

## Communications Consumer Panel response to BIS' invitation to comment on the UK technical non-paper on e-commerce (digital single market)

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### Introduction

The Communications Consumer Panel (the Panel) and the Advisory Committee for Older and Disabled People (ACOD) welcome the opportunity to respond to BIS' invitation to comment on the UK technical non-paper on e-commerce (digital single market).

The Panel works to protect and promote people's interests in the communications sector. We are an independent body, established by the Communications Act 2003. The Panel carries out research, provides advice and encourages Ofcom, Government, the EU, industry and others to look at issues through the eyes of consumers, citizens and micro businesses. The Panel pays particular attention to the needs of older people and people with disabilities, the needs of people in rural areas and people on low incomes, and the needs of micro businesses, which face many of the same problems as individual consumers.

There are four members of the Panel who represent the interests of consumers in England, Northern Ireland, Scotland and Wales respectively. They liaise with the key stakeholders in the Nations to understand the perspectives of consumers in all parts of the UK and input these perspectives to the Panel's consideration of issues.

There is also cross-membership with Ofcom's Advisory Committee on Older and Disabled People. This means that Members, in their ACOD capacity, provide advice to Ofcom on issues relating to older and disabled people including television, radio and other content on services regulated by Ofcom as well as about issues concerning the postal sector.

### Response

The UK market for digital content is a significant part of the economy and is growing rapidly. We have welcomed the intention to introduce a new category of digital content in consumer law, new statutory rights for digital content and new

statutory remedies for faulty digital content which will apply to data supplied in a digital form (including software, music, computer games and apps).

No doubt many consumers' experiences are positive, but we believe there remains cause for concern. A survey by the then Consumer Focus found that 16% of purchasers of digital content had had a problem with a digital download. This finding suggests evidence of significant consumer detriment that may well increase over time as the market grows.

As the framework on consumer rights and protections for digital content across the EU is unclear, we welcome action to tackle this unsatisfactory market-inhibiting situation. It is important that any proposals aim to:

- Provide legal certainty for both businesses and consumers as to the rights available in relation to digital content;
- Provide a simple framework that is easy for business and consumers to understand and use, by aligning it where possible with goods and services legislation and with consumer expectations;
- Align across Europe
- Support a growing and significant part of the UK economy and protect intellectual property rights, by taking into account the particular nature of digital content;
- Achieve a fair balance between rights and responsibilities for both businesses and consumers;
- Reduce consumer detriment, through easier access to redress mechanisms.

The Panel would stress the importance, once a common set of consumer rights has been agreed, of communicating information about these changes to consumers. Research published by Ofcom has found that only 22% of internet users say they read website terms and conditions / privacy statements thoroughly, 47% say they skim through them without reading them thoroughly and 21% say don't read them<sup>1</sup>.

The Panel would welcome moves to standardise clear quality standards for digital content so that consumers' reasonable expectations can be defined, regularised and protected; so that the quality standards consumers can expect digital content to meet can be clarified; and so that consumer confidence increases and is then maintained.

The question of whether consumers should have the right to digital content meeting a certain quality, even if they do not pay money for it, is a complex one. The Panel has some concern that rights may not apply to digital content provided

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<sup>1</sup> Media Use and Attitudes, Ofcom 2014 [http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/adults-2014/2014\\_Adults\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/adults-2014/2014_Adults_report.pdf)

in exchange for valuable information. As the Panel noted in ‘Personal Data Online: the Consumer Perspective<sup>2</sup>’, although there may not always be a conscious recognition of the exchange, the provision of personal data by a consumer can have significant benefits in the form of services and applications that are more tailored to their needs, or that they might otherwise have to pay for. Building on this theme of the importance of awareness, in its response to BIS’ midata consultation<sup>3</sup>, the Panel noted that consumers will need to be made aware of how valuable their data is to businesses.

The digital content market bears the unusual characteristic of not allowing the consumer to inspect or try digital content prior to purchase - the consumer is reliant solely on information provided about the digital product before purchasing. As in so many other areas in the communications market, transparency is key and is one way of addressing this information asymmetry. However if transparency is not correctly applied - if digital content does not conform to the quality rights of being fit for a particular purpose or corresponding to the description given - then repair or replacement is unlikely to be adequate or to rectify the situation. In such cases, we believe that a short-term right to reject is appropriate - as in the case of physical goods (e.g. a DVD) - despite the fact that it is generally not feasible for a consumer to return digital content.

The Panel notes particularly research commissioned by the Law Commission that shows that strong remedies, particularly the right to reject, give consumers the confidence to purchase goods and transact with brands which are unfamiliar to them, and from traders whose policies they do not know. This situation is exacerbated by the often intangible nature of the digital market, where there are no physical shops or outlets and possibly no easy means of making contact if a consumer has a problem.

We would urge that digital content/services are considered assessable for whether they are of satisfactory quality and fit for purpose. Although we accept that it is difficult to estimate the costs and benefits, from a consumer’s point of view, we consider that it is inherently unfair if a consumer is unable to receive a refund for a purchased service that is not fit for purpose. If the consumer had been aware of this in the first instance, they are unlikely to have purchased the service. The key point is that there is an absence of informed choice. There is a risk that a system which deprives the consumer of any right to redress as a result of these elements is fundamentally flawed.

In relation to the portability of digital content, we believe that consumers should be able to access the content that they have paid for wherever they go.

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<sup>2</sup> <http://www.communicationsconsumerpanel.org.uk/online-personal-data/online-personal-data-1>

<sup>3</sup> <http://www.communicationsconsumerpanel.org.uk/downloads/CCP-midata-response.pdf>

On the concept of “ownership” of digital content, the Panel believes that consumers must be able to understand what rights are and are not included in the licence they are buying. This must be clear and not hidden in small print.

We are conscious of the risk of fraud but believe that this should be tackled as a problem in its own right and should not prohibit consumers from accessing the content they have paid for.

The Panel remains concerned by consumers’ access to information about complaints and redress mechanisms. Research by the then Consumer Focus found that, of those consumers who experienced a problem with digital content, the main reasons that 32% did not take action were uncertainty about how to obtain redress (60%) and the low value of the download (40%). Similarly, a study by the Office of Fair Trading on consumer detriment found that consumers are less likely to seek redress for low value transactions. As noted, this is highly significant for the digital content market where there is a high volume of low value transactions, with music tracks and apps often selling for a pound or less.

If problems with purchased goods or services go unresolved, consumers are not always obtaining adequate redress. This is particularly the case with low value goods where, although the individual loss may be small, the cumulative consumer detriment is significant. Moreover the relevant traders have no incentive to improve their offers, potentially leading to customer detriment, a loss in consumer confidence and lower participation in the wider market.

Without easy access to ADR, consumers end up simply putting up with a problem rather than pursuing it or they may have to resort to costly court action to resolve complaints. Consumers are often deterred from seeking redress by the prospect of navigating the legal system, and ADR provides a faster, cheaper and more straightforward means of obtaining redress.

Previous BIS consultations on consumer rights have noted that the terms and conditions of many digital content traders may also put consumers off from seeking redress for faulty or sub-standard digital content. The Panel has argued for the importance of providers giving consumers clear and reliable information. The Panel shares the concern that, where consumers expect to receive redress that the business does not think it is obliged to provide, there is a risk to businesses of time and money being spent on unnecessary disputes along with reputational risk if they decline to provide that redress or if they make the process difficult. Whilst the right to receive redress is essential, it is the process used by the consumer to do this that is critical. We would highlight the need for established standards, consumer friendly processes (up to and including Alternative Dispute Resolution) and clear information.