



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the European Commission consultation on the future of electronic commerce and the implementation of the Directive on Electronic commerce (2000/31/EC)

November 2010

Introduction and recommendations

We welcome the European Commission's consultation on the future of electronic commerce and the implementation of the Directive on Electronic commerce (2000/31/EC).

Online shopping can benefit consumers with increased competition and lower prices, more product choice and services and the ability to shop at anytime from vendors located anywhere in the EU or around the world. However the immediacy of transactions, the remoteness and anonymity of buyer and seller can pose challenges to online consumer protection.

In order to stimulate the growth of e-commerce and encourage the take up in e-shopping among consumers across the EU, and in particular in cross-border transactions, we believe the EU needs to adopt a robust e-commerce consumer protection strategy across EU member states.

However we do not share the view that a revision of the Directive on Electronic commerce is required, or will deliver this goal. Instead we recommend the European Commission tackles the key challenges and consumer concerns in order to increase consumers' confidence and trust online and to sustain innovative and competitive e-commerce growth.

Rather than responding to the online questionnaire, of which some of the questions were not accessible to consumer organisations, we decided to address the issues we consider important to consumers' interests.

We recommend the European Commission policies on the future of electronic commerce:

- Address the regulatory gaps in relation to digital products (eg eBook readers, computer software and online music) and new trading platforms such as C2C transactions and mobile commerce
- Address the issue of enforcement gaps across EU member states with regard to online information disclosure, advertising, payment, data protection and privacy, deliveries and new online platforms such as consumer to consumer (C2C) transactions (eg online auctions and marketplaces) and mobile commerce
- Improve transparency and quality of consumer information on traders' websites. In particular an introduction of summary box information, based on the model developed in financial services market, should be considered so that consumers can get access to essential information about the product, trader's contact details, and rights specific to distance selling regulations within easy reach
- Maintain the existing provisions on ISPs liability under the 'mere conduit' principle of the Electronic commerce directive (2000/31/EC)
- Address the issue of the fragmentation of the online content market in the internal market
- Enhance enforcement and compliance of existing regulations through improving co-operation and intelligence sharing between member states

Addressing consumers' online concerns

Online consumer information and advertising practices

Online shopping is characterised by remoteness of the buyer and seller so the ability to access accurate information about the product and the retailer forms an essential part of the transaction. Yet many consumers are not adequately informed about products they are buying, the identity of the business they are dealing with, or their rights and obligations specific to online sales, for example, the right to a cooling off period, the right to contract cancellation if the product is not delivered within 30 days after placing the order. The EU web sweep of online retailers selling consumer electronic goods carried out in 2009, which included UK online retailers, found that many websites did not provide complete information about the products, prices and their own businesses.¹

Ipsos MORI's research commissioned by Consumer Focus Scotland on the public's experience and perceptions of trading services in Scotland found a high number of consumers did not know who to contact if they had a complaint about goods bought over the internet.²

Consumers' confusion over who to contact in case of problems is likely to increase in complex transactions involving different actors such as online auctions³ and marketplaces, payment intermediaries, advertisers, search engines where traders may not disclose clear information about their roles and responsibilities towards a consumer. For example our cross-country research of consumer experiences of buying goods and services over mobile phones indicated gaps in information disclosure about lines of responsibilities of traders in transaction chains.⁴

Access to reliable information also depends on fair and transparent online advertising and marketing practices. The latter is increasing in importance not only for online commerce but also offline shopping, as many consumers who do not intend to purchase online use the internet for product search and price checks. For example 58 per cent of online advertising in the UK is done on search engines and search comparison sites.⁵

Yet there is limited transparency of information available to consumers about these types of advertising practices and consumers using the search engines are unaware that a prominent position of a vendor may not equate with the best quality offer or best match of a product searched.

