



European Commission
Directorate-General Health and Consumer Protection
Rue de la Loi 200
1049 Brussels
Belgium

European Commission Public Consultation:

Green Paper on the Review of the Consumer Acquis – Question H1

25 May 2007

The undersigned associations and firms represent a wide range of leading European technology innovators, including business software providers. The companies represented create and deliver a diverse range of digital products and services to consumers across the EU, and their innovations contribute significantly to European competitiveness and productivity.

We are responding to the *Green Paper on the Review of the Consumer Acquis* (the “Green Paper”), presented by the European Commission on 8 February 2007. Our response focuses on the Commission’s question H1: “Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?”¹

For the reasons highlighted below, we fully support Option (1) and strongly caution against the consequences — for consumers and for Europe more broadly — of the changes proposed in Options (2)-(4)

¹ Green Paper on the Review of the Consumer Acquis, at 24.

We believe that for a variety of reasons — including the fact that an effective consumer protection regime already exists, the unique characteristics of software engineering, and the importance of encouraging innovation and competition in the software space — the status quo should be preserved. Modifying the status quo could create new barriers for software trade and negatively affect a functioning and competitive cross-border market where digital products are seamlessly distributed in the European Union.

While we perceive a well functioning regulatory environment for software, we would welcome the development of joint activities with industry as part of our long-standing commitment to enhancing consumer confidence in e-commerce. These private-public measures are briefly presented in the conclusions of the present submission.

Specifically, we support Option (1) because:

An effective European consumer protection regime is already in place.

- The Green Paper states that “[t]he lack of coverage of contracts for the supply of software and data ... is a particularly important problem.”² Unfortunately, the Green Paper does not identify what that the problem is. It seems premature to propose solutions without first having a clear understanding of the particular market failures that require redress.
- Our preliminary review of the available evidence suggests that (i) the competitive pressures on manufacturers of software and digital content services drive these firms to act in the best interests of consumers; and (ii) existing national laws and consumer protection mechanisms are adequate to resolve any issues that do arise.
- European consumer protection laws offer a significantly higher level of protection than those applicable in other regions, notably in the United States and in Asia. Indeed, there are several Directives in place in Europe that offer a harmonised framework of rules, unlike in the U.S., for example, where the framework is far more fragmented.
- Industry already addresses the problems consumers may experience with software or data with customer care programmes. Customer care services all over the EU provide consumers with a broad range of support, like hotlines, customized instructions, online support and even replacement of the software. While the actual number of calls is considerable, the total

² *Id.*, at 24.

percentage of consumers contacting the hotlines is very low considering the total population of users that software vendors may have.

- As the Green Paper recognises, ‘digital content’ is not sold, but contractually licensed. Software and other digital content contracts are subject to the Unfair Terms in Consumer Contracts Directive (Directive 1993/13/EEC) and consumers are protected by a multitude of remedies available for breach of contract — remedies that we believe have proven effective in addressing consumer concerns. In addition, the Distance Selling Directive (Directive 1997/7/EC) and the E-Commerce Directive (Directive 2000/31/EC) already cover certain software transactions, and transactions relating to software and other digital products will also be subject to the Unfair Commercial Practices Directive (Directive 2005/29/EC) once it is implemented. National rules and remedies supplement this broad European framework.
- In practice, current European consumer protection mechanisms have proven highly effective in redressing situations relating to digital products. Two recent cases — indirectly referenced in the Green Paper itself — illustrate the effectiveness of the existing regime: the stringent remedies and related penalties imposed on Sony Entertainment (‘Sony Root Kit case’) for the use of non-conforming copy protection technologies; and the modifications requested by European consumer ombudsman regarding the license terms for digital music downloads from a leading market operator.
- Whilst there has been some concern expressed by consumer organizations regarding certain uses of digital rights management (“DRM”) technology in the context of digital download services, these concerns do not merit a wholesale revisiting of the consumer protection framework. It is important to note that the market for online music sales is still very much in its infancy and indeed, industry itself is driving solutions in this space. Also it is important to recognise that online audiovisual services involve an extra layer of complexity: digital content providers must respect both, the rights provided by the consumer acquis and the rights of copyrights and neighbouring rights holders. The online content industry is working closely with DG Internal Market and DG Information Society to achieve an appropriate balance that will protect consumers and rightsholders of content alike.
- It is also worth pointing out that software manufacturers go to great lengths to ensure consumer satisfaction: notifying consumers when there is a problem, offering extensive customer support and quickly and regularly issuing updates and fixes. This process is a far better way of addressing consumer concerns and far more efficient in keeping with the

dynamic and fast moving nature of the technology than changing the liability regime.

