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**OECD ROUNDTABLE ON CONSUMER PROTECTION IN THE PURCHASE OF DIGITAL  
CONTENT PRODUCTS: SUMMARY OF DISCUSSION**

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## FOREWORD

On 13 April 2011, at the time of its 81<sup>st</sup> session, the OECD Committee on Consumer Policy (CCP) held a roundtable examining key trends and consumer challenges in the purchase of digital content products. The event was organised within the framework of the committee's review of the OECD 1999 *Guidelines for Consumer Protection in the Context of Electronic Commerce* ("the 1999 guidelines").

This report provides a summary of the discussion held among representatives from governments, industry, civil society and academia. It was declassified by the committee at its 82<sup>nd</sup> session on 26 October 2011.

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## OECD ROUNDTABLE ON CONSUMER PROTECTION IN THE PURCHASE OF DIGITAL CONTENT PRODUCTS: SUMMARY OF DISCUSSION

The following is a summary of the roundtable discussion on digital content products that took place on 13 April 2011. The event was held within the framework of the CCP's review of the 1999 guidelines ([www.oecd.org/dataoecd/18/13/34023235.pdf](http://www.oecd.org/dataoecd/18/13/34023235.pdf)).

### OECD work on digital content: Working Party on the information Economy (WPIE)

The Secretariat to the WPIE provided an overview of the work it had carried out since 2005, which included:

- A Recommendation on public sector information ([www.oecd.org/dataoecd/41/52/44384673.pdf](http://www.oecd.org/dataoecd/41/52/44384673.pdf)).
- Policy guidance for digital content ([www.oecd.org/dataoecd/20/54/40895797.pdf](http://www.oecd.org/dataoecd/20/54/40895797.pdf)).
- A series of reports exploring how digital content had changed the structure of markets across the OECD in areas including: music, scientific publishing, online computer games, mobile content, public sector information, user created content, film and video industries, and news papers ([www.oecd.org/document/62/0,3746,en\\_2649\\_34223\\_32160190\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/62/0,3746,en_2649_34223_32160190_1_1_1_1,00.html)), and
- A paper on virtual worlds ([www.oecd-ilibrary.org/docserver/download/fulltext/5kg9qgnpjmg.pdf?expires=1326723813&id=id&accname=guest&checksum=113E3A681AB22874AED2A8E9DA6022FF](http://www.oecd-ilibrary.org/docserver/download/fulltext/5kg9qgnpjmg.pdf?expires=1326723813&id=id&accname=guest&checksum=113E3A681AB22874AED2A8E9DA6022FF))

The Secretariat further noted the importance of examining the following issues in the near future:

- The “apps” economy (*i.e.* applications that are used on mobile devices). Focus would include examining:
  - The level of competition between emerging operating systems platforms (*i.e.* Android, and Apple's operating system).
  - In-apps payments problems (for example, in early 2011, the US Federal Trade Commission investigated information disclosure and authentication issues associated with the download of a free game application aimed at children under which other applications (“in-apps”) may be purchased; in this case, children had been able to make purchases of in-apps without parental knowledge, leading to highly expensive bills).
  - Interoperability and privacy issues.
- EBooks, looking at the new ecosystem, interoperability, and digital rights management issues.

### Consumer rights: Interpretation of how existing generic consumer protection rules may apply to digital content products

#### *Emerging findings from the Department for Business Innovations and Skills (BIS) (United Kingdom)*

A presentation was made by the BIS on the preliminary results of its research on consumer redress rights for non-conforming digital products. The project, aimed to ensure parity in core consumer protection in the purchase of digital content products (whether they are tangible or intangible) covered products provided on disc, downloaded, streamed, and those that are cloud based including, for example, eBooks, apps, ringtones, and music. Research showed that:

- Varying court interpretation of existing legislation has led to legal uncertainty as to the consumer rights attached to, on the one hand, tangible digital products, and, on the other hand, intangible products. Software, for example, has been regarded as a good when supplied on a disc; its nature when downloaded had however not been clarified.
- Recent research commissioned by the BIS has concluded that while downloads may be treated as goods (with possible adaptations), other products, such as those that are cloud-based, may be classified as services. Other products could be seen as a mix of goods or services.

It was noted that clarification of consumer rights in the purchase of digital content products is needed. The review of the 1999 guidelines was seen as helpful in that regard as it could help to promote consistency internationally. Supporting research could be undertaken on consumer detriment, licenses, fraud, and liability.

### ***Recent surveys from Consumers Focus (United Kingdom)***

Results of surveys carried out in the United Kingdom confirmed that digital products delivered in different formats had been treated differently. The following consumer problems were noted:

- Lack of remedies for faulty goods.
- Lack of contract transparency, lengthy and complex contract provisions and unfair contract terms.
- Inadequate information on *i)* the characteristics of products and purchasing processes; *ii)* dispute and redress mechanisms, and *iii)* the conditions under which a purchased good or service might be accessed or terminated.

OECD work could include: *i)* mapping the application of domestic laws to digital content products across the OECD; and *ii)* exploring what the impediments to cross-border trade of digital content products are and how they could be remedied.