¹ <http://bit.ly/9Ck1X3>; <http://bit.ly/bluZwX>; see also the European Commission report on cross-border e-commerce, 22 October 2009 <http://bit.ly/aKcXJG>

² *Cause for complaint? How consumers deal with problems with goods and services in Scotland*, June 2010 <http://consumerfocus.org.uk/g/4mh>

³ For example in order to buy on an auction website the consumer will have first to conclude a contract with the auction site itself (a service contract – to have access to the technical infrastructure that allows him to purchase products) and second, another contract (a sales contract) with the seller. In Riefa, Christine, *To Be or Not to Be an Auctioneer? Some Thoughts on the Legal Nature of Online 'eBay' Auctions and the Protection of Consumers*, *Journal of Consumer Policy* (2008) 31:167-194.

⁴ Consumer Focus Survey *Pocket shopping – International consumer experiences of buying goods and services on their mobile phones* Marzena Kisielowska-Lipman December 2009 available at: <http://consumerfocus.org.uk/g/4m0>

⁵ Internet Shopping. An OFT Study, 2007.

In addition new types of advertising techniques such as targeted and behavioural advertising raise concerns about the transparency of advertising practices and how best to protect consumers' privacy and being the target of unsolicited advertising. An additional issue arises in relation to available enforcement and remedy mechanisms to protect children, who are particularly susceptible to online advertising. Our research *A Tangled Web: Marketing to Children*⁶ examined current regulation on online advertising to children and found that they are not adequately protected by either the law or industry self-regulation. This is despite the recent extension of the digital remit of the non-broadcast advertising code by the Committee of Advertising Practice (CAP code) and changes made to improve advertising on brands own websites. The CAP code still does not cover sponsorships, competitions and marketing communications from foreign media.

We recommend the European Commission takes steps to improve enforcement of consumers' protection on the right to information and protection against misleading advertising practices. We believe that improving online information disclosure would benefit both consumers and traders, enhance consumers' online trust and contribute to the development of sustainable online market. In reducing the information imbalance, we recommend the European Commission studies the best practice models of enhancing transparency of information to consumers. In particular we recommend the European Commission considers the applicability of a summary box model that has been introduced by the Financial Services Authority in the UK to attempt to reduce the information asymmetry on financial services to consumers, to online sales.⁷

We recommend the European Commission initiates work to improve the quality of information online. In particular we would encourage the European Commission to work jointly with the national enforcement agencies in member states to help with advice to small online businesses which may lack knowledge and resources on how to meet their statutory obligations.

Online payment

Currently consumers paying online encounter problems with limited choice of payment methods, payment surcharges and variation in payment protection.

As far as choice of payment is concerned retailers have the ability to limit payment options. The limited choice of payment may pose a significant barrier to vulnerable consumers. For example currently many consumers who fall into low income household category may have limited access to payment cards (the most popular payment method offered by online retailers in the UK) because many of these households do not have bank accounts.⁸ Therefore we recommend the European Commission addresses the issue of widening choice of payment methods in order to enhance participation in online commerce, consumers who do not have access to payment cards.

Payment choice may also be limited by additional surcharges that are applied to specific means of payment. In some cases, for example purchasing air tickets online, surcharge may apply to each ticket rather than the total cost of the transaction that adds incremental costs to the purchase value for family members for example.

We recommend the European Commission investigates the issue of surcharges especially in the airline industry.

⁶ *A Tangled Web: Marketing to Children*, Consumer Focus October 2010.

⁷ <http://consumerfocus.org.uk/g/4mo>

⁷ <http://bit.ly/9UGTpN>

⁸ <http://consumerfocus.org.uk/g/4mi>

The second issue that raises concerns is variation in payment protection. We would like to note that so far regulation and regulators have been slow to catch up with new payment methods and providers that are not traditional financial institutions, for example PayPal and mobile payments. For example in the UK the Office of Fair Trading (OFT) covers licensing of credit providers and the Financial Services Authority (FSA) covers licensing of deposit taking institutions, however payment providers may not necessarily fall into either of these categories and so are not eligible for licences and not subject to the supervision of these regulatory authorities. The UK Payments Council is a membership body established to ensure that UK payment systems and services meet the needs of users, payment service providers and the wider economy. However it restricts membership to financial institutions. More pro-active work in supporting innovation and enforcing adoption and a more inclusive membership structure to enable entry to payment providers that are not financial institutions is needed in the EU internal market to remove barriers to innovation and market entry and to enable standards to be set across all payment providers.