Computer programs are not toasters and should not be subject to the same liability rules as toasters.

- Software is fundamentally different from the tangible, physical goods governed by the Consumer Sales Directive ('CSD'). A significant premise of the CSD is that the seller can predict with a high degree of certainty both the product's anticipated uses and its potential performance. Whilst this is true for most if not all tangible goods – including cars and toasters - meaningful predictions are far more challenging in the software context because of the way software is developed, used and modified.
- Because of the environment in which software operates, the software code must be dynamic and renewable and must allow upgrades, patches and other interventions. Moreover, even the most basic software needs to interoperate with the operating system, other applications, tools, and programs (both current and legacy software), as well as with other devices (e.g., printers, modems, fax machines, scanners, digital cameras, outside drives, etc.) — interactions that necessarily involve interoperating with products created by multiple vendors. Every single one of these interactions — which are fundamental to the software experience and should be encouraged — directly impact the software's performance and may lead to consumer experiences that the developer did not and could not have reasonably predicted or anticipated.
- It is impossible to anticipate all possible user scenarios involving software. Indeed, many users modify and customize the end program and hardware to suit their needs. While industry invests significant resources in developing the most reliable and secure software possible its developers can simply not foresee all possible uses and modifications the software will be exposed to. One example of the difficulty to predict 'faulty' application behaviours is the 'sendmail' tool, a widely distributed open source software tool that proved faulty when used in certain settings, even after developers from all over the world had been improving and using this tool for more than 20 years. For these reasons, software developers cannot ensure complete conformity with every possible use.
- Finally, software faces another unique challenge that is unlike that faced by any tangible product. As is well known, most widely adopted software technologies are subject to relentless attack by criminals and hackers. When a new method of attack is discovered, these are often reported as security 'vulnerabilities' in the software, which vendors then immediately

seek to fix. Subjecting software vendors to liability as a result of the activities of hackers and other criminals would be both unfair and nonsensical.

Changing the existing system will hamper innovation, make software more costly and create uncertainty for the future of software development in Europe.

- Under the current European regulatory environment, software and data content and service providers are forced to compete vigorously for the consumer's business. This regime incentivises digital content innovators to provide high quality, cutting-edge products and services that respond to consumer demands. The risk of enhanced liability will undoubtedly cause firms to be more conservative in the development and delivery of products and services, however. Features will be limited in order to avoid potential legal risks. As noted above, apart from very small and limited software applications operating in very controlled environments, it is simply impossible to make a piece of software that is completely bug-free. In the software context, avoiding the liability risk would become more important than producing software that is easy to use or rich in functionality.
- Such a change is also likely to increase the cost of developing and distributing digital content, as firms are forced to invest more heavily in liability insurance or spend vast sums performing virtually limitless tests on their products. The increased cost of product development and delivery will be even more difficult for start-ups and smaller firms to bear. As a result, software innovation could become the realm of only major firms with significant R&D budgets. Ultimately commercial software code will be more expensive and independent and custom vendors and free and open source developers will find themselves marginalised in the market. Competition and innovation overall will suffer — undermining rather than advancing the interests of consumers.
- The extension of the CSD liability rules to licensed software packages is also likely to discourage consumers and enterprises from developing open source software. By nature, open source software is the product of many different contributors. It integrates components that are made available by a variety of developers or companies and it can prove difficult, if not impossible, to identify who is responsible for a faulty application component. Individual programmers may be reluctant to develop, contribute to or distribute new open source packages in the spirit of progress and innovation if there is a risk that they will be held liable for uses of their code that they could not predict or that result from the interaction of their software with other technologies.

Small and medium-sized software enterprises will be most impacted by additional rules in this area.

