

Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)

1. Introduction

Despite its length and the complexity of the issues it dealt with, the public consultation was a success, receiving a total of 420 responses. 50% were submitted by businesses or business associations, and a remarkable 31% came from individual EU citizens. Other smaller proportions were received from consumer associations, lawyers, the administrations of 12 Member States, and the representative bodies of the regulated professions. Many right holders and representatives of creative industries were also motivated to respond. Among the EU Member States, France, Germany, the Netherlands and the United Kingdom were particularly well-represented, while only 3 countries (Romania, Bulgaria and Lithuania) declined to offer a response. Below we present a summary of the patterns of opinion which emerge from the questionnaire.

Among, the private individuals who responded to the questionnaire, 95% attested to making online purchases. As this figure is considerably higher than the EU average, we must assume that respondents were probably more knowledgeable and less concerned about the risks of e-commerce than the population at large. This could explain the divergences with the responses of consumer associations, which we should assume more accurately represent the views of the average consumer.

2. The Development and Practice of Electronic Commerce

2.1. Consumer behaviour

- **Factors motivating online purchases (Q.2)** – The most significant factor, cited by 88% of respondents, was access to goods and services not otherwise available in their area. Only slightly less decisive were price considerations (84%). Almost 60% were motivated by the more practical method of delivery offered by online shopping.
- **Type of goods purchased (Q.4)** - 89% of respondents cited electronic equipment, 76% books and tourist services, and around 45-50% bought household goods, clothes and accessories, and financial services. Roughly 16% purchased food items and 17.8% health services. 7.9% bought prescription and 11.9% non-prescription medicines.
- **Origin of online purchases (Q.5)** - 84% of respondents declared they had bought from an area outside their usual local shopping area, contrasting with 45% originating within the local area. 73% had purchased from another EU Member State, and 63% from a third country.
- **Method of payment (Q.7)** - 79% of payments were made by credit or debit card, 48% via an online banking-based e-payment service, and 33% by electronic transfer. Almost 20% of payments were made offline.
- **Problems experienced during purchase (Q.9 / 14)** - The principal problem experienced was a lack of information about the vendor, the guarantee and consumer rights. Only 11% of individuals claimed to have had problems with delivery and payment, but consumer associations provided contradictory evidence, noting problems

in 71% and 57% of cases respectively. 58% of consumer associations noted technical problems with payments.

- **Delivery problems (Q.10 / 15)** – 80% of those experiencing delivery problems had encountered delay, and in 48% of cases, the product ordered never arrived. 51% of private individuals noted a refusal to deliver in the correct geographical area, contrasting with only 40% of consumer associations.
- **Payment problems (Q.11 / 16)** - 75% of payment problems involved an insufficient variety of payment methods. 41% experienced card refusal.
- **Factors discouraging online shopping (Q.12 / 17)** –
 - The most significant single factor cited was the lack of confidence in after-sale service (57% of private individuals and consumer associations).
 - 44% of both groups noted concerns about the protection of personal data.
 - 23% of individuals and 42% of consumer associations cited problems with delivery
 - 26% of individuals and 28% of consumer associations noted problems with payment.
 - Other factors cited by 15-30% of respondents included a preference for direct purchasing in person, a lack of choice of products and services online, and the absence of advice during purchase.
- **Awareness of rights (Q.13 / 18)** –
 - More than 80% of individuals declared themselves aware of their right of cancellation (however, only 28% of consumer associations concurred).
 - Another 80% were aware of the obligation to respect privacy and data protection (contrasting with 57% of consumer associations).
 - 62% felt aware of the obligation of the vendor to provide an address and contact details, though no consumer associations agreed.
 - Around 40% attested to being informed about the obligation to deliver at the latest 30 days after the placing of the order, and the obligation to provide the customer with confirmation in writing of the main features of the contract. Consumer organisations attested to this only in 15% of responses.

2.2. Views on the growth of e-commerce (Q.19)

- The majority of respondents tended to celebrate the rapid growth of e-commerce. 80% of consumers conduct research online before purchasing, according to a digital industry federation.
- However, the Commission believes this conceals the fact that Europe's level of e-commerce remains low in comparison with the US and Korea. 75% of US internet users have already made online purchases, in contrast to only 54% of their EU counterparts. Only 17% of consumers conduct the entire purchasing process online, according to a leading selling platform.
- Respondents were generally favourable towards the growth of e-commerce on several grounds:
 1. It can contribute to growth, even in the current economic crisis;
 2. It can promote development in areas suffering from economic decline – however, the potential for change is limited if areas are not served or infrequently served by postal operators or are subject to higher delivery charges. This is a particular problem for remote areas
 3. It can help vulnerable populations with mobility difficulties gain access to new services and experiences (e.g. financial services, cultural products)
 4. It can reduce environmental impact

