

European Commission's public consultation on contract rules for online purchases of digital content and tangible goods

Contribution of Orange

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Orange is one of the world's leading telecommunications operators with sales of 39.445 billion euros in 2014 and has 159,000 employees worldwide at September 30, 2014, including 99,800 employees in France. Present in 30 countries, the Group served 240 million customers worldwide as of 30 September 2014, including 182 million mobile customers and 16 million broadband internet customers. Under the Orange Business Services brand, Orange is also one of the world leaders in providing telecommunication services to multinational companies.

Orange is listed on NYSE Euronext Paris (ORA) and on the New York Stock Exchange (ORAN).

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Contact person:

Vianney Hennes, Director of the representation to the European Institutions,
vianney.hennes@orange.com, +32 2 800 87 30

Information about the respondent

1. Please enter the name of the organisation / company / institution you represent:

Orange Group

2. Please indicate your main country of residence:

France

3. Please indicate your main country of activity:

France

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

- Yes, 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)
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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)
- 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)

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.

First, the assessment only considers part of the picture. Other aspects have to be taken into account such as the chain of responsibilities behind content publishers.

“Digital content” refers to a wide range of categories of content and services’ providers that hide a chain of players that have roles which may impact the contractual conditions finally imposed to consumers. Some restrictions may be imposed directly by the right holders to the publisher of the service, for the provision of digital content (i.e. limited number of devices for the VOD/ EST services). As a consequence, the publisher is obliged to transfer these limitations to the consumer. Therefore, in case an EU action is considered, all the actors in the digital value chain should be covered, and not only publishers.

Second, the Commission’s analysis disregards the fact that European consumer law, today, remains fragmented. There are a number of Directives which could potentially apply to digital content today; the Consumer Rights Directive, the Directive on Consumer Sales and Guarantees, the Directive on Unfair Contract Terms. Each of these Directives has been implemented by Member States within the allowed leeway creating an inconsistent patchwork of rules for the industry.

The Commission is aware of this situation and in the past some rationalisation had already begun with the Consumer Rights Directive, which replaced two Directives - Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises. This rationalisation needs to continue in order to reduce the regulatory burden for companies and help consumers understand their rights.

Third, from Orange perspective, there is a lack of level-playing-field especially in the field of digital communication because telcos’ traditional services fall under strict sector-specific regulation, which also tend to apply also to telcos’ online digital communication services. These sector-specific rules, defined in the Universal Service Directive – and that include information duties, dispute resolution measures, specific rules for billing, contracts and marketing – are often imposed to telcos also when providing other digital services than ECS.

The future legal framework should be applicable to “all digital services” regardless of the way such services are provided, the main activity of their providers or of their eventual EU or non-EU based location. To improve the coherence of consumer protection and safety, the principle of “same services, same rules” should be strictly applied together with careful assessment of the eventual limitations of the new rules to the “freedom of contract” principle which is granted by the civil law. Moreover, it may also burden traders with excessive organisational and economic obstacles, a situation that, instead of leading to the expansion of their activity beyond the borders of a given Member State, may slow down their local growth.

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

Overall Orange considers that existing consumer law ensures consumers of digital content products a considerable level of protection. Orange agrees on the principle that consumers should benefit from an equal treatment no matter the type of digital content purchased. This will be, notably, ensured through the enforcement of the current consumer protection framework in place.

In addition, from a business perspective, the European industry needs the geographical extension of the current e-commerce framework. Such extension would also benefit consumers that would enjoy equal protection from non-EU based service providers. Businesses should be able to compete on the same terms no matter their status. Some services should be submitted to the same set of rules.

From the perspective of the telecom operators willing to sell digital content products, inconsistencies exist and are directly linked to the EU consumers acquis itself which is not only limited to the horizontal directive but also includes rules under the sector-specific Telecom Framework. In particular, the Directive 2002/22/EC, Universal Service and Users' Rights Directive, provide for a number of contractual and extra-contractual rules which add to the provisions contained in the horizontal legislation.

Sectorial measures, such as on transparency of information (both contractual and non-contractual information), contract termination and withdrawal, alternative dispute resolution mechanism, constitute a double layer of regulation for the telecom sector. Moreover, where new rules aim at full harmonisation of some contractual aspects for digital content purchases, it should be noted that because Universal Service is covered by a directive, the national transposition rules will continue to be fragmented maintaining a harmonisation issue for those contracts concluded by telecommunications operators.

In addition, the Internet has caused fundamental changes in the economics of services which are today based on business models to which regulation still has to adapt. To fill this gap, the scope of the European Consumer law should encompass services paid through the exploitation of personal data.

