

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

Information about the respondent

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

European Gaming and Betting Association, Rue Gray 50, 1040 Brussels.

WWW.EGBA.EU

2. Please indicate your main country of residence:

Belgium

3. Please indicate your main country of activity:

The European Gaming and Betting Association (EGBA) is the Brussels-based industry body representing the leading online gaming and betting operators established, licensed and regulated within the EU. On the basis of these licenses EGBA members operate in a large number of Member States. .

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

Yes, our contribution may be published under our name

5. Are you answering this questionnaire as a:

**Other (for example, academics, other NGO, public authority outside the EU/EEA, trade union)
(please specify)**

We are a European trade association representing the interests of the main EU established, regulated and licensed online gambling operators.

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

PART 1 – DIGITAL CONTENT

Context

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

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

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

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

Legal background at EU level

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

Section 1 –Problems

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

EGBA strongly agrees with the opening statement in the “Context” that the economic benefits of the digital market can and should be further unleashed by increasing consumer confidence and legal certainty for business on the Internal Market.

Whilst EGBA does agree that consumer confidence can be increased by providing more legal protection online, the internet itself already significantly increases the power of the consumer in the market place. The free flow of information via quality and price comparison websites, blogs etc, can almost instantly steer demand away from an offer if it is perceived to be of lesser quality or too highly priced. As a result, online business is under constant commercial pressure to create positive consumer experiences and avoid negative perception, thus strengthening the position of the consumer.

EGBA also agrees that contract law, including for remedies, is fragmented in the EU, causing unnecessary regulatory costs and legal uncertainty for both business and consumers. It is evident that digital sectors will benefit from a harmonised approach in the EU.

The consultation on contract law for online purchases focusses on the supply and demand for ‘digital content.’ In the analysis, nor in the following questions, a definition or approximation is provided of what content or indeed digital content is, also why it apparently is set apart from other digital activities. Neither is it explained what the underlying rationale is for the Commission to specifically focus this consultation on digital content remedies, rather than a wider, more narrow or any other scope.

Comments regarding the regulatory situation of the online gambling sector in the EU:

No EU-sector specific regulation for online gambling is currently in place, with most Member States opting to regulate their markets through the introduction of domestic licensing systems which differ from each other and create a fragmented legal, regulatory and commercial environment in which online gambling operators are required to operate.

Online gambling is included in a number of horizontal EU directives and regulations, including for the protection of consumers. The sector is inter alia covered by the Unfair Commercial Practices Directive and the Alternative and Online Dispute Resolution Directive and regulation that will be in force shortly. However, online gambling has been excluded from the Consumer Rights Directive, resulting in the recent EP study on the Cost of non-Europe¹ to conclude that *”excluding gambling contracts from the Consumer Rights Directive can expose consumers to situations where some contracts are unregulated.”* (p 35)

¹ http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536357_CoNE_Single_Market_V.pdf

The study also concluded that: *“A single market for gambling and online gaming is not currently established in the EU, leading to significant gaps in consumer protection when gambling transaction occurs cross border. ...Protection for problem gamblers and vulnerable consumers is also fragmented and less effective as a result.”* (p 8) and that: *“There is a need for common standards to address the rights and obligations of both the service provider and the consumer in order to ensure a high level of protection for citizens and consumers, particularly minors and other vulnerable persons, and the prevention of misleading and excessive advertisements.”* (p43)

EGBA fully agrees with the conclusions of the EP study. It is evident that for an inherently cross border sector such as online gambling, a harmonised approach will greatly benefit consumer welfare and protection as well as create the legal certainty that EU business requires to compete with unregulated offers from outside of the EU.

Online gambling is by definition a cross-border sector. In its 2012 Communication on Online Gambling in the Internal Market², the European Commission stated that *“Consumers in Europe also search across borders for online gambling services which, if not properly regulated, may expose them to significant risks.”* EGBA therefore disagrees with the exclusion of gambling contracts in their entirety from the scope of the EU's Consumer Rights Directive (CRD) as it can expose consumers to situations where some gambling contracts are "unregulated" or simply "exempt" resulting to a major lack of trust and legal certainty for consumers and businesses. EGBA pleads for a harmonised approach which will ensure greater consumer welfare and protection as well as the creation of a high level of legal certainty.

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

Yes, the fragmentation of the European market caused by a lack of EU rules leads to deficiencies in the overall consumer protection framework. Consumers will not be aware of the rules that are applicable in the different Member States. This lack of consumer knowledge will cause a lack of trust in the services offered by the regulated digital providers.