5. It can strengthen the Single Market – however, most deliveries are still made within national borders

2.3. Market perceptions (Q.28 / 29)

- **Successful sectors** - financial services, books, DVDs, transport tickets, games, tourism, online advertising, and illegal music. According to a performers' society, 98% of digital music in Spain is illegal. Clothing was said to be growing.
- Respondents noted stronger growth among "pure players" and retailers in e-commerce than among SMEs.
- **Underdeveloped sectors** - Food, streaming of sport and cultural events, and cars
- There was no consensus with regard to the medical products and services industry, and to the consumption of cultural products, especially music. Some stakeholders (usually right holders) felt the legal offer was sufficiently developed, while others (usually consumers) took the opposite view.
- **Nature of competitive environment** - Both an e-commerce and an SME industry association agreed that e-commerce was developing alongside existing retail services, instead of triggering a process of "cannibalisation".
- "Multichannel" strategies (when retailers sell in "brick-and-mortar" contexts as well as online) tended to be regarded as more successful than strategies limited to the online sector.
- Nonetheless, respondents noted two problematic tendencies:
 - Franchisees are losing out to competitors with an online presence;
 - There is "cannibalisation" in the music sector, with disc sales losing out to digital.

2.4. Delivery issues (Q.20)

- **Extent of problem** - Delivery problems were cited as an obstacle by 71% of consumer associations, as well as an SME trade association and an online selling platform.
- However, there was a lack of consensus on the existence of the problem. Complaints tended to be noted in countries whose postal sectors are functioning at a suboptimal level.
- **Types of problems:**
 - High cross-border prices
 - Lack of price transparency
 - Existence of regions with infrequent or no postal coverage
 - Additional charges in rural areas
 - Lack of harmonisation of postal addresses
 - Lack of clarity as to responsibility in case of problems
- **Solutions** - A reliable postal service provided at a reasonable price that was adapted to constraints posed by geography, traffic congestion and urban parking systems.
- Respondents also argued delivery should adapt to customers' availability, for instance delivering to a location outside the home such as place of work.

2.5. Financing issues (Q.21)

- **Extent of problem** - Both individual businesses and their industry associations stressed that it was often difficult to secure finance or risk capital in the EU, especially in the current crisis. For some respondents this was a general problem, but for others it

was specific to the e-commerce sector, linked to the difficulty of valuing intangible capital and retaining intellectual property rights.

2.6. Level of knowledge of legal or fiscal obligations; extent of offer competitive advisory services (Q.22 / 23)

- Respondents gave indications, especially among industry associations, of a reasonably good level of legal expertise at a national level, but of lower quality for cross-border cases.
- A cross-section of respondents including a games developer, an ISP and an SME trade body argued this problem was caused by the lack of legal harmonisation across the EU.
- A more important factor for SMEs was seen to be the costs of access to legal advice.
- Several respondents called for publicly available and free information for SMEs and consumers.

2.7. Payment issues (Q.24 / 25 / 26)

- **Extent of problem** - there was no general consensus on whether payment problems exist. 57% of consumer associations and many businesses agreed that problems do exist, but 11% of private individuals and some industry federations stated the opposite.
- **Types of problems**
 - **Limited variety of means of payment offered**, or limited coverage by card provider. The most common problem was that debit cards are not accepted online. The problem is exacerbated by the fact that credit cards are not offered in all countries or to all potential consumers (e.g. not offered to the young).
 - This situation was felt to reflect a lack of investment by card operators, and their practice of cross-fertilisation which uses debit cards to subsidise the cost of credit cards.
 - More fundamentally, online transactions often require access to a bank account, which consumers from vulnerable groups might not have.
 - It was also noted that there was no online banking based e-payment system for m-commerce.
 - **High cost of payments** - Stressed by numerous businesses and industry associations. Credit cards but also Paypal and telecoms operators (who levy payments in m-commerce transactions) received particular criticism.
 - Consumers also complained, especially in relation to purchasing airline tickets online. In this context charges are sometimes levied on each ticket purchased, even if they are all contained within a single payment.
 - Critical respondents considered high fees were not justified because they did not reduce incidence of fraud. Instead, high fees merely reflected the dominant market position enjoyed by card operators. Card operators by contrast claimed this sector had a healthy level of competition.
 - **Other charges** - Chambers of commerce noted that some traders levy charges for returning goods, in order to cope with the high charges demanded of them by card operators.
 - **Payment systems' reliability** – The questionnaire revealed a persistent lack of trust; several businesses reported security failures during payments.
 - **Authentication failures** - Currently, foreign credit cards tend to be judged as less secure and may be blocked. Moreover, the security measures operated by credit card companies are either insufficiently secure, or exclude clients with cards from certain Member States. Several Member States have developed

systems of authentication by electronic ID card but this is not valid for cross-border transactions.

