Legislation and administration/Corporate Law
Niina Harjunheimo

12 August 2015

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

The Commission published in June 2015 a public consultation on contract rules for online purchases of digital content and tangible goods. The purpose of the consultation is to collect interested parties' views on the possible ways forward to remove contract law obstacles related to the online purchases of digital content and tangible goods.

1 Part I – Digital content

1.1. Section 1 – Problems

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

According to the Finnish e-commerce statistics[1], the consumer spending in digital content has raised from 134 million EUR in 2010 to 145 million EUR in 2014 (+ 9 %). In 2014 the total consumer spending in e-commerce was 10,5 billion EUR which means that the share of the digital content was 1 % of the total spending.

Marketing of digital content and contract terms of digital content contracts are covered in Finland by the Consumer Protection Act's provisions on marketing (implement the UCP Directive), contract terms (implement the Directive on Unfair Contract Terms) and distance sales (implement the Consumer Rights Directive).

As there are no specific rules on digital content contracts (e.g. on remedies in case of a defective digital content), the general contract law rules apply on such contracts. This means e.g. that digital content needs to coincide the information given by a trader before conclusion of a contract and if problems arise, consumers benefit from the remedies provided by the general contract law rules (e.g. a right to have a defect corrected).

Accordingly, even though there are no specific rules on digital content contracts, consumers are not "unprotected" as a contracting party, and

[1] E-commerce statistics include all online shopping and purchases from domestic and foreign web stores. Driving forces behind the extensive research are the Federation of Finnish Commerce, the Finnish Direct Marketing Association and TNS Gallup.

from the perspective of national market there appears to be no need for specific rules on digital content.

E.g. as for the lack of "ability to influence contracts" it is worth to note that 'off-the-shelf' products are offered based on 'take it or leave it' contracts as it may be either impractical or even impossible to negotiate each consumer contract separately – and the use of such standard contracts is common also "offline" due to the same reason. As for the use of unfair contract terms in consumer contracts, such terms are covered by the Directive on Unfair Contract Terms which is applicable both in digital and non-digital markets.

Moreover, e.g. telecom operators are already faced with several specific provisions when offering consumers service packages that contain also digital content. The Universal Service Directive has to be applied to the electronic communications services part of the package / contract, the Payment Services Directive on the payment characteristics. New specific rules on digital content contracts would further complicate the legislative framework – and that would be clearly against the better regulation objectives.

Introducing new specific EU rules on digital content could then be justified only if there are significant single market reasons for EU actions (e.g. companies face considerable contract law related barriers when selling digital content cross-border). However, Finnish companies offering digital content to consumers in the EU single market have not encountered the kind of contract law related problems described in the consultation document. The problems confronted have been mainly due to Member States' differing language requirements and rules on minors' possibilities to conclude a competent contract.

Accordingly, at the moment there is no need for new specific EU rules on digital content contracts from the single market perspective either.

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

Even though there are no specific rules on digital content contracts in Finland, consumers are not "unprotected" as a contracting party – the general contract law rules apply (please see answer 1). It is difficult to see any need for more protection.

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

Please see answer 1.

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

National contract law rules on digital content would not change significantly the status quo from the harmonisation perspective. National legislation could have a negative impact on the business environment if the provisions are very protective and burdensome for companies to comply with.

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.

At the moment there is no need for introducing specific contract law rules on digital content, i.e. new EU legislation on consumer protection. Please see answers 1, 2 and 4.

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?

Please see answer 5. It is especially important to avoid any new consumer protection initiatives based on minimum harmonisation as such initiatives would just add the amount of EU legislation without tackling any legal fragmentation in the EU single market.

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.

There is no evidence that legal fragmentation in the EU single market would cause significant obstacles to business-to-business cross-border trade. Businesses have freedom of contract and freedom to choose the law governing their contract – and it is important to maintain the freedom of contract. Accordingly, if the Commission prepares a legislative initiative on digital content even though there is no need for such an initiative, the initiative should not cover business-to-business transactions.

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

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

Please see answer 7.

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).

As we don't see a need for specific contract law rules on digital content, we have not ticked any boxes.

However, we want to underline that contract law rules can't and should not have implications or impact on content (digital or non-digital) as such. Penal codes in the EU Member States and international agreements and conventions such as European Convention on Human Rights cover the said angle.

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).

Please see answer 9.

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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
- X Other (please specify)

Please explain your choice(s).

