



# Position Paper

## EU Commission Public Consultation on CONTRACT RULES for Online Purchases of Digital Content and Tangible Goods

EMOTA<sup>1</sup>'s main goal is to assist policy makers in removing any barriers to cross-border trade. EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions. We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

### Recommendations

- **Maintain the current B2C scope of the 1999 Consumer Sales Directive**
- **Aim for the timely full harmonization of consumer guarantee rules**
- **Aim for the timely full harmonization of specification/labelling requirements**
- **Avoid introducing new rules that would increase administrative burdens**
- **Ensure that future legislative proposals do not discriminate between digital goods/products and the online sale of tangible goods**

### Introduction

EMOTA strongly welcomes and supports the EU Commission commitment to remove barriers to cross-border trade resulting from legal fragmentation especially in the area of consumer protection (guarantees, unfair contract terms, labelling).

We call on the EU Commission to ensure that any new proposals in this area aim to avoid the lengthy political debates, often based on inaccurate concerns regarding a potential reduction of consumer protection levels in certain markets, as a way to block the efforts to remove barriers to cross-border trade.

EMOTA firmly believes that the removal of barriers to cross-border trade will increase competition in all markets and thus choice and quality for consumers, while decreasing trading costs and ultimately the costs for consumers.

### Questionnaire on the new rules for digital content guarantees and remedies:

<sup>1</sup> EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96



EMOTA's primary focus is on tangible goods. However, we would like to raise several concerns regarding a possible proposal for a legislative framework for digital content contracts:

1. EMOTA does not support the introduction of a different legal instrument addressing solely a digital content or services. The EU should aim to develop a legal framework which does not create additional requirements solely because of the nature of the product or services. It should be "technology neutral". Our position is based on the following arguments:
  - A new Directive/Regulation that would focus solely on the contractual rights around B2C transactions in digital goods services would result in increased compliance costs because of the increased presence of digital products (software) in the functioning or use of tangible goods (electronic cameras, smart white goods, etc).
  - Thus, sellers of tangible goods would be faced with two parallel systems of legal requirements, one for the tangible goods and one for the digital dimension of these goods.
  - Consumers and sellers would be faced with increased costs and potential legal uncertainty in the case of faults where the origin would be difficult to assess (software or hardware).
  - The scope of such a proposal would be extremely difficult to define as the link between the actual tangible goods and the functionality (software) aspects is increasingly complex and will quickly evolve in the future.
2. In addition, any future legislative proposals in the area of digital content should not cover products or services for which the consumer access or license has been granted in exchange of other means than money (so called "free"), or where these products are not linked to a tangible good purchased by the consumer (e.g. an app designed to connect a camera to a phone or a white good). Our position is based on the following arguments:
  - EMOTA believes that when a tangible product is advertised as having a number of digital functionalities (e.g. connecting to a smartphone or a wireless network) these aspects are to be considered as part of the product specification. Any lack of conformity should be solved in the existing framework of rules, respecting the hierarchy of remedies where this is applicable.
  - The EU Commission statement that digital goods are not currently covered by a legal framework is not entirely correct. If a service or digital product are advertised as enabling a number of functionalities, should these not function as advertised, the consumer would still be protected by the current consumer protection framework including by the rules on Unfair Commercial Practices.
  - Sellers already are subject to rules on functionality for digital content as a result of the 2011 Consumer Rights Directive.
3. Avoiding the overlap between data protection rules and the new rules on guarantees for digital content:
  - EMOTA advises against the introduction of rules on remedies/damages for products where the consumer is granted access without any financial payment as these could create a highly complex and costly legal framework, preventing the development of new digital services and products:
  - Such an approach would require establishing a "value" for personal data. The estimations would be extremely complex if not impossible as the value of data would be determined by the value of the service/product for which the data are collected and processed.



- Aiming to impose such a value could trigger a high cost for those businesses that are not data centered (online retailers) and require access to different marketing tools, using data, personal or not, in order to remain competitive through and effective in their communication with the consumers.
  - Any rules on the use of personal data in connection to consumer guarantees should not overlap with the current and upcoming data protection rules (e.g. principle of proportionality or rules on breach notification or noncompliance). These already ensure a very high level of protection for data subjects which cannot become quantifiable financially, as the current legal framework establishes different thresholds of protection in accordance with the legitimate interest of the controller and the level of intrusiveness/risk of the processing.
  - In case the digital good/content does not function as advertised or produces damages to the tangible good, the current legal framework would already enable consumers to seek redress accordingly.
4. Establishing the quality requirements of digital products and services:
- The current legislative framework for Consumer Guarantees, Consumer Rights and Unfair Commercial Practices already provide sufficient safeguards and trader obligations concerning functionality and conformity in order not to require a specific new set of rules around such aspects.
  - In addition, EMOTA believes that the introduction of quality parameters as a mandatory compliance requirement, beyond the provision of information concerning functionality (for example by including processing speed, transfer speeds, etc.) could result in further administrative burdens for traders and increased costs. Digital products constantly evolve and improve and so does the hardware on which these function, thus it is clear that legislation would not be able to keep up with the developments fast enough.