2.8. Sporting and cultural events (Q. 30 / 31)

- More than 50 individuals (out of a total of 131) responded to Q.30 which enquired after the streaming of sporting and cultural events on the Internet. This demonstrates their level of interest in accessing sport and cultural content on the Internet.
- Even if half of the responses were not directed at cross-border content, a significant number (many of which from the Netherlands) deplored the lack of access beyond national borders, especially with regard to niche sport and cultural events with a smaller audience to which the Internet allows access regardless of the location of the audience.
- Several responses highlighted **technical factors**, such as:
 - lack of comprehensive broadband coverage (contrast between city and rural areas)
 - poor quality of streaming, notably on account of the use of substandard technologies
 - differences between proprietary rights in different territories (i.e. Digital Rights Management)
- Others stressed that the **offer is unsatisfactory**:
 - lack of choice
 - prices similar to content accessed offline but with less functionality
 - a lack of transparency and ease of use
 - a lack of awareness of services available abroad
 - problems with payments on foreign sites
 - It was argued that these restrictions discourage users, as evinced by the fact that "open" access events are always tremendously popular.
- Some respondents attributed this lack of development directly to the exclusive **cross-border licensing regime**, which limits the legal offer of content by demanding information about the country of residence via the IP address.
- Some respondents, echoing the professionals' analysis (Q.31), argued that the **economic models derived from offline contexts were inadequate** when applied online, and stressed the lack of will, and indeed the opposition of current providers to adapt to the digital environment.
- Some also pointed the finger at **broadcasters** who defend their distribution model and thus contravene the principle of net neutrality. Others noted that right holders tend to identify the Internet as inherently inimical.
- Many respondents stressed both the **difficulties and the costs associated with obtaining licences**. Even if these are successfully obtained, holders can find themselves confronted with contradictory demands.
- By contrast, broadcasters tended to defend their model with the usual refrain of "cultural diversity" which means that content is only of interest to national populations.
- Some respondents also advanced **piracy** as an excuse for the lack of a cross-border offer.

2.9. Other obstacles to the development of e-commerce (Q.37)

- **Cultural factors**
 - A trade association of SMEs and a consumer association suggested customers' preference for shopping in person.

- A technology company argued that a factor was also the underdeveloped character of entrepreneurship in Europe.
- Several business associations stressed a persistent lack of requisite e-skills.
- Both consumer and business associations thought that language issues were also important obstacles.
- **Infrastructure problems**
 - A consumer association noted the need for modern IT infrastructure such as broadband coverage to allow development, especially of new technologies such as 3D video and HD.
 - A postal operator argued that there was a need to improve the Internal Market transport infrastructure needed for delivery.
- **Fragmentation of EU law**
 - The E-Commerce Directive was consistently held by respondents to be an instrument that has promoted the development of information society services in the EU.
 - But respondents noted that problems arose in areas outside the competence of the ECD, or related to its derogations.
 - In response suggestions were made for more coherence in the *acquis*, especially in terms of data protection, insurance market mediation, private international law, and consumer protection.
- **Fragmentation of EU law in the area of IPR/copyright**
 - This issue was frequently raised both by businesses and consumers as a block to the growth of cross-border e-commerce, and to the provision of information society services
 - Right holders argued that a failure to respect copyright and the size of the illegal market were most important in preventing the development of information society services. A publishers' association argued that the problem is leading to job losses, less innovation and a threat to creative production.
- **Fragmentation of EU law in the area of consumer rights**
 - A wide range of stakeholders noted this problem including businesses and industry associations, but a leading consumer association did not concur.
 - For many, the draft Consumer Rights Directive then available did not constitute a sufficiently effective response because it did not lead to full harmonization.
 - There was perceived to be a problem with Article 6 of Rome I and uncertainties about the applicable law.
 - Those of more libertarian inclination advocated freedom of contract, on the grounds that excessive regulation actually undermines consumer protection.
- **Data protection issues**
 - Lack of coherence between the provisions of the E-Privacy Directive and current developments in e-commerce.
 - Opposing views were held by consumer associations and businesses. The latter expressed a desire for a framework that would be sufficiently flexible to allow behavioural marketing (i.e. it would allow identification through IP address and use of cookies).
- **Tax issues**
 - **VAT** - Film industry associations raised the issue of the application of VAT to digital cultural products, and a magazine publishers association raised the same issue in relation to online press. Several companies called for reflection on the rate of VAT, and the procedures for collecting it, in particular for SMEs.