- An extension of the Directive's liability rules will generate new and unjustified compliance costs. Such costs, including more extensive insurance, additional legal fees and increased software testing costs will raise the bar to entry into the marketplace for small and medium-sized software enterprises. Higher barriers to entry will in turn result in less innovation and software development taking place in Europe with other, less heavily regulated regions of the world becoming more attractive. Other SME producers of digital content and services will be similarly impacted.
- Application of the liability regime to software will also decrease interoperability among digital products and services.
- As noted above, no developer can reasonably predict or anticipate the behaviour of its application in the software ecosystem; specific applications can behave erratically as a result of their interaction with another application or due to setting modifications by the end-user. Even if each line of code is wholly error free, no software vendor can guarantee that its software will operate faultlessly when interacting and interoperating with other vendor's technologies.
- Changes to the liability regime for software and digital content services will naturally encourage vendors to offer packages and solutions that are vertically integrated and that do not allow interoperability because by doing so they would be in a better position to manage their risk of liability. This would reduce consumer choice, undermine the richness and heterogeneity of the user experience, and run counter to industry's drive for more product and service interoperability.

Treating Software as a 'good' is likely to affect the European 'cultural exception'.

- In addition to the potentially detrimental impact on European innovation, consumer choice and interoperability, we note that treating software as a good for purposes of consumer protection rules would also potentially contradict the Commission's past statements on the treatment of software, in which the Commission has argued that "[t]he notion of 'digitised products'" — which appears to be what the Green Paper is attempting to address — "encompasses a very large number of economic activities,

[including] many long-recognised services.”³ Specifically, by treating software as ‘a good’ the line between audiovisual and software services or products will be blurred and, the current legal regime applicable to audiovisual services might be altered. This alteration could result in changes to the current trade regime applicable to audio-visual services (including specific rules exceptions for funding/subsidies of cultural productions).

Furthermore, we acknowledge that most software is already traded widely within the EU, as many consumers acquire online software licences in other Member States than the ones they reside. This is due to the fact that many software vendors own all relevant rights and are in a position to offer licences EU-wide and cross-border without restrictions. Any issues identified by the Green Paper regarding the licensing of digital content do not lie within and cannot be solved by extending the scope of CSD.

In conclusion, whilst we support efforts to simplify and improve the regulatory environment, we believe that in the absence of a demonstrated and compelling need, extending the Directive on Consumer Sales to software and digital content services is unnecessary and inappropriate.

Instead, we would like to suggest measures that could help enhance consumer trust in e-commerce and wish invite the European Commission to consider developing joint activities with industry to that effect. For example:

- Industry is actively involved in voluntary industry-led information programmes like trust marks, seals and information schemes. Such initiatives aim at building trust and promoting safe environments. The European Commission could support such programmes that provide a good example of self-regulatory measures ⁴.
- These efforts could be complemented with awareness-raising initiatives. We invite the European Commission to address perceived lack of consumer confidence in the online market together with industry. This could be in form of a European Consumer Awareness Day or online portals in cooperation with industry ⁵.
- We invite the European Commission to consider installing a forum for the exchange of practices, together with e-retailers and other stakeholders.

³ Submission from the European Commission to the World Trade Organization, Work Programme on Electronic Commerce, WT/GC/W/497, at 2 paragraph 11 (9 May 2003).

⁴ BBBOnLine Privacy Seal. <http://www.bbbonline.org/privacy> or TRUSTe <http://www.truste.org>

⁵ E.g. portals like OnlineCyberSafety provide tools to consumers that help them identify potential risks and increases their confidence.

Such a platform could enhance the dialogue within the business community and with consumers and help to increase confidence in the online world and cross-border sales.

- European research funds have proven to be very effective in complementing the policies for the completion of the European single market. We call upon the European Commission to address the identified issues by providing research assistance through the 7th framework programme, especially to SMEs.

We appreciate this opportunity to submit our comments in connection with the Commission's consultation on the Green Paper and look forward to working together with Community legislators and Member States.

For further information, please contact:



Judith Lammers, Department for IPR and Industrial Property:

j.lammers@bitkom.org

www.bitkom.org

Kimon Zorbas, Manager Public Policy Europe:

kimonz@bsa.org

www.bsa.org/eupolicy



Alexis Serfaty, Policy Director:

Alexis@eabc.org

www.eabc.org



Siada El Ramly, EU Policy Advisor:

contact@europeansoftware.org

www.europeansoftware.org



Eirini Zafeiratou, Director GSM Europe:

ezafeiratou@gsm.org

www.gsmeurope.org