There are also specific issues related to mobile payment, that is growing due to the increased take up of smart phones amongst consumers, such as mobile security, payment process, dispute charges and protection of minors.⁹

Currently the Organisation for Economic Co-operation and Development (OECD) Committee for Consumer Policy is carrying out work on online payment protection that forms part of its review of the OECD Guidelines on Consumer Protection in the context of e-commerce. We recommend the European Commission takes account of the OECD work and investigates the level of consumer protection in online payment, as well as examines the option to extend the chargeback mechanisms to all device initiated forms of payments online across EU member states.

Digital products

Consumers' rights and obligations in relation to the online purchase and servicing of digital products are not clearly established. For example consumers buying digital products online lack redress and remedies for faulty or damaged digital goods and services. Digital products delivered in the process of downloading or streaming are classified as 'intangible goods' and as such are exempt from the statutory consumer's right to redress.¹⁰ As a result consumers buying digital goods and services are exposed to risks in case products are not fit for purpose or undelivered, and need to rely on the good will of retailers and content providers when seeking remedies.

More complexity is added by the copyright attached to many digital products that restrict terms of use. Consumers buying copyrighted digital content do not acquire the ownership of the product but only the right to use it under terms of the end user licence agreement (EULA).

The study by our predecessor organisation the National Consumer Council *Whose license is it anyway?* found that many of the contract terms contained unfair clauses and called upon the UK enforcement authority the OFT to undertake market study on the

⁹ Consumer Focus Survey *Pocket shopping - International consumer experiences of buying goods and services on their mobile phones* Marzena Kisielowska-Lipman December 2009 available at: <http://consumerfocus.org.uk/g/4m0>

¹⁰ The gaps in consumer protection for digital products has been acknowledged in a report *Consumer Rights in Digital Products*. A research report prepared for the UK Department for Business, Innovation and Skills, by Professor Robert Bradgate, September 2010. <http://bit.ly/aTYlqn>

fairness of terms in licence agreements.¹¹ Our recent mystery shopping survey of buying digital products online also found some contracts containing clauses that question the level of restrictions imposed on software requirements, time limits or limitation of liability in case of product non-conformity.¹²

The quality of information provided to consumers when buying digital products raises additional concerns. We would like to note that obtaining accurate information is especially acute to digital products because the latter come with many restrictions that may impact on their usability. For example many digital products require specific software or equipment that may determine their playability, or are protected by intellectual property rights licences that determine terms of use. However our study, mentioned above, found examples of low quality consumer information demonstrated by lengthy contracts, complex wording and widespread use of legal jargon. For example having read terms and conditions many mystery shoppers did not understand their rights and responsibilities when buying digital products.¹³

We recommend the European Commission addresses the regulatory gaps in relation to digital products. In particular we recommend the European Commission includes digital products under the scope of the proposed Consumer Rights Directive in the area of information requirements, unfair contract terms and remedies for non conformity.

C2C transactions

The emerging business models that fall within the category of C2C transactions such as online auctions or marketplaces also raise issues over adequate consumer protection. Most common complaints related to C2C transactions refer to goods not delivered to buyers; payment not delivered to sellers; delivery of goods of a lesser value or very different from the advertised description; late delivery of goods and failure to give relevant information about a product or terms of sale.

In addition consumers may fall victims of fraudsters and persistent offenders using C2C platforms to disguise themselves, selling sub-standard medicine, illegal or hazardous products. For example in 2009 Which? online search on eBay found DIY botox and tan jab kits available on sale that raised questions about safety.¹⁴

Yet consumers face problems with redress because the auctions do not accept liability for sellers' or buyers' losses, or for the quality, safety, or legality of the products on sale, nor are responsible for the verification of the identity of the users.

Consumers are often not aware whether they are dealing with an individual subject to C2C regulations, or a seller selling 'in the course of business' who is subject to B2C regulations such as the right to cancellation and warranties, in cases of businesses using online auctions for trading 'fixed priced' products.

For example the OFT study of Internet Shopping reported that the required information about business sellers in case of online auctions is not always available to consumers.¹⁵

We recommend the European Commission examines the scope for expanding the consumer protection rules to C2C transactions and develops a clear set of rules for

¹¹ *Whose licence is it anyway? A study of end user licence agreements for computer software* Carl Belgrove, National Consumer Council 2008.