- A technology company noted that the Digital Agenda ignored the issue of private levies.
- There were general calls, especially from businesses, for tax harmonisation, or harmonisation in the collection mechanisms/procedures.
- **Vertical restraints**
 - Both businesses and consumer associations identified these as an obstacle. However, luxury brands companies welcomed them.
- **Lack of harmonisation in EU law regarding rules on sales promotions**
- **Contract law issues**
 - Representatives of m-commerce were in favour of strengthening the validity of contracts made via SMS or email.
 - The occasional requirement to send a physical written version of an electronic contract was noted as an obstacle.
- **Competition issues**
 - It was argued by some companies that there were high barriers to entry in the telecoms companies and among banks, as well as an oligopoly among postal services and bank cards.
- **Net neutrality**
 - Some respondents reported about alleged infringements to this principle noted in regard to search engines giving search preference to own products.
- **Enforcement of existing rules**
 - Failure to observe transparency obligations relating to businesses' identity
 - Failure to observe obligation to provide paper contracts.

2. Derogations from Article 3 (Article 3(4) and Annex) ECD (Q.32-36)

2.1 Case-by-case derogations of Article 3 (4) ECD

- Many respondents considered the Internal Market clause to be absolutely essential for the development of e-commerce within the EU. Some called on the Commission to exercise more control over the application of the Internal Market clause.
- **Application of the derogation of Article 3 (4)** - According to the national public authorities, the derogation has never been applied in FI, CZ, DE, MT, EE, NO, - or at least the respondents were not aware of it.
- Some public authorities and business organisations referred in general to (other) Member States which do (or should) apply the derogation for restrictions on the online sales of OTC medicines, advertising and sales restrictions for tobacco and alcohol products but no details were given.
- Others warned that a narrow interpretation of the Internal Market clause would undermine the development of e-commerce as it would create legal uncertainty.
- One consumer organisation expressed concerns that a possible revision of Article 3 (4) which could lead to forum shopping by service providers.
- One national administration (Belgium) gave a reason for the limited amount of notifications that the Commission and the Member States have received under Article 3 (4). It reported that Article 3 (4) has been applied several times for rules to protect consumers (unfair commercial practices) and public health (internet sales of medicines). But since the coming into force of Regulation (EC) No 2006/2004 of 27 October 2004, the Regulation on consumer protection cooperation, it has no longer made use of the procedure under Article 3 (4) ECD.
- Further observations were made on a limited number of individual cases.

2.2 Derogations set out in the Annex of the ECD

- There were relatively few responses to the Annex as a whole. A section of respondents (mostly business organisations and enterprises) had doubts about the added value of all or part of the derogations mentioned in the Annex.
- Some respondents focused on the lack of (full) harmonization in the area of **consumer contracts** which necessitate the derogation for contractual obligations concerning consumer contracts. One respondent suggested that the Commission should undertake a cost/benefit analysis on the derogation once the Consumer Rights Directive has been adopted. One consumer organisation made the point that the scope of "contractual obligations concerning consumer contracts" is unclear.
- A few respondents referred to the derogation for the **applicable law**. One group (publishers) made clear that the derogation should be "reviewed and eventually removed".
- Many contradicting observations were made on the **copyright** derogation.
 - Copyright industries claimed that the EU *acquis* on copyright protection has *promoted* the cross-border availability of copyright protected works. In other words: contractual freedom has *contributed* to the development of e-commerce. The territorial application of copyright does not preclude EU-wide or cross-border licensing, and "copyright clearance takes place without practical difficulties". Licenses are following demand. Due to language differences SMEs have chances in smaller geographical areas.
 - However, all other stakeholders took the opposite view and identified the present copyright situation as *a major barrier* for the availability of content beyond the national borders and the establishment of the Digital Single Market. The licensing systems are too complex. Consumers seeking to buy copyright protected content online are often only allowed access to online stores directed at their country of residence. Territoriality of copyright may lead to price discrimination.

2.3 Other comments made on administrative cooperation (Q. 70-73)

- Only a selection of Member States had specific procedures for notifications under the ECD or the Transparency Directive 98/34/EC. Some respondents proposed a more efficient and more direct system of notifications, e.g. by using information systems such as the IMI (Internal Market Information System). No best practices were reported.

2.4 Discriminations on the basis of nationality or place of establishment/residence

- Consumer groups have stressed the importance of tackling unjustified discriminations based on Article 20 Services Directive. However, some business organisations and companies fear an excessively strict interpretation of Article 20.

