charter of Fundamental Rights and certainly not implement mandatory schemes that would backlash on consumers through higher prices and undermine the current trend of innovative offerings being offered across Member States.

30. Do you think that users should have uniform rights across the EU when buying tangible goods online? Please explain why by giving concrete examples.

31. Do online traders adapt their contract to the law of each Member State in which they want to sell? If yes, do they face difficulties/costs to do so? Please explain.

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

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

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

A number of Member States have recently adapted consumer laws[3], and in this regard, further change in the short term would present needless disruption. It would be beneficial to have more information as to the perceived benefit of this type of change.

34. The European Commission announced in the Digital Single Market Strategy that it will make a proposal allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods which would be harmonised in the EU. Other approaches include, for example, the development of a voluntary stakeholders' model contract that consumers and businesses could use for their cross-border e-commerce transactions. What is your view on the approach suggested in the Digital Single Market Strategy?

Section 3 – Content of the initiative

35. Do you see a need to act for business-to-consumers transactions only or should the EU also act for business-to-business transactions? Please explain.

EDiMA recommends that the initiative is limited to cover B2C transactions only, to the extent that any change is required at all. Regulators are considering transfer to transfer B2C rules to what can be considered unrestricted/uncharted B2B territory. The nature of the work that is currently being undertaken should focus on consumers if and where there are identified issues.

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

If in the end business-to-business transactions are included, there should be no difference made regarding the size of the business (if it is an SME or not), as generally it is not practical to impose two different sets of requirements depending on the size of business you are selling to.

[3] UK Consumer Rights Act 2015, http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf; Ireland Competition and Consumer Protection Act 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0029/

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

- ☐ Quality of the tangible goods
- ☐ Remedies and damages for defective tangible goods
- ☐ How to exercise these remedies, like who has to prove that the product was, or was not, defective (burden of proof) or time limits for exercising these remedies
- ☐ Restitution of price and tangible goods in case of termination of the contract
- ☐ Unfair standard contract terms beyond the existing protection
- ☐ Other (please specify)

Please explain your choice(s).

Quality

38. Which should be the criteria for establishing the quality of the tangible goods? Should there be any additional/different criteria in addition to those already provided by Article 2[4] of the Consumer Sales and Guarantees Directive? Please explain.

A seller has to deliver goods to the consumer in conformity with the contract of sale, which a seller will be in conformity of if they:

- comply with the description given;
- are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- are fit for the purposes for which goods of the same type are normally used; and
- show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account

[4] Article 2 (Conformity with the contract)
1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
2. Consumer goods are presumed to be in conformity with the contract if they:
(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
(c) are fit for the purposes for which goods of the same type are normally used;
(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.
3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:
- shows that he was not, and could not reasonably have been, aware of the statement in question,
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

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

any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

39. How long should the period be during which the trader is required to prove that the tangible goods were not defective at the moment of delivery? Please explain.

Currently the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods. The burden of proof should stay the same (i.e. be on the seller from the sale to six months and on the consumers after six months).

Remedies[5]

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

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

Please explain your choice(s).

41. Should the buyer have a free choice of remedies or should there be a hierarchy of remedies (namely the trader is first given the option to repair the good)? Please explain.

The choice of remedy should be left to the trader. Leaving the choice to consumers could lead to unnecessary replacements when repairs could be available, which will also have a negative impact on the environment and lack any benefits for the secondary markets. We could propose a hierarchy of remedies to avoid abuse.

Time limits to exercise remedies[6]

42. Should the buyer be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after the buyer has bought the good or discovered that the good was defective? Please explain.

The Consumer Sales and Guarantees Directive already provides a minimum time period of two years. Unless evidence is presented that there is a need to reassess this matter, at this time there appears to be no reason to go beyond this time period which has already been confirmed as adequate.

[5] Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.
[6] *Idem*.

43. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which the buyer has to exercise the remedies? Please explain.

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

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

The Consumer Sales and Guarantees Directive already provides a minimum period of one year for second-hand products. Unless evidence is presented that there is a need to reassess this matter, at this time there appears to be no reason to go beyond this time period which has already been confirmed as adequate.

Damages[7]

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

EDiMA believes that strict liability should not apply.