### ***Research in France on consumer protection for digital products***

A report was made on the situation in France where courts had examined how generic consumer protection rules (*e.g.* distance contracts and personal data) may apply to digital content products. Such jurisprudence showed that the following issues should be resolved:

- Different rules may apply to similar digital content products depending on the format in which they are delivered (physical or intangible).
- More complex issues may emerge in the case of mixed digital content products (*e.g.* games) delivered on a physical support but to which intangible products may be added.

The development of specific legislation was seen as necessary. As suggested in BIS' presentation, rules could, for example, require online providers to inform consumers about the length of time during which a purchased good or service (*e.g.* a game) might be accessed or terminated.

### ***Studies from the European Commission (EC) (Directorate General for Justice)***

Preliminary information was provided on two EC studies being conducted on:

- *Consumer detriment.* The project highlighted that problems are experienced in the following areas: lack of adequate information about products and transactions, unclear/complex

information, quality, access, security and privacy issues, interoperability problems, and unfair contract terms.

- *The legal framework that should apply in the EU to B2C digital content contracts.* The work, which will draw on country reports, will provide a comparative analysis of country legislation and recommendations for possible future legislative action.
- The current discussion between the EU Parliament and the Council on a Directive on consumer rights.<sup>1</sup>

### ***Views from industry: Digital Europe and the Motion Picture Association***

Growing consumer participation in online activities involving the purchase and use of digital content products was noted. The level of pre-contractual information about available goods and services had expanded exponentially, through, notably, price comparison websites, discussion forums, and other online feedback platforms. Economic consumer empowerment and, as a result, changing consumer behaviour, had gone along with rethinking consumer protection as consumers were increasingly taking control of their own protection online. Such level of responsibility represented a challenge for regulation to keep pace of what consumers were already able to do with respect to enforcing their own rights or penalizing brands which would not respond to their demand and expectations. Any regulation to be developed in this area should therefore be non-prescriptive so as to notably avoid slowing down innovation.

An overview of rules governing the online distribution of films was further presented. These were mainly based on a direct contractual relation between the licensor and the licensee. Copyright was seen in that context as an essential tool allowing the film business to notably receive funding, market and distribute its products. Digital rights management had in this regard allowed for the implementation of a variety of business models (such as pay television under which a programme may, for example, be copied once) aimed to respond to growing consumer demand for various digital content products. While the development of specific rules covering digital content was not regarded as necessary, enhanced enforcement of existing schemes, and, in particular, rules prohibiting fraudulent activities, such as piracy, were recommended.

### **Committee discussion and next steps**

#### ***Committee discussion***

Delegations highlighted the need for international consistency in consumer rights in the purchase of digital content products, due to the cross-border nature of many transactions. Delegations also indicated that:

- The adoption of specific legislation on digital content may not keep up with rapid technological changes.
- Implementing generic consumer protection rules for all digital content products, whether provided in a physical or intangible form, could be beneficial for consumers. This had been done in Australia and New Zealand under recent legislative reform. Software, whether provided in a physical form or through download, had been defined as a good for which guarantees, information disclosure requirements, and rules on unfair contract terms have been applied.

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<sup>1</sup> The EU Directive on consumer rights was adopted in July 2011 and is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>.

- In the United Kingdom, industry had argued that license agreements should supersede generic consumer protection rules.

### *Next steps*

Delegations discussed the definition of digital content products that could be used and the scope of the CCP's future work.

- A number of delegations favoured a broad definition that would cover intangible products. Efforts should be made to determine the unique characteristics of digital content products and the extent to which products could be treated as goods and/or services. Examining ongoing discussion on this issue in the trade area (at World Trade Organization level) could help advance the debate. Other delegations however indicated that more attention should be paid to the specific issues to be studied and that this should drive how products were defined.
- Views also varied on the issues to be covered. Some delegations suggested narrowing the scope to a limited number of issues. Others found that it may be premature to do so at this stage and that more research on the issues mentioned in a preliminary draft outline should first be undertaken. The studies carried out by the EC (see: [http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital\\_conf\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm)) were referred to as potentially useful for scoping the work.

There was general agreement that the analytic report to be prepared should explore:

- The structural changes in the market from a consumer and competition/trade perspective.
- Issues related to the way digital content products are being delivered, ordered and used by consumers.
- Unfair contract terms, which, it was noted, were already prohibited under the 1999 guidelines (Part II, Section II).
- Redress. The analysis could explore differences in available consumer redress mechanisms with respect to returning intangible products (*e.g.* an e-book) as opposed to tangible products ordered online (*e.g.* a physical book). How such differences would comply with the principles in the 1999 guidelines (Part II, Section VI) should be looked into.
- Information disclosure. Recognition was made that the 1999 guidelines contain a number of principles on what information should be provided to consumers to make informed choices in e-commerce (Part II, Section III). However, delegations suggested focusing the work on the problems that consumers may encounter with ways that information on products is presented to them (including lengthy and complex contract provisions, information on product characteristics, and the conditions under which purchased goods or services may be accessed, or terminated).
- There was agreement that privacy and security issues, which are being addressed elsewhere in the OECD, should not be covered.

The 1999 guidelines were seen as robust in light of their general principles on transparency, unfair contract terms, information disclosure and consumer redress. Delegations agreed that focus should be made on how such principles could be further elaborated to cover digital content products more effectively; it would be helpful in this regard to examine how countries have been applying these basic principles to digital content products.