Finnish companies offering digital content to consumers in the EU single market have not encountered the kind of contract law related problems described above. The problems confronted have been mainly due to Member States' differing language requirements and rules on minors' possibilities to conclude a competent contract.

However, if the Commission proceeds with preparing a legislative initiative on digital content contracts even though there is no need for such an initiative, we highlight the aspects below.

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)
- X A mixture of both

Please explain your choice(s).

Most digital content products are unique and circumstances vary. A starting point should be to measure a claimed defect against the criteria set by the contract. Main rules coulc also be set by law.

13. When users complain about defective products, should:

- X 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).

According to the general contract law rules the contracting party that refers to a defect and asks for remedies must provide evidence that a defect exists.

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)?

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

Please explain your choice(s).

The consumer should have all of the above remedies in the order as they appear. According to the general contract law rules the trader should first have a possibility to try to correct the defect, if not considered unreasonable. If correction is not possible or reasonable, a price reduction should be given. Termination of the contract should be possible if a price reduction is not considered a reasonable solution (when assessed objectively) but not if a lack of conformity is minor.

In order to ensure the coherence of the Member States' national rules on damages, the rules should not be harmonised at the EU level.

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.

The question is unclear and difficult to understand in the contract law context.

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 order to ensure the coherence of the Member States' national rules on damages, the rules should not be harmonised at the EU level.

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

Please see answer 19.

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Additional rights

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

☐ Yes
X No

The length as such should not be a decisive factor.

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
X No

Please explain your choice.

Different technologies of the trader and "another trader" mean that there would be technical difficulties in ensuring transferability. The content might also be used or be part of something else if so agreed between the contracting parties and / or include trade secrets.

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

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

Please explain your choice(s).

Actions upon termination depend on what is needed and / or agreed in a specific case.

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?

X Yes
☐ No

Please explain your choice.

It is typical that digital content is in constant change depending e.g. on development of new technology or safety issues. Accordingly, a possibility to modifications should be up to a contract.

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2 Parti II – Online Sale of Tangible Goods

Section 1 – Problems

29. In general, do you agree with the analysis of the situation made in the "Context" (annex 2)? Please explain.

According to the Finnish e-commerce statistics[3], the consumer spending in goods has raised from 3,8 billion EUR in 2010 to 4,7 billion EUR in 2014 (+ 24 %). In 2014 the total consumer spending in e-commerce was 10,5 billion EUR which means that the share of the goods was 45 % of the total spending.

Marketing of goods and contract terms of contracts on the sale of goods are covered in Finland by the Consumer Protection Act's provisions on marketing (implement the UCP Directive), contract terms (implement the Directive on unfair contract terms) and distance sales (implement the Consumer Rights Directive). Specific rules on contracts on sale of goods are included in chapter 5 of the Consumer Protection Act (sale of consumer goods) which implements the Consumer Sales and Guarantees Directive.

Consumer Sales and Guarantees Directive sets only minimum standards and many Member States have used the possibility to add more protection to consumers by purely national provisions. Accordingly, many Member States have introduced extensive more protective rules on contracts on sale of goods.

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.

Fully harmonised rules on sale of goods and guarantees instead of the current rules based on minimum harmonisation would simplify the business environment in the EU single market and ensure a level playing field.

At the same time it important to note that full harmonisation can bring added value for companies only if the harmonised rules strike a right balance between the interests of companies and those of consumers while avoiding additional burdens on companies.

[3] E-commerce statistics include all online shopping and purchases from domestic and foreign web stores. Driving forces behind the extensive research are the Federation of Finnish Commerce, the Finnish Direct Marketing Association and TNS Gallup.

However, before considering any further EU actions, it is important that implementation and effects of the Consumer Rights Directive are carefully analysed. This is because adoption of the directive was an important step in harmonising e.g. the rules on pre-contractual information requirements and right to withdraw and in line with the better regulation principles the EU should refrain from new legislative initiatives before having analysed carefully impacts of the existing rules.

In any case, it is important to avoid any new consumer protection initiatives based on minimum harmonisation.

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?

The European Commission's announcement in the Digital Single Market strategy is somewhat unclear – does it mean a proposal to fully harmonise the rules on sale of goods and guarantees or does it refer to a proposal that would make the traders' national laws applicable to cross-border contracts?

Thus it is difficult to comment on the Commission's announcement but see answer 33.

Furthermore, it is important that the rules are the same for cross-border and domestic sales. If rules were different, traders would have to operate two different websites – one for cross-border and one for domestic sales.