The current fragmentation of the EU online gambling market leads to high and unnecessary regulatory compliance costs. These costs have a direct effect on the ability of regulatory frameworks to channel the consumer to the regulated offer. As is stated in the Commission Communication on Online Gambling in the Internal Market, and as confirmed by the CJEU, the regulated offer needs to be sufficiently attractive so as to channel the consumer to the regulated offer and away from the unregulated offer, which on the internet is only a few mouse clicks away.

Outside of the regulated offer, the consumer is not sufficiently protected at the same level of security he/she would enjoy in a regulated environment both in terms of consumer protection measures as well as legal remedies. We agree that consumers should be protected when buying digital content products (including online gambling products).

² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0596&from=EN>

However, it shall be noted that regulatory duplication and corresponding costs that are not necessary, such as fragmented contract law requirements, negatively impact the level of consumer protection in the EU.

However, with regard to the questions at hand and as mentioned in response to question one, it is unclear what the Commission definition of digital content products is. The concern is that legal certainty will be negatively impacted and regulatory costs increased if some activities that are similar from an operational and business perspective are defined as digital content, but others are not. Likewise, in view of the rapid technological developments, definitions that are not technologically neutral will hinder technological development and impede EU business.

In view of that, EGBA encourages the Commission to follow this first general consultation with more specific consultations to ensure that any potential initiative will be beneficial to consumers and business.

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

Yes, there are obvious regulatory costs involved for business by having to apply several sets of contract law rules rather than one set of contract law rules throughout the EU.

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

Online gambling has already been affected to a very large degree by regulatory fragmentation. It places an extremely high compliance burden on businesses which cannot operate in a uniform market within the EU. This negative impact on business has no corresponding benefit to the consumers whose interest would be better served by having a uniform approach to certain rights which they can rely on regardless of where in the EU they are residing.

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 Strategy³ that it sees a need to act at EU level. Do you agree? Please explain.

EGBA agrees with this statement. The online gambling sector is intrinsically a cross-border sector. A truly digital single market needs harmonized rules for the protection of consumers and their rights, without introducing an overly stringent set of rules which would hamper cross border trade or innovation. The online gambling sector suffers, like a number of other online sectors, from market fragmentation. An initiative in this area would complement existing EU legislation in this field, and result in less diverging national legislation.

³ A Digital Single Market Strategy for Europe COM(2015)192 final

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?

EGBA supports full harmonisation leading to increased transparency, balanced and fair contract terms and an overall increased security for the player. Indeed, harmonisation would contribute to ensure that these rights will be at a similar and high level wherever the consumer plays. Minimum harmonisation without a mutual recognition clause would not provide the legal certainty for business and equal protection for consumers, which are the main objectives of the internal market and consumer protection legislation.

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.

Similarly to the 2011 Commission proposal, EGBA believes that covering B2C would suffice. Extending the scope to B2B might steer away the attention of the Directive which should be the protection of consumers when they have been delivered a service or good, which did not meet the standards that they could reasonably expect.

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

Please explain your choice(s).

Please see our response to questions 1 and 2 regarding the definitions used in the consultation. Here in question 9 also the term digital content services is introduced, potentially enlarging the scope of the consultation from products to services. In that case online gambling should be considered a digital content service as data are produced and

supplied in digital form and it includes, especially in the case of “apps”, the action of downloading the app on a digital device to access the data and to effectively be able to wager a bet or gamble. Some of the products are also offered in combination with video materials. This might be the case for live betting products. Also match reports are made available on gambling operators’ websites after the games have finished. While EGBA is fine if the Term "Digital Content Product" would covers all the products/services mentioned above (besides the ticking boxes), EGBA encourages the Commission to continue the consultation with a follow up to ensure that the scope of the potential initiative is well defined.

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)

We are of the opinion that digital content products for counter-performance other than money shall not be covered by this initiative. It is true that there are several other types of counter-performance including the providing of personal data. However,

- (1) it will be hard to measure what the "value" of e.g. the consumer's plain activity is,**
- (2) from a "games of chance" angle, a Regulator may just look at real money counter-performances and**
- (3) in order to be consistent with the answer to Q15; there are no user remedies for digital content products provided for counter-performance other than money.**

A consumer will only be able to place a bet when he/she has credited money to his personalised account. The operator then as a counter-performance places the bet for the consumer, upon the completion of which the user will have won or lost money.

Before a user can credit his personal account, however, he needs to be registered and be allowed by the operator to create an account subject to the regulatory requirements and checks in place. In exchange for the creation of a unique account, the user has to provide the operator with personal details, which will allow the operator to make an assessment of the player. These are known as know-your-customer (KYC) requirements. Depending on the applicable legislation more or less details have to be provided by the user and checked by the operator. Typically, the user needs to give his date of birth (for age verification purposes), his address, his e-mail address and ID number.