3. Cross-border commercial communications, in particular for the regulated professions

3.1 Commercial communications (Q.38-45)

- Several respondents stressed the importance of (cross-border) advertising online. For newspapers in particular, advertising in the digital area is absolutely vital.

- There is a trend towards direct-response type advertising, and away from display advertising. Advertisers prefer pay-per-click and similar models, and search advertising occupies a dominant share of total online advertising. Some respondents pointed out that professions have not yet started advertising online.
- Respondents provided useful information about national laws and practices. "Opt-in" systems for unsolicited commercial communication seem to be the rule in most Member States. Robinson lists ("opt-out") exist in some countries but it appears that the service providers normally do not check whether their customers use them.
- The **main problems** raised were:
 - Lack of adequate enforcement of the rules on unsolicited commercial communications;
 - Divergence in the application of the EU *acquis* in the Member States (e.g. different definitions of "electronic mail");
 - Lack of clarification about the application of EU rules to new technologies (e.g. bluetooth marketing or the application of the rules to social networks).
- A few respondents made reference to codes of conduct.

3.2 Online pharmacy services (Q.46-49)

- **Advantages of online pharmacy services:**
 - Ease and comfort of home delivery
 - Privacy
 - Choice and convenience
- **Main disadvantages of online pharmacy services:**
 - Lack of physical examination
 - Counterfeit drugs and illegal pharmacies
 - Possible illegal advertising
 - Supply of banned or unapproved medicines (with e.g. language difficulties), in particular if purchase from third countries
 - Delivery time
- Respondents also provided a useful overview of national laws and (to a lesser extent) national practices.
- Reference was made to studies conducted at national level on the quality of pharmacy services. The relevant regulated professions (dentists, pharmacies, opticians) also mentioned WHO studies on counterfeited medicines.
- Associations of pharmacies and other medical professions/traders did not see many advantages deriving from the sale of medicines via the Internet. They referred to the lack of pan-European (or global) regulation to back their argument that the risks outweigh the benefits.
- Other respondents were less negative and recommended for example a better monitoring mechanism. Some business associations saw potential in the online sale of medicines.

4. The development of the press on the Internet (Q.50-51)

- Contributors stressed above all the need for transparency and for content aggregators to indicate their sources. Some also posited that editors of content should obtain licences.

- Several responses indicated that copyright rules must be respected and referred to the decision of the ECJ relating to article citations (copyright should be applied when more than 11 words have been cited).
- Publishers demanded not only that their agreement be obtained every time their content is used, but also that they receive remuneration if it is used commercially.
- Some respondents noted the hegemonic position of Google in the advertising sector, and called for more transparency about how research criteria are used.

5. Interpretation of the provisions concerning intermediary liability in the Directive

The majority of respondents argued that a revision of the ECD's liability regime would be unnecessary, but thought the existing rules require clarification.

There was general consensus in favour of developing a harmonised EU "notice-and-takedown" procedure, but much less agreement on the precise contours of these rules. Right holders and Internet Service Providers (ISPs) tended to take opposing stances, with consumer and citizen organisations often agreeing with ISPs on the basis of ethical considerations.

5.1. Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which? (Q.52)

- Intermediaries claimed that the provisions' ambiguity causes problems. For instance, they feel pressurised into taking down content although they are neither able nor authorised to judge its illegality and are liable to face prosecution if they take down content in good faith, but in error.
- Several right holders suspected that providers of new services not foreseen by the legislators of the ECD "hide" behind its liability exemption although it should not apply to them. Such services include auction sites, blogs, social media, video sharing sites, and paid referencing systems.
- Right holders criticized the cost, complexity and inefficiency of notification procedures.

5.2. Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? (Q.53)

- A broad selection of right holders from different sectors argued that "actual knowledge" is defined by receipt of notification.
- Some right holders claimed that even a general awareness of the possible existence of illegal content should be sufficient to constitute "actual knowledge".
- Intermediaries denied that notification in itself is sufficient to constitute "actual knowledge" because notices do not necessarily possess the level of detailed information required to identify and locate an infringement.
- A stricter view insisted that only a court judgment or notice from an administrative authority should constitute "actual knowledge". A civil rights organisation advocated making an exception to this rule for "manifestly illegal content" such as child pornography, racist or terrorist material. Portugal has already interpreted Article 14 ECD in this way.
- ISPs tended to oppose a broad definition of "actual knowledge" on the grounds that it would in practice constitute a general monitoring obligation, which is prohibited under

Article 15 ECD. Moreover, civil liberties organisations argued it would risk allowing ISPs to assume the role of judge, for which they lack both expertise and authority.