Also rules on sale of goods and guarantees for online and offline sales should be the same. Different rules would be burdensome for traders as they would have to operate different systems for online and offline consumers.

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.

There is no evidence that legal fragmentation in the EU single market would cause significant obstacles to business-to-business cross-border trade. Businesses have freedom of contract and freedom to choose the law governing their contract. Accordingly, if the

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Commission prepares a legislative initiative on the sale of goods, the initiative should not cover business-to-business transactions.

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

Please see answer 35.

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 of the Consumer Sales and Guarantees Directive? Please explain.

The current rules of the Consumer Sales and Guarantees Directive should be kept as the criteria for establishing conformity of the good with the contract. Creating something new and different would cause legal uncertainty.

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

The status quo of the Consumer Sales and Guarantees Directive should be maintained: unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

Provisions of the current directive represent a fair balance between the interests of consumers and traders.

Remedies

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

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

Please explain your choice(s).

It is important to maintain a clear hierarchy of remedies based on two levels: 1) repair or replacement and 2) price reduction or cancellation of the contract.

Repair or replacement of the defective goods should be the first options to bring the defective goods in conformity. Even if the consumer does not require that the defect is repaired or that a non-defective goods is delivered, the trader shall have the right to perform such rectification if it offers to do so without undue delay after the consumer has notified it of the defect.

However, the trader shall not be liable to repair the defect if there is an unavoidable barrier or if this would cause unreasonable costs.

Hierarchy of the remedies is essential to ensure a fair balance between the interests of consumers and traders.

As defined in the Consumer Sales and Guarantees Directive, the consumer should be able to require an appropriate reduction of the price or have the contract terminated if a) the consumer is entitled neither to repair nor replacement, b) the trader has no completed the remedy within a reasonable time or c) the trader has not completed the remedy without significant inconvenience to the consumer. However, the consumer should not have a right to a termination of the contract if the lack of conformity is minor.

As regards the right to withhold the payment of the price until the defect is remedied, the consumer should not have the right to withhold an amount that evidently exceeds the claims that he is entitled to on the basis of the defect.

In order to ensure the coherence of the Member States' national rules on damages, the rules on damages should not be harmonised by the EU rules.

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.

A clear hierarchy defined in the Consumer Sales and Guarantees should be maintained, i.e. free choice of remedies available for consumers should not be introduced. The trader should have first a right to repair or replace the defective goods. See also answer 40.

Damages

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)?

In order to ensure the coherence of the Member States' national rules on damages, the rules should not be harmonised by the EU rules.

Notification

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 consumer should have an obligation to notify a defect to the trader. The consumer should notify the trader of a defect within a reasonable time after he/she discovered or ought to have discovered the defect in order to invoke a defect in the goods.

A notification obligation and a time limit are needed in order to ensure a fair balance between the interests of consumers and trader, namely to ensure that the trader becomes aware of the defect the consumer wants to invoke. Furthermore, without notification the consumer's continued use might aggravate the defect and what could have been avoided at a small cost could become considerably more expensive and difficult to remedy.

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.

There should be no special or uniform rules on the content and form of commercial guarantees – these should be left for the traders to decide. Commercial guarantees vary much from product to product, and they are a way of competing on the market.

Accordingly, any possible legislative initiative on sale of goods should not include e.g. any mandatory terms about commercial guarantees but only ensure that commercial guarantees are clearly spelled out to the consumer and made different from legal guarantees (incl. that legal guarantee rights are not affected by the commercial guarantee).

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

See answer 48.

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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.

Consideration of unfair contract terms is always done case by case and unfairness should not be fixed in advance by a binding list. An indicative list provides adequate guidance to companies on terms that can be interpreted to be unfair.

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.

See answer 50.

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Annex 1

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).

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Annex 2

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.

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COMMISSION CONSULTATION ON PRODUCT RELATED RULES SUCH AS LABELLING

The Commission published in June 2015 a public consultation on contract rules for online purchases of digital content and tangible goods. Annex of the consultation contains questions on product-related rules such as labelling.

Section 1 – Problem

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

We agree with the analysis and highlight the following aspects.

Even though barriers to the free movement of goods within the single market have been systematically removed during the last decades, the EU Member States still continue to approve or amend a lot of national product related technical regulations. For example, during 2009 - 2012, the Member States reported each year about 700 - 800 amended or new technical regulations. Finnish companies, in turn, reported in Survey on Internationalization and Trade Barriers in 2013 about 50 trade barriers of discriminatory and unreasonable product-related requirements in the EU single market (incl. national requirements of product testing, certification, national labelling requirements and type approval).

