



## **Submission to the Green Paper on the review of the Consumer Acquis**

May 2007

### **About eBay**

eBay is a global leader in the digital environment. We provide an online marketplace where practically anyone can trade practically anything. With 233 million users selling and buying on eBay worldwide, the eBay marketplace is a platform for C2C as well as B2C and B2B ecommerce.

At any given time, there are approximately 105 million items listed on eBay and approximately 10 million listings are added per day, providing consumers and businesses with a broad variety of choice to buy products, 24/7 from all over the world.

eBay is not an auction house or a retailer. While eBay is well-known for its auction-style transactions, users can also buy and sell in fixed-price formats, which accounts for approximately 37 percent of the total Gross Merchandise Volume (Q3 - 2006). This choice between buying a product using an auction-style transaction or at a fixed price format (so-called "Buy-It-Now") adds to the sovereignty of the buyer.

eBay pioneers communities built on commerce, sustained by trust, and inspired by opportunity. eBay enables ecommerce on a local, national and international basis with an array of websites – including the eBay Marketplaces, PayPal, and Skype – that bring together millions of buyers and sellers every day.

### **eBay and the Acquis review**

An Information Society Service Provider eBay is satisfactorily regulated by the eCommerce Directive. Why then are we interested in the review of the Consumer Protection Acquis?

Trust is the currency of the eBay marketplace. Without it sales would not happen and eBay would not flourish. eBay therefore provides the transparency necessary to enable cross-border ecommerce. At present achieving the full potential of the marketplace, as with the Internal Market, is hampered by the lack of transparency and legal certainty for buyers and sellers provided by the application of consumer law.



As a facilitator of ecommerce eBay is in the unique position of being able to provide insight into the application and usefulness of the current Consumer Acquis from the perspective of the eBay community. The review of the Consumer Acquis, and particularly the Distance Selling Directive (DSD), presents an opportunity to modernise existing protections for consumers and suppliers, increase confidence and growth potential amongst the existing community whilst at the same time attracting new participants.

The specificities of the Distance Selling Directive have already been dealt with in eBay's submission to the European Commission Public Consultation on the implementation of the Directive. [See eBay's submission](#)

eBay, due to its unique global leadership position in the digital environment, is perfectly placed to help regulators and legislators understand the needs of its community members.

The questions raised by the Green Paper are key to the modernisation of the legal framework that protects consumers in the 21<sup>st</sup> Century off- and online retail environment. eBay is therefore looking forward to working with the European Commission, Members of the European Parliament, Member State Governments and fellow stakeholders to ensure that any forthcoming review will create a regulatory environment that increases protection of buyers and sellers, confidence in online commerce, and leads to a growth in ecommerce in Europe.



**Question A1: In your opinion, which is the best approach to the review of the consumer legislation?**

eBay views a mixed approach as the best way forward. A horizontal instrument would be the best way to ensure legal certainty and clarity with transposition of key definitions and technical measures e.g. the definition of a consumer, the length of the cooling-off period, etc

eBay does not wish to see the removal of vertical Directives that provide the specificities required by particular sectors. For example, the motivation for introducing a withdrawal right is different in the various fields of consumer protection regulation. Catering to such specificities is crucial to a fair regulatory solution, to gaining consumer and trader trust in ecommerce, and should therefore be maintained.

At the same time simplification of existing rules through greater harmonisation will encourage higher levels of compliance by traders, who will be less likely to be discouraged by labyrinthine regulations. This will in turn lead to higher levels of actual consumer protection.

**Question A2: What should be the scope of a possible horizontal instrument?**

If national borders are to become irrelevant in the digital environment then clarity and transparency for both sellers and consumers, in both domestic and non-domestic contracts, must be developed to create equality between the different sales channels both on and offline.

**Question A3: What should be the level of harmonisation of the revised directives/the new instrument?**

The eBay market place presents a harmonised way of doing business across national borders. The mechanics of making a listing as a business, or indeed conducting market research and making a purchase are identical across European markets. However as mentioned above the lack of a fully harmonised consumer protection framework across the EU Member States confuses buyers and sellers and acts as a disincentive to cross-border trade. For example it is commonplace for traders to restrict the sale of their goods to their home market to guarantee protection and increase legal certainty.