- There was a general perception across sectors that the current legislation dissuades ISPs from taking voluntary measures against illegal content because the existence of these would make it more difficult to deny having "actual knowledge", and thus to secure a liability exemption. In response it was suggested that the EU establish a "Good Samaritan Clause" modelled on the US Communications Decency Act. This stipulates that taking voluntary actions should not be punished.
- Although not raised in this particular consultation, some stakeholders have underlined that intermediaries are at risk of compromising their liability exemption if they engage in reframing or reshaping of content, however minimal, technical, or automatically executed. This situation derives from ambiguities inherent in the provision of Article 12 ECD that intermediaries should not "select or modify information" in order to qualify for exemption.

5.3. Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information? (Q.54)

- ISPs expressed satisfaction with the current interpretation as its flexibility enables the particularities of each individual case to be taken into account. They also stressed that takedown as a process involves several elements, such as obtaining legal advice, engineering expertise, or translations, as well as human judgement. Therefore the time needed for takedown should not be underestimated, or confined to a static standard.
- Right holders took the opposite view, arguing that "expeditious" should be more strictly defined as a short time period. This would then be more effective in the face of some forms of illegal content of very short duration such as live streaming. Nevertheless, respondents declined to make a specific proposal for an acceptable time period.
- Civil rights NGOs opposed any stricter definition on the grounds that it would incentivise takedown before legality had been fully assessed, which would risk infringing the freedom of expression and conferring inappropriate jurisdictional rights on private actors.

5.4. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law? (Q.55)

- The national NTD procedures that exist would apply only, with the exception of Sweden, to providers of "mere conduit services". Because the ECD already exempts from liability providers of "mere conduit services", regardless of whether they take down illegal content or not, national regimes cannot be considered NTD procedures and therefore cannot be used to clarify the concepts of "actual knowledge" or "expeditious" at an EU level.

5.5. What practical experience do you have regarding the procedures for notice and take-down? (Q.56)

5.5.1. Problems

- Both the frequent absence of any company procedure as well as diversity among different companies' existing policies pose significant costs for all stakeholders in terms of human and financial resources.

- ISPs emphasised that complainants too often fail to use existing NTD procedures and submit notices in unwieldy and time-consuming formats (e.g. presenting photocopied URLs which require manual input).
- Right holders complained about a trend towards the "monetisation" of NTD procedures, which could be characterised as the development of a "notice-and-revenue-share" procedure. According to this the right holder is paid a percentage of the advertisement revenues attributable to his content and obliged to renounce any future liability claim, but the content is not taken down.
- ISPs also complained that they are liable for acting in good faith on an erroneous notice, and that there is no penalty or liability for submitting an erroneous notice.
- It was felt by many stakeholders that the current legal situation promotes the inappropriate transfer of juridical authority to the private sector as well as incentivising unnecessary and undesirable restrictions on the freedom of expression.
- Member States raised the problem posed by ISPs based outside the EU.

5.5.2. Solutions

- The majority of stakeholders proposed a European NTD procedure.
- Some respondents were keen to establish a legal obligation on the grounds that efforts to promote self-regulation have hitherto failed. Others argued that voluntary codes would be sufficient.
- Right holders argued that a low level of detail in the notification is sufficient; some indeed claim that information such as a URL and identification of the illegal content should not be required.
- Right holders requested that the NTD procedure should be easily accessible and simple to complete in an electronic format, and should not be conditional on fulfilling other conditions.
- By contrast, intermediaries claimed that a high level of detail should be required. A search engine and two video platforms suggested that the principles defining a potential European NTD procedure should include the following:
 1. The complainant should make reasonable efforts to contact the user who is responsible for uploading the content, before contacting the intermediary;
 2. The notice should have sufficient information (defined as i) identification of complainant, ii) identification and location of content with URL, iii) convincing demonstration of illegality);
 3. Users should have the possibility to object;
 4. Takedown should be expeditious, but the time limit should be realistic;
 5. If illegality cannot be confirmed by the company, a court judgment is not necessary; ADR mechanism should be used instead;
 6. No liability exists if content has been wrongly taken down in good faith;
 7. No "actual knowledge" and hence liability is created for intermediary if it forwards a complaint to a user;
 8. No liability is automatically created on receipt of a notification;
- Right holders including collecting societies, media companies and publishers supported a "notice-and-stay-down" procedure according to which a single notice would result in "actual knowledge" of all similar future infringements. However, an ISP, a search engine and a technology company believed that this would be incompatible with Article 15 ECD.
- Civil liberties NGOs, a search engine and video platform, and some ISPs preferred a "notice-and-notice" procedure according to which the intermediary merely passes on

notification of the alleged infringement to the content provider/user, without thus accruing liability. Denmark also supported this.