Accordingly, the excessive use of national technical regulations is burdening the ability of businesses to sell across borders in the single market.

The crux of the issue is the limited application of the mutual recognition principle.

In intra-EU trade in goods, according to the mutual recognition principle a product lawfully marketed in one Member State and not subject to Union harmonisation should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination.

The principle is set out in the Treaty on the Functioning of the European Union and directly applicable in all Member States. In order to make the

mutual recognition principle fully operational in practice the European Parliament and the Council have adopted a Regulation (EC) No 764/2008.

For the purposes of the Regulation, a technical rule is e.g. any provision of a law, regulation or other administrative provision of a Member State compliance with which is compulsory when a product or type of product is marketed in the territory of that Member State, and which lays down requirements applicable to the product or product type as regards the name under which it is sold, terminology, symbols, testing and test methods, packaging, marking or labelling. The definition is in line with the case-law of the Court of Justice of the European Union – the Court has clearly stated that a concept of 'measures having an effect equivalent to quantitative restrictions on imports' in the Treaty covers along with other requirements also marking and labelling requirements, including language requirements[1].

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?

Our answer is as a main rule no and we refer to our answer 1. The principle of mutual recognition is well developed in the case-law of the Court of Justice of the European Union, and the principle sets very strict limits to the Member States to depart from the principle.

There is, however, one exception to the principle by the Court of Justice: the Member State of destination may refuse the marketing of a product in its current form where – and only where – it can show that this is strictly necessary for the protection of, for example, public safety, health or environment. In that case, the Member State of destination must also demonstrate that its measure is the least trade-restrictive measure.

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.

Yes we agree. National product related technical regulations create obstacles to cross-border trade, both online and offline. See also our answer 1.

[1] See for example Case 27/80 *Fietje* and Case *Piageme* C-369/89. E.g. in Case *Piageme* the Court stated that an obligation exclusively to use the language of the linguistic region constitutes a measure having equivalent effect to a quantitative restriction on imports, prohibited by the Treaty. Accordingly, it is enough to use language that is easily understood by purchasers or to ensure that the purchaser is informed by other measures.

Directive 98/34EC aims to prevent new technical barriers to trade being created. It sets up a legal mechanism that requires Member States to tell the European Commission and other Member States about their product related technical regulations, at a draft stage.

During 2009 - 2012, Member States reported in the notification procedure provided in the directive over 3000 new or amended national product related technical regulations. Article 8 of the directive requires that when the Member States notify a technical regulation, they must also inform the Commission about the grounds which make the enactment of the regulation necessary. In practice the justifications are often rather scarce. It is important to improve the functioning of the notification procedure so that it can be utilized more effectively in minimizing the trade barriers caused by the national product related technical regulations. The Commission should develop more precise guidance for the justifications and monitor that the Member States comply with the directive's requirements.

Furthermore, it is important that the Commission allocates sufficient resources on monitoring the EU rules on free movement of goods, including the mutual recognition principle. If the Member States apply the EU rules incorrectly and prevent so free movement of goods in the single market, the Commission must intervene and launch, if necessary, an infringement procedure.

It is also important to allocate sufficient resources on problem solving (e.g. SOLVIT). Companies must get fast assistance from the Commission and solutions in situations when Member States authorities' actions prevent the free movement of goods contrary to the EU rules.

Furthermore, costs still incur for companies as Member States' authorities implement and apply the harmonized EU product rules differently. The Commission should prevent such barriers to the free movement which fragment the EU single market.

At the same time it is important that all EU Member States conduct high-quality and well-balanced market surveillance. Market surveillance should be based on common principles for market surveillance and consistent interpretations of safe products and products presenting risk, and market surveillance authorities should engage in cross-border cooperation – these all are important factors to ensure both free movement of products and a level playing field within the single market.

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, b)

difficulties related to different packaging rules at national level, c) Difficulties related to different labelling rules at national level and d) other issues (if so, please explain)?

We refer to our previous answers. The mutual recognition principle if well developed in the case-law of the Court of Justice of the European Union and the crux of the issue is to ensure its proper and efficient application. It is also essential to prevent new technical barriers to trade being created by improved application of the Directive 98/34 EC and ensure that the Member States' authorities implement and apply the harmonized EU product rules in a consistent manner that guarantees both free movement of products and a level playing field in the single market.

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Annex 1

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 . 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.