Finally, from an economic point of view, care should be taken not to impose overly prescriptive requirements, especially for low-value services, as this could inhibit innovation. In particular: limiting the duration of contracts may inhibit new business models; requirements to return data constitute a considerable cost and technical challenge while it may result irrelevant to end users ; termination rights arising as a result of changes to terms and conditions could be very prescriptive when ordinary contract law would provide sufficient remedies. A proportionate response is required to take into account the specificity of digital content which very often consist of low value goods and services and very often services paid via data or other non-monetary means.

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

For Orange, further elements are needed from the EC to establish precisely what quality means for digital content. Today, as a telecom operator, Orange is already bound to apply very detailed and stringent rules on service and product quality, which do not apply to other market players. As explained in the previous questions, Orange is in favour of a more principles-based approach, protecting essential rights in a proportionate way which applies equally to the same services.

An eventual EU contract law rule should update the interpretation of terms as it is the case for “permanent medium”. Today email is the sole permanent medium accepted to conclude distance contracts. Extensions of interpretation could be introduced to adapt to contracts on digital content.

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

Although Orange operates in seven countries of the European Union¹, cross-border trade is currently limited in our organization especially regarding digital content, which is managed locally. Diverging consumer protection laws is one of the reasons of such limited development but barriers to cross-border trade go far beyond this issue.

A series of other legal obstacles exist, such as such as the lack of level playing field; national copyright laws; the cost of providing customer care and dealing with customer complaints in several languages; the need for the adoption of open standards for content delivery; tax regulations; regulation of private copy levies. In addition, the fact that copyright and licensing are national-based is an obstacle to the achievement of the European single market.

¹ France, Poland, Belgium, Spain, Romania, Slovakia and Luxembourg

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 Strategy² that it sees a need to act at EU level. Do you agree? Please explain.

There is a need for a European approach in order to achieve a Digital Single Market with the dual goal of providing more clarity to consumers on their rights and at the same time reduce the burden in terms of compliance costs for businesses who aim to provide European products and services.

In addition, harmonisation between national legislations is key to avoid any forum shopping phenomenon from opportunistic players on the EU market.

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?

Although Orange operates in seven countries of the European Union, cross-border trade is currently limited in our organization especially regarding digital content, which is managed locally.

As already mentioned, barriers to cross-border trade go far beyond consumer protection law. A series of other legal obstacles exist as listed in Question 4.

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

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

Section 3 – Scope of an initiative

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

As Orange, we think that business-to-consumers transactions should be clearly distinguished from business-to-business transactions in the initiative. Consumers benefit from specific rights which are not adapted to businesses and should not be extended as such.

However, Orange takes the opportunity of this consultation to highlight that a dedicated regulation for business-to-business transactions needs to be considered by the European Commission. Indeed, today, at EU level, competition law is currently the only legal instrument which regulates abusive business-to-business behaviours. The concept of "dominant market position" is inadequate and outdated in light of the speed at which market shares are lost and won. Some businesses become key players without having a dominant market position, and the duration of legal proceedings renders most of the effects generated by these imbalances irreversible. The duration of the proceedings which the European Commission launched against Google in 2010, and the limited effects of similar proceedings against Microsoft are perfect illustration of the problem. Moreover, the criteria for the application of EU competition law are not effective to address the significant imbalance between contracting businesses.

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

Several Member States have developed rules on significant imbalances in business-to-business transactions³ and introducing this kind of regulation at EU level would increase equity. The regulation of business-to-business transactions would apply to all companies operating in the EU market and this approach would also be technologically neutral.

An EU framework would more effectively sanction abusive behaviours. While competition law is based on a complex analysis, including analysis of the relevant market and the abusive behaviour in question, significant imbalances are assessed on the sole basis of the contract, rendering assessment of the provisions simpler and more objective.

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

³ See article L442-6 of the French Commercial Code.

- 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).

For the purpose of this initiative and to ensure consistent consumer protection online, all digital content products and services, whatever the status of their provider (telecom operator, OTT, content provider, etc.), should be submitted to the same set of rules.

The proposed list of services does not include Electronic Communication Services. ECS's contracts are further regulated in the Universal Service Directive. Thanks to the availability of connectivity services, today an increasing number of voice text, photo and video messaging services have become substitute of the traditional ECS services creating the need for a cross sector harmonization of contracts rules. The need for the so-called level playing field has been recognised in the DSM strategy and harmonising contracts is a fundamental factor.

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

- 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).

The current regulation mainly applies to products and services charged against a monetary fee. The digital world relies primarily on free content or services, often funded by advertising and the use of user data to tailor this advertising or the services offered. Over the last decade, we have seen companies emerge relying on gathering and using consumers' data in two-sided business cases, but where services are offered for free in return for customers' data, regulatory requirements beyond the data protection framework have been limited.