- However, other ISPs criticised "notice-and-notice" on the grounds that it would require identification of the IP or email address of the user, constituting an infringement of data protection rules, and because it would place the ISP in the role of "policeman" for which it would not be qualified.

5.6. Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations? (Q.58)

Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why? (Q.67)

- Examples of court judgments that appear to contradict the prohibition of a general monitoring obligation (Recital 47 ECD) include *Google v. Zadig Production* (Tribunal de Paris) and *Lancome vs. Ebay* (Tribunal de Bruxelles).
- Respondents were divided in their reaction to the preliminary question posed by the Cour d'Appel de Bruxelles, asking whether an obligation to prevent future infringements of the full repertoire of the Belgian collecting society (SABAM) constitutes a general monitoring obligation. ISPs held this to be contrary to the ECD, but right holders argued this can be interpreted as a specific case of monitoring, which is allowed under Recital 47.
- A Member State noted a problematic ambiguity in Article 15(2) ECD, which enables Member States to establish obligations for ISPs to inform competent authorities of illegality and communicate "information enabling the identification of recipients of their service with whom they have storage agreements". It is argued that, if interpreted narrowly, this could create obstacles to the effective investigation of illegality. Therefore it supported a modification of the ECD to include an obligation on all ISPs to cooperate in providing the information needed to investigate infringements.

5.7. From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering? (Q.59)

Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse? (Q.60)

- Respondents universally had doubts about the value of filtering. Views were ranged on a spectrum between the view that filtering is per definition not effective or efficient and the view that it has value despite notable weaknesses.
- Right holders tended to be favourable to an interpretation of the duty of care in Recital 48 ECD obliging service providers to conduct some degree of monitoring using filtering techniques.
- An education and research network noted that its effectiveness is ultimately dependent on the extent to which the user wishes to be shielded from certain content.
- The concerns can be grouped into four categories:
 1. *Technical impossibility*
 - All filtering techniques involve a level of unintentional blocking of legal content ("overblocking") and of unwitting admission of illegal content ("underblocking"). Respondents noted "overblocking" was a particular problem in to peer-2-peer traffic.
 - Deploying filtering encourages an "arms race" with pirates who seek ever more ingenious ways of circumventing filters. A telecoms company noted this was already to be observed in France. Filtering imposed under the HADOPI law is incentivising

users to use encryption and VPN (virtual private networks) which makes specific filtering for investigative purposes less reliable.

- There appear to be differences in efficacy between content types. Video-sharing sites and rights holders reported success with "fingerprinting" techniques, although not in the context of live-streaming. The music industry noted success with similar "watermarking" techniques for audio files. However, the games industry has not found a reliable filtering technique for its content. Moreover, a publisher noted that filtering does not work at all on "flat pdf files".

2. *Network speed*

- A range of stakeholders including ISPs, search engines, telecom companies and industry associations reported that filtering, especially "deep packet" techniques, consume lots of processing power and result in significant traffic speed reductions.

3. *Costs*

- Right holders complained of the high costs involved in developing "fingerprinting" techniques, especially when applied to content that is already online. Moreover, a lack of coordination between companies means costs are not shared. Consumer associations and ISPs feared that these costs will be passed on to the consumer.

4. *Ethical concerns*

- Most stakeholders apart from right holders argued that filtering would risk restricting the freedom of expression. An antivirus software producer noted that filtering for illegality is subjective and contentious, and a VOIP provider on this basis argued it was an inappropriate activity for private actors.
- Furthermore, NGOs and consumer associations raised concerns about the risks to privacy and data protection rules posed by filtering.

5.8. Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service? (Q.68)

- Many right holders considered the classification sufficiently ambiguous to allow providers of new services not foreseen by the legislators of the ECD to "hide" behind the liability exemption.
- A luxury goods company and a media company drew attention to the ambiguity about the status of those information society services such as search engines which generate advertisement revenues, and which cannot therefore be considered wholly neutral hosting providers.
- One ISP proposed extending the range of activities exempted from liability to include e.g. hyperlinking, storing and alerting. Other intermediaries were less radical but nonetheless considered that sites driven by user-generated content such as video sites and auction platforms should be included in the definition of "hosting".

5.9. The Court of Justice of the European Union recently delivered an important judgement on the responsibility of intermediary service providers in the Google vs. LVMH case. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way? (Q.66)

- Some right holders welcomed the judgment for narrowing the definition of intermediary activities. In contrast, ISPs disliked the narrow approach.