¹² The research was carried out between March and April this year and aimed to test real-life experience of people purchasing digital content and services. In total we placed 194 orders that included (1) computer software, (2) downloads (music, movies and e-books) and (3) streaming (music and movies). We are due to release a research report this month.

¹³ Ibid

¹⁴ <http://bit.ly/cyNjDu>

¹⁵ Internet Shopping. An OFT Study, 2007.

consumers who engage in selling products online on a one-off basis as opposed to on a regular basis. In addition we recommend the European Commission investigates the issue of quality of information provided by facilitators of online marketplaces, to ensure that providers of online marketplaces improve information to consumers about their rights and responsibilities, as well as put in place effective mechanisms to help consumers evaluate risks and assist in complaint resolution. Some online platforms facilitators already put some ODR systems in place which we will discuss in the paragraph below, but they need to be further improved.

Privacy and data protection

Buying online comes at the price of privacy as often consumers' data is collected by different parties, for example by ISPs, traders, web browsers, publishers, affiliation companies, social networks platforms, ad-serving agencies and others, and the vast majority of consumers are not aware of this situation. New technologies facilitate collection, storage and trading of personal information online to supply the new online marketing model of profiling and behavioural advertising.

Consumers concerns over the integrity of personal information collected online and the potential for abuse are reinforced by incidents of online fraud and the growing requirements for consumers to provide personal information that has significant value not only to advertisers, but for fraudsters as well.

At the same time the existing EU regulatory framework for data protection is not adequately enforced across member states.

For example the UK's Data Protection Act (DPA) does not implement European law properly, in relation to the articles about the powers of the Information Commissioner's Office, definitions of personal data, conditions when sensitive data can be processed, fair processing notices given to individuals, rights granted to data subjects, and ability of individuals to seek a remedy.¹⁶ In addition despite the existence of the EU Directive on Privacy and Electronic Communications that requires member states to ensure the confidentiality of their communications and related traffic data, and prohibits interception and surveillance of users unless the users concerned have given their consent, communications of UK consumers have been intercepted by the online advertising technology Phorm without consent.¹⁷

There is no mechanism for the right to access one's personal information. There is little that consumers can actually do if their data is disclosed deliberately, hacked into or lost through negligence.

We welcome the European Commission's strategy to strengthen data protection rules across the EU under the review of the EU Data protection Directive and look forward to close co-operation with the European Commission on the latter.¹⁸

¹⁶ <http://consumerfocus.org.uk/g/4mj>

¹⁷ <http://bbc.in/9trpwk>

¹⁸ <http://bit.ly/ajgfRK>

Deliveries

We recommend that the European Commission addresses the issue of deliveries that remain a common problem generated by online sales and works towards improving delivery standards. These include non delivery, late delivery, damaged goods, and lack of clear disclosure on delivery terms and conditions including delivery charges. For example some companies do not display the cost of additional delivery charges during the check out stage. Others hide delivery charges in small print. Delivery problems are particularly acute in rural areas, where retailers and delivery operators might apply additional restrictions. For example research carried out by Consumer Focus Scotland found that restrictions placed on deliveries in rural areas can include: (1) higher delivery charges, (2) longer delivery times (3) deliveries not being available to certain rural areas.¹⁹ Others display additional delivery charges in small print or fail to deliver to targets indicated in terms and conditions. Furthermore, if the product is damaged during the delivery it is often not clear for consumers where to complain.

In particular, we believe that improving standards on deliveries is essential to enhance cross-border e-commerce. For example the Office of Fair Trading study of Internet Shopping found problems with deliveries as a key obstacle to cross-border trade cited by both traders and consumers.²⁰

Complaints and redress

A major inhibiting factor to buying online is the fear of not being able to obtain redress or compensation in the event of a problem. The low consumer confidence over online redress is even more apparent in the context of cross-border purchases indicated by the recent European Commission report on cross-border e-commerce. That found 71 per cent of consumers believing it is harder to resolve problems such as complaints, returns, price reductions, or guarantees when purchasing from providers located in other EU countries²¹.