Additional protection should also cover non-monetary transaction. Considering the increasing role of other possible counter-performances business models, however, at least a minimum set of contractual rules should apply to these transactions.

Rules should be applied neutrally to all digital content and services, and the type of underlying business model's remuneration should not free the provider from meeting basic consumer protection rules such as transparency, contract withdrawal/termination, dispute regulation, warranty, etc.

In order to qualify the provision of data as a counter-performance (remuneration) for the provision of the commercial service or product, it would be reductive to include only data actively provided by the user as many online products and services are provided in exchange of data directly collected by the service provider, often without the knowledge of the consumer (i.e. search results, online games,...).

We believe that the legal framework should protect consumers whatever the business models are based on consumers paying a monetary or non-monetary fee.

Any new rules should be applied on the basis of proportionality criteria to not prevent innovation in current dynamic markets but enabling all players equally to establish innovative business models.

Section 4 –Content of an initiative

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

- 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 and remedies are essential to build trust and confidence in the digital single market. Disproportionate or overly prescriptive restrictions, which impose high costs for industry without adding clear value for consumers need to be avoided.

Restrictions preventing the development of new business models should be avoided, such as limiting the duration of contracts, restrictions on modifying contracts. In any case, the necessity of such restrictions should be justified with adequate impact assessments.

Quality of the digital content products

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

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

Please explain your choice(s).

The subjective approach with contracts remains necessary to determine how quality is granted case by case.

Due to the great variety of digital content we consider it impossible to create an exhaustive catalogue of objective characteristics related to the quality of digital content products. Assessment of quality has to be future-proof and to take innovation into consideration. This heterogeneity prevents from the establishment of very detailed objective criteria by law.

However, a minimum set of criteria could help in particular when the contract is silent.

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).

A person who lodges a complaint about the malfunctioning of a digital content should prove that the product is defective.

Once the digital content is purchased, the content is used in the specific technological environment of the final users not any more under the control of the trader and it is sometimes impossible for traders to prove that this content is not defective.

As an example, the trader may have limited access and knowledge to the network and equipment (including operating system and software) used to access specifically to the content.

Remedies for defective digital content products

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

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

Please explain your choice(s).

In case of consumers that have proved that a digital content is defective, traders (such as service provider and/or content provider) should find a remedy so that the contact meets the promised quality should be the most appropriate solution.

Additional remedies such as termination with reimbursement should remain last resort remedies.

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.

In principle, those who use personal data as a fee for a service should be treated the same way as those who provide service against monetary remuneration; however remedies may differ for products which involve monetary payments from those available for other kind of remunerations. In such cases, other form of redress (such as service replacement) may be considered.

In case there has not been any payment for the digital content, the client should not be able to claim for reimbursement even in case of defective product or services.

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.

Legitimate legal safety for companies is required. The definition of a reasonable specific time limit for consumers for remedies is needed.

In case of digital content products immediately available and used by a customer a time limit for reporting their defects, e.g. to 2 years, would be unpractical. While using such digital product, the user immediately becomes aware of its quality or defects, if any (e.g. a file cannot be opened, a given song has not been made available in full etc.).

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.

Two distinguished time limits are necessary because a time limit for the appearance of a defect and a time limit for asserting one's rights in this respect are two different things.

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

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

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

The right to damages should be based on trader's faults. Consumption of digital content depends also on consumers' devices and software. The content service provider has no control over these elements.

The trader's fault liability approach would establish the necessary boundaries between what depends on the service provider and what depends on the other actors of the value chain such as the device and software provider.

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

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

Additional rights

21. & 22. Long term contracts termination for digital content products

Customers should not be able to terminate their subscription for free within the binding period because such periods are calculated to cover the costs of providing cheaper hand-sets or data bundles. However, in case of long term contracts terminations required by consumers, a compensation for traders should be allowed to cover initial investment for the client.

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

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

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

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.

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

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

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

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).

Content is whether purchased or rent (VOD and/or SVOD): in case content of definitive purchase, termination has no effect on the use of the content from the consumer. The consumer has the necessary rights to keep and use the content. The service provider does not have to intervene to prevent any use of the content. In case of both VOD and SVOD, when the subscription is terminated, the service provider has to disable the user account to prevent any further use of the service.

A trader should have the right to make use of any technically available measure once the contract is terminated.

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.

For Orange, the possibility to modify digital content products features should be allowed in order not to hamper the technological evolution of products/services. The service provider should be able to integrate the eventual evolutions of applications and software aiming at, in particular, enriching the offer, resolving bugs, or ensuring the compatibility with new equipment.

