

TACD

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Resolution on Defending Consumer Rights and Fair Business Practices in the Digital Environment

During the past decade, a strong tendency by our governments to deregulate and increasingly rely on industry self-regulation has prompted a fundamental breakdown in the consumer marketplace in the United States and European Union. The subsequent unmonitored corporate behavior left our markets with too many defective consumer goods and unsustainable and economically devastating financial services products. This push for so-called regulatory reform has badly weakened adoption and enforcement of consumer protection laws, the central component necessary to ensure a fair and honest marketplace.

Lamentably, consumer protection and enforcement in the developing digital environment and marketplace does not even meet these badly diminished standards. In the digital marketplace, consumers are forced to adhere to terms and conditions imposed by business. As research conducted by consumer organisations in the UK, Germany and Norway shows¹, many online businesses continue to use unfair contracts of adhesion and non-negotiable terms that consumers must accept if they want to purchase services or virtual copyrighted goods (such as software, music or books) online.

These terms and conditions are far from transparent. They employ complex wording and incomprehensible legal jargon that give providers the right to remove services or terminate contracts without giving notice, unreasonably limit vendor liability and prohibit consumers from making otherwise legal use of the products and services they paid good money for. This inherent unfairness is particularly apparent in “cloud” computing and social network “contracts” that often give the provider the right to use anything a consumer does or stores on its remote servers. By “accepting” the incomprehensible and unintelligible terms on these sites, consumers unknowingly give up rights to ownership of personal information and content, including its resale to third parties. Some providers hide the disclosures where users are not likely to notice them, or worse, don’t make them publicly available. Even if they are found, they can change without notice and can’t be saved by consumers for future reference. As a further disadvantage, many of these products and services are sold cross-border and terms and conditions expose consumers to legal uncertainties when the laws vary between countries.

¹See for e.g. Consumer Protection in Digital Media, Verbraucherzentrale Bundesverband, 2006 http://www.vzbv.de/mediapics/consumer_protection_in_digital_media_2006.pdf; Complaint Against iTunes Music Store, Forbrukerradet, 2006, <http://forbrukerportalen.no/Artikler/2006/1138119849.71>; Whose license is it anyway?, National Consumer Council 2008, http://collections.europarchive.org/tna/20080804145057/http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr_whose_license.pdf

EU legislation (The Unfair Contract Terms Directive) protects consumers against terms and conditions that are considered unfair, and that favor business in contracts that have not been individually negotiated. However these laws are not effectively enforced by regulators and consumers rarely complain because they do not read the contracts and are not aware of the legislation. In the U.S., where many state laws generally prohibit unfair or unconscionable contract terms, the courts have seen fit to uphold contracts of adhesion in the limited cases in which consumers have challenged these digital “contracts..” These decisions generally have held that clicking through a series of virtually hidden terms on a website is sufficient to create a binding contract. The U.S. Federal Trade Commission, which has the authority to take action to stop unfair and deceptive acts or practices, has not been vigilant in regard to unfair terms in agreements for digital products and services.

A further gap in online consumer protection concerns basic remedies and redress for digitally downloaded goods, which form an increasing share of the online marketplace. For example 28% of UK consumers have purchased music in MP3 and movies in digital format, and this figure rises to 49% for those aged 15 to 24.² And in the EU, on average 37% of people download or access digital content such as games, music or films – a figure that rises to well over 50% in the Netherlands and Norway.³ Yet the sale of digital downloads are not subject to the same protections and guarantees as are so-called “tangible” goods in the event they turn out to be faulty, damaged or not as described. In the EU if consumers buy a CD from a shop they have rights; if they buy and download the same music from the same shop online, they have no clear rights. In the U.S., while some states provide protections to consumers in both situations described above, most simply do not (nor is there any clear federal protection for consumers purchasing digital goods). The EU is reviewing its consumer rights legislation, but no plans have been made to extend legal protections to digital products. Similarly, while there have been discussions across the U.S, about including digital products under existing consumer protection laws, little or no consistent progress has been made in achieving this goal.

Allowing e-businesses to impose such unfair terms on consumers or to engage in unfair practices can and ultimately will prove to be a hindrance in allowing the internet to reach its full potential for innovation and new business models. As we look to rebuild our market economies, it is essential that consumers trust in their purchases and are confident that the law will protect them if a business imposes unfair contract terms. Restoring consumers’ lost trust and confidence in both the traditional and e-commerce marketplaces can only be accomplished by strengthening consumer protection laws and adapting them to the online environment – and by vigorously enforcing those laws.

RECOMMENDATIONS

TACD resolves that EU and US governments should:

1. Regulate the creation or amendment of legal instruments by requiring that consumer contracts must:

- be explicitly agreed to by consumers
- be easily saved and printed by online consumers
- be concise, simple and readable
- allow users to exercise their reasonable rights over the products purchased;

² Time to change the tune, Consumer Focus, February 2010, <http://www.consumerfocus.org.uk/assets/1/files/2010/02/Consumer-Focus-Time-to-change-the-tune1.pdf>

³ Source: Eurostat http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/main_tables

- NOT allow the provider to alter the nature of the transaction as originally understood by the consumer
- NOT give providers the right to use consumer information and property without their knowing and express permission
- NOT limit provider's or vendor's liability
- NOT prohibit consumers from seeking redress through a public court system
- NOT prohibit consumers from taking collective action

2. Ensure laws that address unfair business practices are broad in scope, and therefore future-proof.

3. Vigorously enforce the laws concerning unfair business practices and make certain that newly created consumer protection statutes are enforceable by both regulators and individual consumers. In addition to responding to complaints, regulators should monitor and investigate potentially unfair terms in digital contracts, through for example regular market sweeps and market studies.

4. Extend the scope of basic consumer protection legislation, such as guarantees and rights of return, to include digitally downloaded goods (i.e. music, software, games, and books).

5. Ensure effective and appropriately sufficient penalties for service providers and digital product vendors that engage in unfair practices and the availability of effective means for consumer redress, including the right to collective action and cross-border dispute resolution.

6. Provide regular instruction to businesses on best practices to comply with the law. These instructions should mandate that service providers and digital product vendors:

- Supply consumers with easily accessible up-front information about the terms and conditions of their products and services prior to purchase.
- Ensure that agreements are written in concise, plain language and presented in readable formats, and that they are published on their websites in open document formats that are easily downloaded and printed.
- Ensure that the content of the terms and conditions is applicable and relevant both to the product and the national law of the purchasing consumer.
- Take affirmative and active steps to make certain that their contracts and practices are not unfair, rather than wait for regulators or consumers to take action.
- Ensure that contracts which give companies the right to "any time, any reason" changes also allow consumers the right to cancel without penalty when changes are implemented and to make every effort to ensure that consumers are apprised of and recognize such changes.