We recommend the European Commission policies on the future of e-commerce aim to increase effectiveness of consumer redress.

One of the ways to do so is to facilitate consumers with the right to collective redress that could be used as a particularly useful instrument to ensure effective access to justice to a large number of consumers affected by the same problem.

With regard to the consultation question on the use and effectiveness of the Online Dispute Resolution systems (ODRs) by both consumers and businesses, we recommend the European Commission carries out in depth work to evaluate their applicability and mechanisms.

We note that at present some retailers offer consumers access to ODR. Although the use of ODRs may be more effective than traditional dispute methods in terms of time, convenience and financial resources involved, it also has drawbacks. These include lack of direct interpersonal contact that may limit consumers' ability to convey their arguments and acceptable solution to a dispute. In addition ODRs may require a certain degree of knowledge and familiarity with sophisticated web technology that may be an obstacle to some consumers.

¹⁹ *Parcel Deliveries: Current Practice and Possible Solutions* – A briefing from Consumer Focus Scotland, July 2010. <http://consumerfocus.org.uk/g/4mk>

²⁰ Internet Shopping. An OFT Study, 2007.

²¹ EC Staff Working Document report on cross-border e-commerce, SEC(2009) 283 final.

Also it is not certain whether the ODRs currently available to consumers comply with the principles embodied in the existing EC Recommendations for Alternative Dispute Resolution²² especially regarding the independence of a third party, the impartiality of the procedure and the compliance with the fundamental right to due process.

We recommend the European Commission examines compliance of the ODR schemes offered on the market with the above recommendations.

We also recommend the European Commission works with national regulatory authorities of member states to improve the quality of complaint handling mechanisms. Research into consumer experiences of online shopping indicate that access to customer services and effective complaint handling are the key areas that generate problems.²³ For example consumers find it difficult to get access to information about who to contact in case of problems. Some traders do not provide information on customer services and complaint handling. Many retailers provide an email address as the major point of contact, however without any targets for responding to communication attached.

Mobile commerce

The increasing take up of smart mobile phones among consumers drives the development of a new business model that enables consumers to purchase goods and services over mobile phones. The most popular list of products traded over mobiles includes ring tones, screen savers, games, traffic reports and news, but services such as mobile banking services, payment transactions, downloading music, watching TV and videos, social networking and location tracking are increasing in demand too. However there are concerns that consumer protection for mobile phone users is less robust than for computer users, while the potential for fraud and abuse is greater. For example the OECD Policy Guidance for addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce identified concerns over limited information disclosure, payment security, unauthorised purchases, privacy, child protection, and malware (spam and viruses).²⁴ The recent Consumer Focus mystery shopping survey conducted with the use of a mobile phone with consumer organisations from 11 countries found restrictive market choice, inadequate information disclosure, poor complaint handling and redress, problems with payments, insufficient advice on mobile security and poor protection of under-aged from over-consumption.²⁵ The OECD Committee for Consumer Policy has been carrying out work on identifying consumer protection gaps in online payment, including mobile payment and we recommend the European Commission takes account of this work in its future e-commerce policies.

²² Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC) and Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

²³ *Cause for complaint? How consumers deal with problems with goods and services in Scotland*, June 2010; Consumer Focus Survey *Pocket shopping - International consumer experiences of buying goods and services on their mobile phones* Marzena Kisielowska-Lipman December 2009 available at: <http://consumerfocus.org.uk/g/4m0>

²⁴ OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, Korea 2008.

²⁵ *Pocket shopping. International consumer experiences of buying goods and services on their mobile* by Marzena Kisielowska-Lipman, Consumer Focus, December 2009.

Creating a regulatory framework to promote sustainable e-commerce

Enhance competition of online market

We urge the Commission to promote coherent policies that ensure that the e-commerce market can be driven by the nature of *actual* consumer demand, and not constrained by limitations imposed by suppliers and distributors to provide the type of e-market that they think consumers *ought* to want. We are particularly disappointed that the Commission failed to show commitment to promote competition in online market, as it is allowing manufacturers to continue to impose 'brick and mortar' requirements on retailers before engaging in online sales during the review of the Regulations on vertical block exemptions.²⁶ We regret that by endorsing such restrictions, the Commission is likely to undermine the growth of internet shopping and adversely affect efficiency, consumer choice and competition in the single market. Above all the decision brings into question the Commission's real commitment to enhance e-commerce.²⁷

Therefore we recommend that any Commission policies on the future of e-commerce that result from this consultation aim to reduce barriers to e-commerce, including those that arise from competition restrictions.

