

TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE
CONSUMER DIALOGUE DES CONSOMMATEURS

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Resolution on E-commerce

The growth of e-commerce and the emergence of new forms of virtual commercial transactions such as mobile commerce, online auctions and social networks offer tangible benefits to consumers in terms of convenience, speed and choice. Yet the rapidly developing online marketplace also poses challenges to consumer protection that must be addressed to increase consumers' confidence and trust online and to sustain innovative and competitive e-commerce growth.

The existing regulatory frameworks to safeguard basic consumer rights to safety, choice, information, dispute resolution and redress are either weak or ill adapted to the current online marketplace. The growing market for digital content raises concerns over consumers' rights to access digital products, attach devices of their own choice, and redress and remedies in case things go wrong. Concerns about consumer privacy and the protection of individual records must be addressed now because of the increasing use of online profiling and behavioural marketing. In addition, unfair business practices that are detrimental to consumers have been reported in connection with mobile commerce and ambiguous regulations of online auctions.

The lack of adequate consumer protection exposes consumers to unacceptable risks and contributes to low consumer confidence in the online environment. Concerns about inadequate product information, misleading advertising, the protection of privacy, cancellation rights, lack of clarity over end-user licence agreements (EULAs), dispute resolution and redress, and lack of effective remote enforcement could prevent e-commerce from reaching its full potential.

Recognising that the electronic marketplace has evolved, the Organisation for Economic Cooperation and Development (OECD) has initiated a review of its "Guidelines for Consumer Protection in the Context of Electronic Commerce" (the Guidelines) adopted in 1999 when e-commerce was in its early stages to assess their impact and adequacy.

TACD Recommendations

TACD urges the U.S. and EU governments to advocate for the OECD to amend its Guidelines to ensure that core consumer protection principles meet the needs of 21st century e-commerce and safeguard the consumer's right to the equal level of protection in both physical and online marketplaces. As the Guidelines state in the preamble:

“Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.”¹

Furthermore TACD resolves that EU and US governments should:

1. Assess currently available legal tools, focusing especially on potential regulatory gaps and inconsistencies with regard to:
 - a. New digital products (e.g. eBook readers online music and other)
 - b. New forms of e-commerce and e-trading (e.g. mobile commerce, online auction platforms)
 - c. Divergent rules on copyright levies that apply to recording media and equipment
 - d. Effective mechanisms for facilitation of dispute resolution and redress, including the availability of collective redress mechanisms
 - e. Applicability of EULAs, including third party agreements
 - f. Transparency of terms and conditions for products embedded with digital rights management (DRM)
 - g. Remedies in case of non-conformity and legal guarantees
2. Take steps to improve consumer protection against misleading and unfair online commercial practices, focusing on:
 - a. Enforcement of existing regulations domestically, and
 - b. Establishment of accountability mechanisms for cross-border transactions
3. Ensure legal protection of consumers’ rights with regard to personal data, especially regarding:
 - a. Online ID theft and fraud
 - b. Collection and trading of personal data without informed consent
4. Investigate the technical possibilities for implementing the right of data subjects to access personal information in order to:
 - a. Correct, modify or delete it
 - b. Prevent personal information from being transferred without unambiguous consent.
5. Take steps to regulate payment issues in e-commerce, focusing especially on

¹ Guidelines for Consumer Protection in the Context of Electronic Commerce, OECD 2000, p.13.

- a. Strong legal payment dispute rights for unauthorized and deceptive online transactions
 - b. Payment restrictions for under-age and unauthorised transactions in particular in relation to mobile payment
6. Develop effective mechanisms to protect children from access to illegal and harmful content including pornography, tobacco, alcohol and gambling sites
7. Establish minimum standards of due process for the investigation and prosecution of online activity, including:
 - a. The right to appeal and to a fair and impartial tribunal
 - b. The presumption of innocence and respect for the right to privacy
 - c. Proportionality and effectiveness of penalties
8. Prohibit discrimination in the provision of goods and services online on the basis of consumers' residence and nationality.

Brief Background

Current trends and Issues in e-commerce and online trading

Recent years have marked a rapid growth of e-commerce and expansion to new commercial platforms such as mobile commerce, online auctions and social networks. The EU e-commerce market alone was estimated at 106 billion Euros in 2006 and 51% of retailers in the EU made sales via e-commerce in 2008.² In the United States the value of e-commerce transactions hit 250 billion US dollars in 2007.³ Yet despite increasing number of online goods and services e-commerce has not yet delivered its potential benefits to consumers. Active response to unsolved and emerging issues is required, especially when it comes to building consumer trust online, expanding market choice, eliminating barriers to access, reducing online fraud and unfair practices, and improving access to information and redress.

The consumer protection framework needs to be re-examined in relation to online advertising and information disclosure, cross-border enforcement, the impact of Intellectual Property Rights (IPRs), privacy and data protection, dispute resolution and redress, and emerging issues associated with more recent e-commerce trends such as digital products, mobile commerce and new online trading platforms. In addition, electronic commerce might be considered as a suitable way of shopping for people living in remote areas or people with reduced mobility such as elderly consumers. Given the current demographic trends in Europe and the US and that e-commerce depends on access to the electronic means concerned (Internet, mobile commerce, etc), it is essential that the means to access online

² European Commission's Staff Working Document, Report on cross-border e-commerce in the EU, 5 March 2009.