## **The EU Commission Public Consultation on CONTRACT RULES FOR TANGIBLE GOODS**

---

### **Section 1 – Problems (EU Commission questionnaire):**

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

*EMOTA agrees with the EU Commission interpretation that the lack of harmonization in consumer rules is a barrier to cross-border trade because of the compliance costs which increase with the number of markets a seller might want to serve. However, we also have to point out that the lack of harmonization in this area is only one of the obstacles to cross-border trade, others include taxation, currency, payments, delivery and language.*

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

*The rules on consumer guarantees (legal) should be fully harmonized including conformity and remedies. The rules on unfair contract terms should also be harmonized at the EU Level. As mentioned above, the harmonization should reflect the commitment to promote cross-border trade and should avoid imposing new burdens, and costs, on businesses and consumers.*



**3. 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.**

*The first difficulty sellers will face when aiming to sell to a new market (intra-EU) is to identify the rules which are different than the rules applicable in their markets, being required to update their terms and conditions. This alone can result in a high cost depending on the types of products sold and the applicable rules and obligations.*

***Despite the harmonization process brought by the 2011 Consumer Rights Directive, and because of the remaining differences, even for some of the areas covered by the Consumer Rights Directive, the costs for selling cross-border are not dramatically lower than the average 9000 Euro indicated by the EU Commission in the 10/07/2015 Roadmap.***

*Companies have to either employ legal experts or/and become members of various structures, such as Chambers of Commerce or specialized industry bodies in order to become fully aware of the sometimes small and complex differences in contract rules. In some cases, depending on the products sold (e.g. bicycles, glasses, or products containing certain chemicals) a more complex analysis is required or even partnerships with offline stores.*

*Further costs result from the investments into translations, labelling, marketing or costs of personal data (depending on how developed the market is the quality of the data will vary). Additional costs would result from the need to implement new payments, accounting, delivery and after sales services for each new market.*

**4. 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.**

*Certainly. At a first instance it is difficult to predict the costs for cross-border expansion as a result of compliance costs. In addition, as indicated above, there are other costs linked to understanding the market conditions or to the implementation of a logistics chain which keeps the offer of the seller competitive.*

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

**5. 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.**

*EMOTA strongly supports the EU Commission actions to remove barriers to cross-border trade. Such actions should be taken as soon as possible in order to help EU based sellers face international competition in the EU markets.*

**6. 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?**



EMOTA supports the full harmonization of consumer protection rules and at the same time the development of other legal or self-regulatory tools which would help reduce trading costs cross-border, these could be:

- **The Home Option:** Should allow sellers and consumers to agree on the use of the seller's contract terms, based on the applicable law in the seller's country of establishment. The differences in consumer protection levels or other technical requirements (e.g. labeling) across the EU are still numerous especially in technical areas for labeling, information requirements. However, these are often rather small compared to the benefits consumers would perceive through the increase of offers.
- **Voluntary Model Contracts:** In many markets across the EU industry or consumer bodies produce so called model contracts. These reflect the minimum legal requirements of those markets. At the EU level very few such instruments exist, as consequence of the disagreement between the various stakeholders on what a reasonably high threshold of consumer protection rules should be. EMOTA strongly believes that the development of model contracts is a commercial activity which is best left to commercial entities or national structures (Chambers of Commerce, industry representations, legal experts or consumer bodies) that have the necessary overview and resources to produce such contracts. An EU level model contract would also entail an important liability risk for those producing such an instrument and for those using it.
- **Overview of the differences in consumer protection rules:** The EU Commission should develop an up-to-date overview of the main differences in consumer protection rules across the EU, given the 6 already existing information regarding the transposition and case law affecting EU Directives and Regulations.

### Section 3 – Content of initiative

7. 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.

- Proposals should strictly focus on the current scope of the legal framework, which is business to consumers. Introducing an extended scope could negatively affect established international business conventions covering business to business trading (e.g. dual purpose contracts could lead to increased legal uncertainty because of the difficulties in establishing whether the buyer should be regarded as a consumer or professional).
- A particular aspect of B2B contracts is that they are the result of a negotiation process which is not the case in B2C contracts.