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).

The contract should allow the possibility to modify the digital content so that the consumer knows what to expect on the content of the modifications and on their consequences on the provided service, while providing enough flexibility to modify details of the services. The consumer must be informed in advance of these changes to content, both when the modification is imposed by the service provider and when the consumer operates the update on its own initiative (i.e. update of applications).

As long as the modifications do not change the main characteristics of the digital content and are not to the detriment of the consumer, the termination of the contract shall not be permitted to give the provider enough flexibility to adapt / enhance its service.

According to French Contracts law, for instance, termination of the contract is permitted only where such changes are to the detriment of the consumer and fall short of contractual obligations. In any case, services consumed up to the date of termination should be paid for and any bundled content or services should not be affected.

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

Notification of the change should explain both the change and the end users termination rights. However, overly prescriptive requirements in relation to the detail of this information should be avoided.

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. & 30. In general, do you agree with the analysis of the situation made in the "Context"? Please explain. Do you think that users should have uniform rights across the EU when buying tangible goods online? Please explain why by giving concrete examples.**

As mentioned by the Commission, the EU framework is already composed of fully harmonized rules for consumers. In our view, overall the Consumer Rights Directive, the Unfair Contract Terms Directive and the Consumer Sales and Guarantees Directive provide sufficient rules for the online purchase of tangible goods by consumers.

As Orange, we consider the Business-to-Business online purchase should be further investigated in a separate and dedicated tool inspired by national laws already adopted and dedicated at removing significant imbalances in BtoB contracts.

- 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.**

Orange activities are mainly national based. In recent times an Orange affiliate company, called Orange Horizons has started merchant websites across Europe and beyond. These merchant websites are compliant with local consumers' rights rules. Ensuring the conformity of sales processes on multiple EU territories requires local legal counsel which constitutes a major barrier to the expansion of cross border sales.

- 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.**

Although Orange operates in seven countries of the European Union⁴, cross-border trade is currently limited in our organization. Online purchase of tangible goods is mainly composed of the sale of subsidized devices for the use of electronic communication services which are subject to national authorizations and other types of permission (spectrum licenses). This strongly impacts our business models regarding cross border online offers.

In our view, a series of other legal obstacles exist such as the lack of level playing field; national copyright laws; the cost of providing customer care and customer complaints in several languages; tax regulations; regulation of private copy levies; the risk of fraud and non-payments, (in a system where devices are largely subsidized, there is an enhanced risk of fraud by consumers for high value smartphones). In addition, the fact that copyright and licensing are national-based is an obstacle to the achievement of the European single market.

⁴ France, Poland, Belgium, Spain, Romania, Slovakia and Luxembourg

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

33. & 34. 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. 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?

Although Orange operates in seven countries of the European Union, cross-border trade for the online sale of tangible goods is currently limited by the nature itself of our business (devices are bundled to access which is national), and also because of divergence of national rules in the case of the online sale of other kind of goods.

An increased harmonisation in the EU would reduce compliancy costs favouring the digital single market expansion.

Section 3 – Content of the initiative

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

As Orange, we think that business-to-consumers transactions should be clearly distinguished from business-to-business transactions in the initiative. Consumers benefit from specific rights which are not adapted to businesses and should not be extended as such.

However, Orange takes the opportunity of this consultation to highlight that a dedicated regulation for business-to-business transactions needs to be considered by the European Commission. Today, at EU level, competition law is currently the only legal instrument which regulates abusive business-to-business behaviours. The concept of "dominant market position" is inadequate and outdated in light of the speed at which market shares are lost and won. Some businesses become key players without having a dominant market position, and the duration of legal proceedings renders most of the effects generated by these imbalances irreversible. The duration of the proceedings which the European Commission launched against Google in 2010, and the limited effects of similar proceedings against Microsoft are perfect illustration of the problem. Moreover, the criteria for the application of EU competition law are not effective to address the significant imbalance between contracting businesses.

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

Several Member States have developed rules on significant imbalances in business-to-business transactions⁵ and introducing this kind of regulation at EU level would increase equity. The regulation of business-to-business transactions would apply to all companies operating in the EU market and this approach would also be technologically neutral.

An EU framework would more effectively sanction abusive behaviours. While competition law is based on a complex analysis, including analysis of the relevant market and the abusive behaviour in question, significant imbalances are assessed on the sole basis of the contract, rendering assessment of the provisions simpler and more objective.

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

⁵ See article L442-6 of the French Commercial Code.

- 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
- X** Other (please specify)

Please explain your choice(s).