Liability of internet intermediaries

We believe that the existing liability regime under the Electronic Commerce Directive (ECD) provides for a balanced framework that protects the interest of various stakeholders and enables the e-commerce market growth. Therefore we oppose any revision of the ECD. Instead, in our view, a clarification on the application of some of the ECD provisions to new services that have emerged since it was created (eg search engines, hyperlinks and cloud computing) would be sufficient.

Also we believe that participants in the e-commerce market would benefit from the clarification regarding application of hosting provisions under Article 14 of the ECD. In particular the existing lack of clarity on the enforcement of notice and take down regulation limiting service providers' liability upon *acting expeditiously to remove or disable access to illegal activity or information* they have '*actual knowledge*' of [Art.14] opens door to ambiguity and abuse. This is due to the fact that service providers do not have constitutional authority or may not possess legal knowledge of a court lawyer to guarantee fair and impartial judgment, nor may be accountable or transparent on adjudicating on notice and take down cases. Those concerns are proven by academic research on the enforcement of notice and take down provisions among Internet Service Providers (ISPs) that indicates that the latter regard dealing with take down requests as a time sink which do not contribute to their core business goals.²⁸

²⁶ European Commission Regulation 33/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

²⁷ <http://bit.ly/clfwX5>

²⁸ Lilian Edwards (ed), *The new legal framework for e-commerce in Europe* (2005).

For example in a survey of Dutch ISPs, out of five who responded, none said they would involve a lawyer in examining take down request.²⁹

Therefore clarification from the Commission on the application of notice and take down regulation would be welcomed.

Single market for digital products

We support the Commission's action plan, adopted under the EU Digital Agenda, to update EU single market rules to the digital era in order to boost the e-commerce market for digital products such as music downloads, computer software, games and others.³⁰

Consumer Focus believes that the Commission should adopt an incremental approach to harmonising copyright law across member states.³¹ The underlying challenge for the Commission will be to establish a single market in copyrighted creative content that is competitive. The Commission should start the process by establishing pan-European licensing accompanied by pan-European supervision of collectively negotiated tariffs. The complexities of copyright licensing, particularly online, are not only a major obstacle to a single European market in creative content, but also obstruct the emergence of new business models for creative content online.

²⁹ Lilian Edwards (ed), The new legal framework for e-commerce in Europe (2005).

³⁰ <http://bit.ly/bJEtK>

³¹ <http://consumerfocus.org.uk/g/4mp>

Enhancing cross-border enforcement and compliance

Online shopping has no borders and requires co-operation of enforcement agencies across EU member states, and outside, to combat fraud, illegal activities and unfair practices. Many of the regulatory issues arising are complex, go beyond enforcement capability of regulatory authority in one country, and can only be addressed and resolved in the course of joined-up action between relevant regulators from affected countries.

Therefore we recommend the Commission acts as the driver to enhance co-operation and intelligence sharing between enforcement agencies and other stakeholders from member states, and improve monitoring and surveillance mechanisms.



Consumer Focus response to the European Commission consultation on the future of electronic commerce in the internal market and the implementation of the directive on electronic commerce (200/31/EC)

If you have any questions or would like further information about our response please contact Marzena Kisielowska-Lipman, Senior Policy Advocate, by telephone on 020 7799 7981 or via email: marzena.kisielowska-lipman@consumerfocus.org.uk

www.consumerfocus.org.uk

Copyright: Consumer Focus

Published: November 2010

If you require this publication in Braille, large print or on audio CD please contact us.

For the deaf, hard of hearing or speech impaired, contact Consumer Focus via Text Relay:

From a textphone, call 18001 020 7799 7900

From a telephone, call 18002 020 7799 7900

Consumer Focus

4th Floor
Artillery House
Artillery Row
London SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8005 / 8006