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

EMOTA does not support the extension of scope to business to business transactions. Any concerns the legislators might have regarding SMEs could be tackled by focused enforcement actions.

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

- Quality of the tangible goods
- Remedies and damages for defective tangible goods



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

Please explain your choice(s).

- *The current legal framework covers sufficiently the potential issues around conformity (quality), remedies and the exercise of remedies. The 1999 Consumer Sales Directive was not a full harmonization instrument and therefore lead to instances in some EU Member States where the rules impose very high costs on sellers (differences in the time periods, the processes, etc.).*
- *The EU Commission should aim to harmonize the diverging areas of national law via a feasible solution which would encourage the development of competition and choice for the consumer, rather than increase costs (via new measures on packaging, determining quality, etc.).*

**10. 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<sup>2</sup> of the Consumer Sales and Guarantees Directive? Please explain.**

*The current framework covers sufficiently the aspects around the guarantees for conformity and functionality. The EU Commission should avoid imposing product specific rules. • Consumers and sellers have the right to choose and offer products for various quality levels in accordance with the market conditions or price. The offerings should be made in full transparency as guaranteed by the current framework.*

## Remedies

**11. 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.**

---

<sup>2</sup> 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.



*The current 6 months' period should be kept as it allows for sufficient time for the consumer to determine whether there is a fault with the product and for the seller to deal with the instances where such lack of conformity was identified in the most efficient way (longer periods would potentially require costly changes in how sellers, distributors and manufacturers organize the availability of products – e.g. for replacements – or the financial arrangements).*

**12. 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).

*The rights should be Repair or replacement, price reduction and termination of contract as a hierarchy. Such a system allows for predictability and an increased level of legal certainty.*

**13. 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.**

*Please see above.*

***Time limits to exercise remedies<sup>3</sup>***

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

*The two year legal guarantee is a sufficient period for the seller to identify and for the seller/producer to remedy the faults. A default longer period might result in inconsistencies for certain products and would increase costs.*

**15. 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.**

*There should only be a single time limit for the defect to appear, ensuring clarity around the rights and obligations of the consumer and seller.*

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

---

<sup>3</sup> Idem.



*The current generally accepted two years' time limit is adequate and has proven to function well. Longer periods would create legal uncertainty as other aspects such as use, maintenance would dramatically weigh in a possible dispute placing both consumers and sellers in a potentially costly position.*

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

*Second hand goods should be covered by a shorter guarantee period. The EU Commission should involve stakeholders in a discussion over what how such a concept could be defined, considering the very diverse product ranges and aspects that should be considered.*

**Damages<sup>4</sup>**

**18. 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)?**

*EMOTA does not support the introduction of new provisions on damages. Consumers are currently granted sufficient redress mechanisms which are proportional with the faults in question.*

**Notification<sup>5</sup>**

**19. 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 notify the defect at the time of discovery. Taking another approach which would include a default assumed moment of awareness could lead to legal uncertainty around the actual length of the guarantee period.*

**Commercial guarantees**

**20. 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.**

*EMOTA does not support the introduction of new rules on commercial guarantees. As depicted by the question, these are voluntary commitments which fall under the scope of Unfair Commercial Practices and similar consumer protection legal instruments.*

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

---

<sup>4</sup> Idem.

<sup>5</sup> Idem.



*Please see above.*

### **Unfair Terms**

#### **22. 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.**

*EMOTA supports the full harmonization of unfair contract terms, based on a comprehensive analysis of the potential solutions. We base our answer on the following:*

- The EU Commission is aware that the EU Member States take different approaches in dealing with unfair terms in consumer contracts, without a harmonized approach at the EU level.
- In some EU Member States the unfair contract terms are already part of the law.
- The European Court of Justice rulings indicate that some terms could be considered unfair in virtually all circumstances, based on the criteria and Annex found in the 1993 Unfair Contract Terms Directive, also providing national courts with a clearer basis for action.
- A proposal for a so called black and grey list approach was included in the proposal for a Common European Sales Law in 2011.

#### **23. 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.**

*EMOTA **strongly opposes** a legislative proposal interfering in the way the seller considers necessary to organize the payments process in order to avoid fraud, unnecessary losses and to ensure an efficient retail operation, especially in cross-border sales. In some cases other protection mechanisms such as credit checks are not possible or available leaving sellers with no other option than to require the direct payment.*

\*\*\*

#### **Contact:**

Razvan Antemir EMOTA  
[razvan@emota.eu](mailto:razvan@emota.eu) ; [www.emota.eu](http://www.emota.eu)