Section 4 –Content of an initiative

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

- Quality of the digital content products

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

Please explain your choice(s).

EGBA supports full harmonisation leading to increased transparency, balanced and fair contract terms and an overall increased legal protection for the consumer. However, it must also be pointed out that an initiative (also covering online gambling) increasing legal protection for the consumer shall go along with EU secondary law regarding online gambling services and taking into consideration the peculiarities of gambling products and online gambling products (e.g. consumers simply betting on the wrong outcome and claiming that the product was defective). This, for instance, can be achieved with adequate cancellation rights. E.g. Providers of online services (covered by the CRD) are obliged to require the consumer's express consent before they start with the service (within the withdrawal period) to ensure that he/she has acknowledged the loss of the right of withdrawal. This could, with certain adaptations, also be applicable to gambling operators. It shall be noted, that typically the online gambling/online betting product is consumed at the moment when the game (e.g. poker game) is played or the bet is placed.

Quality of the digital content products

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

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

Please explain your choice(s).

It is common practice that the rules governing the commercial relation between client and operator are governed by the Terms and Conditions which the customer agrees to before being able to create an account to play. A certain flexibility is required to allow for ongoing services, which may change from customer to customer or country to country. Flexibility is required in order to deal with issues as they arise, and to allow for product development.

13. When users complain about defective products, should:

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

Please explain your choice(s).

The burden of proof should rest on the users if a product is allegedly dysfunctional. Many efforts and financial means are already dedicated to complaints which users can file if they feel that they have not been treated fairly. EGBA operators investigate each individual case to avoid any unfair treatment. However, inverting the roles would make the burden too high to carry for the operators.

The users agreed to Terms and Conditions which lay down rules, which all parties are bound by. If a user discovers an error on an operator's website, he should refrain from taking advantage of the situation.

If the operator is unable to register a bet due to a server or internet connection failure, then the intended transaction entered by the user should be considered void and should not lead to any compensations from the part of the operator. The money wagered however should be refunded by the operator.

Remedies for defective digital content products

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

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

Please explain your choice(s).

The remedies provided to the users are dependent on the nature of each situation. For example, should a service not be successfully delivered due to a failure on the part of an operator's operating system, the operator should refund the amount wagered in the digital content product. If the registered player has an accrued credit at the time the service miscarries, credit the monetary value of the credit to the account holder's account or, if the said account no longer exists, by paying it to the account holder in an approved manner.

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.

EGBA considers that digital content products for counter-performance other than money (or monetary value) shall not be covered by the initiative. This coincides, in the case of online

gambling products, with the definition of games of chance of national Gambling Acts requiring that players have to pay in a stake of money or of monetary value.

There is fragmented case-law on the interpretation of "a stake of monetary value" in different EU Member States. However e.g. the provision of personal data is broadly not considered a "pay in / consideration of monetary value". This definition of "pay in a stake of monetary value" – typical for definitions of games of chance in almost all Gambling Acts throughout the EU – safeguards that consumers take part in games of chance because they expect to win a monetary prize with a significantly higher value than the amount of "money" paid in for participation. E.g. the Austrian and the German Supreme Court assessed that prize competitions in which players participate by means of text messages or phone calls to a premium rate number are considered to fall under the definition of "pay in a stake of monetary value".

We therefore suggest that users shall have the remedies for digital content products provided there is a counter-performance for money (or monetary value), while for the purpose of legal remedies (i) the provision of personal data or (ii) activity by the user in order to access the digital content is not considered a monetary value.

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

A time limit of three (3) to five (5) years should indeed apply and operators should clearly and transparently display them in their T&C.

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

We agree that there may be two (2) different time limits, one for the period during which the defect should appear and one during which users have to exercise the remedies.

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

We think a time limit of three (3) to five (5) years is appropriate.

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)?

We see no grounds why the liability should be irrespective of the existence of a fault. We recommend basing the liability on the principle of fault. The general principle of law that the burden of proof should rest on the user should also apply here. This is, inter alia, consistent with our answer to Question 13.

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

If they wish so, operators should be given the right to do so. This should be disclosed in a transparent manner in the operators T&C. T&C can of course be subject to change and users should be informed accordingly.

Additional rights

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

- Yes
- No

N/A

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

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

Please explain your choice(s).

N/A

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

- Yes
- No

Please explain your choice.

N/A

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

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

Please explain your choice(s).

N/A

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

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

Please explain your choice(s).

N/A

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

- Yes
- No

Please explain your choice.

N/A

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

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

Please explain your choice(s).

N/A

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

N/A