Notification[8]

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

Commercial guarantees

48. Commercial guarantees are voluntary commitments by the trader to repair, replace or service tangible goods beyond their obligations under the law. Do you think uniform rules on the content and form of commercial guarantees are needed? Please explain.

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

Unfair terms

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

If there were to be a list with contract terms which are always to be regarded as unfair, the list should be fully harmonised.

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[7] *Idem*.
[8] *Idem*.

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

Germany has the most extensive list of unfair terms, both grey and black, differing between B2C and B2B. If B2B is considered to be included within the scope, it must be ensured that only a fraction of the B2C lists are covered, if at all.

ANNEX

This Annex to the consultation contains questions on product-related rules such as labelling. These questions are not linked to the Commission future proposal announced in the Digital Single Market Strategy on contract rules for online purchases of digital content and tangible goods and provisions on labelling will not be included in that initiative. However, since the issue of product-related rules such as labelling is also mentioned in the Digital Single Market Strategy in relation to cross-border e-commerce aspects, this annex has been attached to the consultation.

Context

In a Digital Single Market, both consumers and traders should be confident in trading cross-border without barriers that may be created by differences between national rules. The EU's Digital Single Market Strategy identified several obstacles stopping businesses and consumers from fully enjoying the benefits of the Digital Single Market and highlighted the objective of "*ensuring that traders in the internal market are not deterred from cross-border trading by (...) differences arising from product specific rules such as labelling*".

Different technical specifications or rules on labelling and selling arrangements may apply in specific areas and, depending on where in the EU the consumer is located, national product-related rules may require the trader to adapt their products and packaging accordingly. Although the mutual recognition principle applies, Member States may justify such rules by a public-interest objective taking precedence over the free movement of goods, such as on health and safety grounds. National measures which hinder the free movement of goods have to be justified and have to be necessary to effectively protect the public interest invoked. However, even for product categories for which harmonised rules apply, Members States can - under certain conditions and in accordance with a legally established procedure - introduce certain additional mandatory labelling requirements at national level.

This situation means that online suppliers of goods and services who wish to serve a pan-European market may potentially need to know about, and comply with, 28 differing sets of national regulations. Finding out which regulation applies in which case may be difficult. 37% of firms in the EU that have experience with selling online to other Member States stated that lack of knowledge of the rules that have to be followed is a barrier to selling online cross-border. Moreover, 63% of firms that have no experience with selling online cross-border stated that they believe that lack of awareness of which rules have to be followed may constitute a barrier[9]. This shows that the perceived barriers are significantly higher than the real barriers and that there is space for better communication and transparency. This situation creates information and compliance costs for online traders, especially for small and medium-sized enterprises, and in particular when the value of the transaction remains low.

Section 1 – Problem

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

[9] European Commission, Flash Eurobarometer 413, 2015

2. Do you consider that certain national product-related rules should oblige traders to alter their product/product information when they sell their legally marketed products to consumers in other Member States?

3. If you answered yes to the previous question, please explain which products and on which grounds.

Specific questions for traders

4. Do you have information about all the national product-related rules in the Member States:
a) To which you sell on-line?
b) To which you do not sell into but where there would be a market for your products?

5. If you answered yes to the previous question, please explain:
a) How did you obtain this information and at what cost?
b) How did you address the need to comply with Member State-specific requirements?

Specific questions for consumers

6. Would you consider buying the following products from another Member State, provided you are fully informed*:*

	in a physical shop in the other MS	on-line
- a product labelled according to the rules of that EU Member State	Yes / No	Yes / No
- a product packaged according to the rules of that EU Member State	Yes / No	Yes / No
- a product made according to product specifications of that EU Member State	Yes / No	Yes / No

Section 2 – Need for an initiative on product-related rules such as labelling

7. In the Digital Single Market Strategy, the European Commission pointed to product-related rules, such as labelling, as a possible obstacle to cross-border e-commerce. Do you agree? Please explain.

Section 3 – Content of a possible initiative

8. Should an action at EU level for product-related rules affecting cross-border on-line sale of tangible goods cover:

a) Difficulties related to different product specifications at national level
Yes / No
b) Difficulties related to different packaging rules at national level
Yes / No
c) Difficulties related to different labelling rules at national level
Yes / No
d) Other issues, if so, please explain