³ United Nations Conference on Trade and Development, ICT and e-business for development, report submitted at the eleventh session of the Commission on Enterprise, Business Facilitation and Development, Geneva, 19-23 February 2007.

shopping are provided for all consumers irrespective of their personal and/or technical ability⁴.

Recognizing that the electronic marketplace has evolved, the Organisation for Economic Cooperation and Development (OECD) has initiated a review of its “Guidelines for Consumer Protection in the Context of Electronic Commerce” (the Guidelines) to assess their current impact and adequacy. The Guidelines were adopted in 1999 when e-commerce was in its early stages. A report of the review findings will form the basis for a discussion at the OECD e-commerce conference this December in Washington DC, which commemorates the 10th anniversary of the guidelines.

There are also initiatives carried out at the EU level that will create regulations on e-commerce B2C transactions, including laws on sale of goods and services, data protection and privacy. For example the European Commission has proposed a new Consumer Rights Directive that aims to harmonise consumer protection framework across 27 Member States.⁵ Also the EU’s Data Protection Directive is under review.⁶

Online advertising and information disclosure

In the online environment, in which the buyer and seller are remote and the buyer has limited ability to assess physical quality of products, access to accurate and clear information is essential to guarantee informed purchase. Yet many websites do not provide complete information about the products, prices and their own businesses, as documented by the results of the European Commission investigation into misleading advertising and unfair practices on websites selling consumer electronic goods.⁷

The lack of clarity in information disclosure is particularly acute in sales of digital content. Terms and conditions attached to digital content often either omit important details of the transaction, or are unclear about restrictions on usage, software and equipment required, service subscriptions, and interoperability of attached devices and with alternative platforms. For example, consumers frequently enter EULAs without clear consent, via a “click through” license which a user must accept without necessarily being given the chance to read the agreement. The subsequent modifications of contract terms also contribute to the consumers’ ability to defend themselves. The modification of contract terms by service providers after consumers have entered the contract, and lack of consumer notification about these subsequent changes, also put consumers at disadvantage.

There are also concerns about the transparency of advertising practices. For example in the UK 58 percent of online advertising is done on search engines and search comparison

⁴ TACD Charter of Consumer Rights in the Digital World, March 2008

⁵ Commission of the European Communities, Proposal of a Directive of the European Parliament and of the Council on consumer rights, 8 October 2008.

⁶ http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0003_en.htm

⁷ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1292&format=HTML&aged=0&language=EN&guiLanguage=en>;

http://tacd.org/index.php?option=com_content&task=view&id=154&Itemid=43; see also the European Commission report on cross-border e-commerce, 22 October 2009

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1564&format=HTML&aged=0&language=EN&guiLanguage=fr>

sites.⁸ 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 prominent position of a vendor may not equate with the best quality offer or best match of a product searched.⁹ Testimonials and endorsements are another issue, as it is not always clear whether the people making such endorsements are providing independent, unbiased opinions or if they are being compensated in some way. The US Federal Trade Commission has recently revised its guidelines in this regard and made clear that its guidelines apply to individuals who accept products or favours in order to recommend products or services on blogs and other online platforms.

It is also important that consumers at all times know the financial consequences of their purchases, the various means of shipping (by courier, by air, or by surface mail) and the costs of returning goods. This includes both initial costs involved for the user and subsequent costs of using on-line help or other fundamental customer services (e.g. directory enquiries, short message service on a mobile phone).

Furthermore, the existing regulatory frameworks on advertising in the US and EU do not deal adequately with consumer concerns over transparency of new marketing methods such as profiling or targeted advertising, or techniques based on blurring the line between editorial content, advertising and direct selling. In addition there are questions and concerns about enforcement and remedy mechanisms available at the trans-border level and how best to protect children, who are particularly susceptible to online advertising as highlighted by the TACD Resolution on Marketing to Children Online.¹⁰

All these factors have raised questions as to whether the currently applied regulatory frameworks within the US and EU sufficiently address the changes in marketing techniques and ensure consumer protection against misleading and unfair advertising and marketing practices.

Privacy and data protection

Research data suggest that consumers have significant fears about privacy and security of personal data collected online.¹¹ 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. New technologies facilitate collection, storage and trading of personal information online to supply the new online marketing model of profiling and behavioural advertising. As the National Consumer Council “Glass

⁸ Internet Shopping. An OFT Study, 2007.

⁹ Internet Shopping. An OFT Study, 2007.

¹⁰ TACD Resolution on Marketing to Children Online, March 2009.

¹¹ European Commission’s Staff Working Document, Report on cross-border e-commerce in the EU, 5 March 2009; Eurobarometer Survey on E-Commerce in the European Union 2008; EP IMCO Briefing Note on Consumer Confidence in the Digital Environment, 2006; Internet Shopping. An OFT Study, 2007.