This situation is a result of the use of minimum harmonization by the existing acquis directives leading to excessive or inconsistent regulation in some Member States. This causes confusion amongst traders and consumers and hampers the development of businesses without providing additional benefit for the consumer. Full harmonization eliminates or at least minimizes this risk. The introduction of “full harmonisation” is therefore paramount.



**Question B1: How should the notions of consumer and professional be defined?**

Transparency and clarity are central to the legal certainty required for cross-border commerce in the digital environment to reach its potential. eBay would therefore prefer an alignment of the existing definitions in the acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.

**Question B2: Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?**

eBay welcomes the Commission's recognition that the notion of the intermediary does not include internet trading platforms. The question is however relevant to eBay as a number of professionals offer services representing consumers wishing to sell their goods. eBay supports the maintenance of the status quo. Furthermore experience has also shown that in some cases the application of new liabilities may act as a disincentive to businesses thinking of operating as intermediaries. Transparency, is needed to ensure that buyers are well informed about their rights. Consumers should therefore be informed that a good is being sold through an intermediary and that they are therefore going to conclude a C2C-contract..

**Question D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?**

Clarity is key in this area. The maintenance of the status quo would seem to be the best solution to achieve this, since it would ensure maximum clarity for consumers and sellers by applying Community rules exclusively to non-negotiated or pre-formulated contract terms. In cases of obvious misuse, when the terms of a contract are dictated by one dominant party, they can still be judged as being non-negotiated or pre-formulated.

**Question D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?**

eBay supports the use of a Black list as the most likely way to create legal certainty. The Black list should be closed and any amendment should be made with the full participation of the European Parliament and Council.



**Question D3: Should the scope of the unfairness test of the directive on unfair terms be extended?**

Essential elements of the contract (i.e. price and for example the nature of the good sold) are not debatable (as long as they were clearly recognizable for and accepted by both parties). This is particularly true for auction-like transactions, where the consumer proposes the price, therefore removing the risk that there is a significant imbalance in the obligations. eBay therefore supports the maintenance of the status quo.

**Question E: What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?**

eBay views the cooling off period as the main remedy to be considered. However, in the interests of proportionality the consequences of an extended cooling-off-period could be limited to the information requirements that are essential for the consumer's decision whether to conclude the contract or not.

**Question F1: Should the length of the cooling-off periods be harmonised across the consumer acquis?**

Different styles of transactions bring with them different levels of complexity and risk. eBay would support the agreement of two different categories of directives with specific cooling-off periods for each as a way to ensure legal certainty whilst taking account the specificity necessary to differentiate between sectors.

**Question F2: How should the right of withdrawal be exercised?**

The introduction of a uniform procedure for the notice of withdrawal across the consumer acquis would increase transparency, simplify procedures, and act as an incentive to cross-border trade. Furthermore the introduction of a standard withdrawal form would simplify regulation and bring greater legal certainty for all involved.

**Question F3: Which costs should be imposed on consumers in the event of withdrawal?**

Throughout the acquis consumers should pay "a reasonable cost" for the return of a product. They should be responsible for the return of product in an acceptable condition and liable for any depreciation of the goods caused by inappropriate use. For Distance Selling specific concerns please [See eBay's submission](#) to the public consultation on the implementation of the Distance Selling Directive



### **Question I1: How should delivery be defined?**

Delivery should mean that goods are placed at the consumer's disposal at the time and place specified in the contract. This would ensure that delivery is dependent on the availability of the consumer. However this scenario should be flexible enough to allow buyers and sellers to agree an arrangement corresponding to the type of good purchased. Importantly it should also allow cases of non-cooperation or hampering the fulfilment of the contract e.g. when a consumer fails to pick up a parcel from the post office after it being unsuccessfully delivered to their home, to be taken into account.

The passing of the risk should be assumed in this case; where the consumer hampers or prevents reception, leaving the trader with the risk of a loss or degradation of the good. eBay therefore believes that such situations should be included in a definition of "at the consumer's disposal". Such a clarification would help to ensure harmonization throughout all Member States, introduce clarity and increase legal certainty for traders and consumers.