As mentioned in question 29 and 30, the EU framework is already composed of fully harmonized rules for consumers. In our view, the Consumer Rights Directive, the Unfair Contract Terms Directive and the Consumer Sales and Guarantees Directive provide sufficient rules for the online purchase of tangible goods by consumers.

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 2⁶ of the Consumer Sales and Guarantees Directive? Please explain.

As Orange, we consider that the criteria listed in Article 2 of the Consumer Sales and Guarantees Directive is sufficient. Changes to this article or additional ones are not needed.

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.

⁶ 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.

Orange reminds that Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees already provides the period during which the trader is required to prove that the tangible goods were not defective at the moment of delivery. According to this directive consumers always have the right to a minimum two-year guarantee period at no cost and within six months from receipt of the goods, consumers just need to show the trader that they are faulty or not as advertised. National rules can give extra protection. As an example, in France, the presumption of non-conformity will be 2 years instead of six months, and six to one year for second-hand goods.

For Orange, the European framework offers an adequate level of protection for consumers.

Remedies⁷

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).

In case of a defective good, the buyer should have the right of repair or replacement of the good. A price reduction can be proposed by the service provider to the buyer but in any case such reduction cannot be cumulated with a right of repair or of replacement of the good. The termination of the contract should be a last resort option.

Damages and the right to withhold the payment of the price until the defect is remedied are not adapted. Damages cannot be granted by default. It is up to the consumer to prove the damage and to bring evidences for his assessment.

The right to withhold the payment of the price would be incompatible with telcos' practices given the fact that devices are subsidised. Indeed, devices are sent after the payment, or after a multi-months payment plan is agreed. Granting the right to withhold payment would have a huge impact on our business model both on the process and the costs.

⁷ Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.

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

Orange reminds that the conditions listed by the Directive on certain aspects of the sale of consumer goods and associated guarantees provide a sufficient level of protection regarding remedies. According to this Directive, as a first step, the consumer has the right to have goods brought into conformity by repair or replacement, unless this is impossible or disproportionate.

As a second step, the consumer may only require an appropriate reduction of the price or have the contract rescinded only if the consumer is entitled to neither repair nor replacement, or if the seller has not completed the remedy within a reasonable time, or if the seller has not completed the remedy without significant inconvenience to the consumer.

Time limits to exercise remedies⁸

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.

In our view, for legal safety purposes both for the consumer and the service provider, a definite period of time for the consumer to ask for remedy is needed. The longer the delay will be to ask for remedy, the harder it will be to bring evidences that the tangible good was defective when it was purchased.

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.

For Orange, consumers should exercise remedies within reasonable time period from the discovery that the good was defective.

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

As Orange, we consider that fifteen days starting from the discovery of the defect is an appropriate time limit to exercise the remedies.

⁸ *Idem.*

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

In our view, time limits for second-hand tangible goods should be shorter than a new product. The fact that these goods have already been used for a certain time has to be taken into consideration.

***Damages*⁹**

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)?

The right to remedy should be based on the damage of the consumer. It is up to the consumer to provide evidence.

***Notification*¹⁰**

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.

The buyer should be obliged to notify the defect within a certain period of time after the discovery. In our view, fifteen days is a reasonable delay. In addition, the period should start from the moment when the buyer is aware of the defect.

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.

As underlined by the questionnaire, commercial guarantees are voluntary commitments by the trader which go beyond obligations imposed by the law. For Orange, commercial guarantees are an added value for the consumer who already benefit from a high level of protection in the online purchase of physical goods. They are also a means of differentiation

⁹ *Idem.*

¹⁰ *Idem.*

between competitors on the market. Hence, traders should remain free to determine the content of their commercial guarantees.

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

As mentioned previously, regulating the content of the commercial guarantees is not appropriate. In case rules on the form were to be established they should be mandatory to all companies offering commercial guarantees.

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.

For Orange, the scope of a list dedicated to unfair contract terms, “by nature”, for the purchase of tangibles goods is potentially too large. The potential sectors covered by the list are many and too heterogeneous. This is also the case of the tangible goods covered by the purchase contracts. Considering this, this would be a highly complex exercise to achieve.

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.

For Orange, the scope of the activities is so broad and heterogeneous that creating a list of presumed unfair contract terms, for the purchase of tangibles goods would be useless. This is also the case of the tangible goods covered by the purchase contracts. Hence, at this stage, this would be a highly complex exercise to achieve.

In addition, Orange questions the opportunity to qualify advance payment terms as a presumed unfair contract terms. Advanced payment is crucial in the online world to ensure the safety of transactions and to prevent fraud and unpaid invoices.