Consumer” explains, “in the private sector, personal information underpins attempts to increase sales ... by customising and personalising goods and services”.¹²

Yet at the same time the regulatory regimes on data protection are being eroded and are not keeping pace with technology, and enforcement is weak.¹³ The process of collection and trading of personal data is not transparent to consumers and often conducted without their consent. It is difficult for consumers to identify and correct errors, which often become apparent only after something goes wrong and damage is done. 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. Also the regulatory frameworks in the US and EU insufficiently protect consumers against data loss and negligence caused by a third party, and they do not provide individuals with recourse such as collective action for security breaches.

Dispute resolution and redress

Consumers’ rights to dispute resolution and redress - especially cross-border—is complicated by many factors such as jurisdiction, varying methods of ADR trans border, costs, accessibility and convenience.¹⁴ Although the European Commission has initiated actions to improve redress across EU borders, further work is required to strengthen redress mechanisms, especially collective redress. The introduction of a Community instrument such as a Framework Directive on collective redress is crucial to ensure effective access to justice for consumers and should be carried out by the new European Commission. The lack of clear guidance and oversight on the development of Corporate Privacy Rules further obstructs the ability to rely on the certainty of legal protections across borders. Consumers’ ability to dispute payments also varies. For instance, in the US, consumers’ payment dispute rights differ significantly depending on whether the charge is billed to their credit card, debited from their bank account, or billed through their wireless service provider. The uncertainty regarding the jurisdiction under which disputes are resolved also contributes to forum shopping by e-tailers, which often results in regulatory arbitrage that may work against the consumer.

Digital products

While consumer demand for digital goods and products is growing and pushing the online market to expand cross-border, the regulatory framework is lagging and hinders the process.

Consumers’ access to and choice of digital products is severely hampered by existing Intellectual Property Rights regimes (IPRs) that allow discriminatory restrictions on consumers’ ability to access and use products in an anti-competitive manner to protect copyright holders. Consumers are granted limited protection against IPR misuse which results in uncertainty over legal use of the digital content they buy and about the interoperability of equipment and file formats used. The use of IPRs to leverage unfair competitive advantage leads to segmentation of the markets, weakening price competition

¹² Susanne Lace (ed.), *The Glass Consumer: Life in a surveillance society*, National Consumer Council, 2005.

¹³ TACD Resolution on Identity Theft, Phishing and Consumer Confidence, February 2007.

¹⁴ TACD Resolution on Alternative Dispute Resolution in the Context of Electronic Commerce, January 2000.

and limiting consumer choice. Even more harmonised and integrated markets such as the EU internal market do not necessarily resolve this problem, as the iTunes case illustrates.¹⁵

In addition, consumer rights and obligations in relation to the purchase and servicing of digital products are not clearly established, and consumers lack redress and remedies for faulty or damaged digital goods and services. For example, the newly proposed Consumer Rights Directive in the EU neglects the area of digital goods and services and the growing consumer reliance on digital technologies.¹⁶

Mobile commerce

The convergence of operating platforms, development of smarter mobile devices and increasing number of mobile phone users has accelerated 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).¹⁷ The TACD exploratory survey on mobile commerce conducted in 2006 reported 38% of survey respondents experienced problems.¹⁸ Areas of particular concern included limited information disclosure, unauthorised purchases, misuse of personal information, and problems getting complaints resolved. The recent Consumer Focus mystery shopping survey conducted with the use of a mobile phone with consumer organisations¹⁹ 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.²⁰

Online auction platforms

Online auctions are another area of e-trading which generate a large number of consumer complaints. According to the UK Consumer Direct the most common complaints refer to

¹⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22>

¹⁶ Consumer Focus Response to the Committee on Internal Market and Consumer Protection on the Consumer Rights Directive, 2009.

¹⁷ OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, Korea 2008.

¹⁸ TACD Resolution on Mobile Commerce, 2005.

¹⁹ European Consumer Organisations-BEUC (Belgium), Public Interest Advocacy Centre (Canada), the Danish Consumer Council (Denmark), Federation of German Consumer Organisations (Germany), NCOS (Japan), Consumer Korea (South Korea), National Consumer Council (Norway), Slovenian Consumers Association (Slovenia), Organisation of Consumer and Users-OCU (Spain), Consumer Focus (UK) and American Council on Consumer Interests (USA).

²⁰ Pocket shopping. International consumer experiences of buying goods and services on their mobile by Marzena Kisielowska-Lipman, Consumer Focus, December 2009.

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.²¹ 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.

There are also problems with enforcement of B2C distance selling regulations, in cases of businesses using online auctions for trading "fixed priced" products, which give consumers rights to cancellation and warranties. The UK Office of Fair Trading (OFT) study of Internet Shopping reported that the required information about business sellers is not always available to consumers and that consumers often do not know whether they are dealing with a seller selling "in the course of a business".²²

²¹ <http://www.consumerdirect.gov.uk/>
²² Internet Shopping. An OFT Study, 2007.