### **Question I2: How should the passing of the risk in consumer sales be regulated?**

For cross-border sales to increase on and off line traders and consumers require greater legal certainty. To regulate the passing of the risk at Community level, linking it to the moment of delivery, seems to be a desirable goal to avoid the confusion caused by disparate rules. eBay however, sees a need that, if the passing of the risk will indeed be linked to the delivery, it is important that the parties can agree on to whom and when the risk is transferred. Such a situation would occur when the buyer requests a complicated shipping of a good in a situation, where usually the seller requested that the buyer collects the good, it should be possible for both parties to agree that the risks involved are borne by the buyer.

For example, a buyer in Belgium requests the shipping of a vintage motorcycle from Italy when the seller originally requested that a buyer personally collects the vehicle so as to guarantee its condition. On negotiating the sale contract the seller agrees to permit the shipping of the vehicle on the understanding that the risk passes to the buyer at the moment of collection by the shipper from him.

### **Question J3: Should specific rules exist for second hand-goods**

The inclusion of specific rules for second hand goods in the horizontal instrument would ensure that the seller and the consumer would be able to agree a shorter period of liability for defects in second hand goods. eBay does not however agree with this being limited to more than one year. eBay believes that the seller and the consumer should be able to agree a liability period of less than one year.



**Question J4: Who should bear the burden to prove that the defects existed already at the time of delivery?**

eBay's experience is that the status quo has worked well in the past. The limited period of 6 months for the change of the burden of proof minimises the burden on sellers without inappropriately depriving the consumer of his rights.

**Question K1: Should the consumer be free to choose any of the available remedies?**

The maintenance of the status quo would ensure that consumers would continue to be obliged to request repair/replacement before asking for a price reduction or termination of contract only if the other remedies are unavailable. This situation best balances the interests of sellers and consumers.

**Question K2: Should consumers have to notify the seller of the lack of conformity?**

The requirement for consumers to notify traders of any defect within two months and the further harmonisation in this area would create legal certainty for both parties. Existing divergences do nothing but undermine this.

**Question M1: Should a horizontal instrument provide for a default content of a commercial guarantee?**

Commercial guarantees whilst passing direct benefits to the consumer form an important part of the marketing mix. Different companies use different commercial guarantees in order to attract sales. Regulation would remove the incentive for traders to offer such guarantees. This in turn would disadvantage the consumer. Commercial guarantees should therefore remain unregulated.

**Question M2: Should a horizontal instrument regulate the transferability of the commercial guarantee?**

The introduction of a mandatory rule that the guarantee is automatically transferred to the subsequent buyer is acceptable and even desirable to allow for the resale of used goods putting essential consumer rights at risk. However it may be necessary to introduce an obligation to notify the producer about a change in ownership to prevent abuse (e.g. someone whose guarantee period already ended using the guarantee of someone else owning the same product to claim for a repair or compensation).



**Question N: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?**

Transactions concluded on eBay are not auctions. eBay is neither an auction house nor a retailer. Transactions on eBay can, however, be conducted via a competitive bidding process.

eBay strongly believes that to protect consumers' and sellers' rights auctions (as clarified to mean all contracts concluded by competitive bidding) should be brought within the scope of the acquis and in particular the Distance Selling Directive. [See eBay's submission](#) to the public consultation on the implementation of the Distance Selling Directive.

The consumer acquis should provide protections to online traders and consumers equivalent to those they would have in the physical offline environment. eBay believes that a "Doctrine of Equivalence" approach would best address the current imbalance that enables consumers to use the right of withdrawal to sellers' and other consumers' disadvantage.

At present a number of the Directives contain similar exemptions (e.g. financial services, immovable properties, foodstuffs and other perishable goods, tailor made goods, services rendered within the withdrawal period as well as contracts negotiated at the initiative of the consumer). Such exemptions should be maintained. The implementation of the exemptions varies widely between Member States. The list of exemptions should be fully harmonized, as their underlying rationale remains the same in all Member States. Accordingly, eBay would support rationalisation of a fully harmonized list of exemptions.

In order to reduce the information burden on traders and consumers eBay would like to see the introduction of a reasonable *de minimus* exemption that would be standardized across all Directives and Member States – perhaps € 120 per order / transaction. This could be periodically reviewed by the Commission for adjustment based on changed economic conditions and inflation.