- A consumer association pointed out that the concept of "merely technical, automatic and passive" was becoming outmoded in the context of web 2.0 technologies which allow a degree of control over uploaded content.
- A selection of both ISPs and right holders considered the judgment unclear and sought further guidance, especially in regard to newer technologies.
- The ECJ's forthcoming decision on the Advocate General's criticism of its initial decision in the *eBay vs. L'Oréal* case will be informative in this regard, as it will clarify whether hosting activities as set out in Article 14 ECD can be considered as "technical, automatic and passive".

5.10. What is your experience with the liability regimes for hyperlinks, search engines, Web 2.0 and "cloud computing" in the Member States? (Q. 62. / 63. / 64.)

- National jurisprudence on hyperlinking is very fragmented. A UK court considered it to be a mere conduit activity (art 12 ECD), a German court considered it to be a form of hosting (art 14 ECD), while a Belgian court considered that the ECD was not relevant for hyperlinking activities. Spain and Portugal have extended the liability exemption to hyperlinking and search engine activities.
- Several ISPs and a consumer organisation tended to support the extension of liability exemption to hyperlinking, often because it was defined as hosting, whereas right holders held the opposite view.
- Respondents who argued for the extension to hyperlinking also tended to support the extension to web 2.0 and cloud-based services.
- Some ISPs and consumer organisations argued that search engines should be seen as hosting services providers, whereas the search engines themselves preferred to be designated conduit providers.

5.11. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? (Q.69)

- All right holders tended to see lack of investment in enforcement as an important factor in causing piracy and advocated more investment as a solution.
- An open source platform added that current lax IPR enforcement dissuades companies from investing in making a legal offer of content online.
- Several ISPs, technology companies and consumer organisations did not share this assessment, and were of the opinion that making efforts to offer intellectual property legally online would be the most effective tool against piracy. A search engine supported the trend towards "monetising" copyright-infringing content to the benefit of right holders rather than trying to block it.

6. Online dispute resolution (Q. 74-77)

6.1. Comments on the current condition of ODR

- The general consensus in the responses to the consultation was that awareness of ODR mechanisms is either non-existent or poor. Respondents often commented that there is insufficient information provided and publicity given to ODR.
- In cases where ODR mechanisms have been developed, it is in an essentially non-judicial context. Indeed, with one exception, there seems to be no true legal system for resolving disputes online.
- Respondents above all referred to classical ADR mechanisms such as arbitration or mediation. For Internet litigation, some Member States are currently using a system of

mediation via a contact point (e.g. CZ). This contact point often takes the form of a Consumer Rights Protection Centre (e.g. FI, LV), or a Consumer Ombudsman in the Nordic countries. Other specific bodies mentioned included:

- FIN-NET: for litigation between consumers and financial services providers;
- ECODIR (FR) for consumer disputes following completion of an online transaction
- Money Claim On-line Service (UK - government run)
- Reference was also made to the development of the eJustice Portal and, for cross-border litigation, ECC-NET.
- In general, ODR mechanisms have nevertheless arisen out of private sector efforts and/or systems directed at specific sectors. Some examples would include:
 - Platforms of Ebay or Paypal;
 - Internet Shopping is Safe, operated by the Interactive Media in Retail Group (UK)
 - Le Médiateur du Net (FR); atforuminternet.org
 - On-line settlement systems provided by Telecom Italia
 - VISA dispute resolution with Chargeback
 - Thuiswinkelwaarborg (PB) which advocates the development of a European trustmark and ODR (currently being piloted)

6.2. Advantages of ODR

- It is less expensive, especially in the area of cross-border litigation;
- It allows a swift and effective reaction;
- It aids communication;
- Proceedings can be brought anywhere;
- It is less formal;
- It does not depend on the schedule of law courts.

6.3. Disadvantages of ODR

- If some respondents considered that the costs and benefits for those seeking legal redress would balance out, others countered with the argument that ODR is more expensive and less effective. This is in particular the position of certain businesses which have watched the volume of litigation increase significantly as a consequence of the introduction of an online dispute resolution mechanism. However, businesses seem to want to maintain their image in the eyes of consumers and would not want to stop this trend.
- For others, ODR appears complex and unwieldy.
- Even among supporters of ODR, a certain number of **difficulties** or areas for improvement were noted:
 - Lack of interpersonal contact;
 - Since the procedure is conducted in writing, a lawyer is ultimately still required;
 - Difficulties arising if individuals are unfamiliar with advanced web technologies;
 - Problems arising from the fact that participation in ODR is voluntary but recognition and enforcement is still needed from a court or tribunal;
 - European ADR principles – independence, impartiality, and compliance with the fundamental right to a fair trial - are not always applicable in the field of ODR;
 - Problem posed by bogus complaints.

6.3. Potential solutions

- **Safeguards and clear principles** are also needed to guarantee a good system of ODR:
 - Ensure the independence of ODR;
 - Costs passed on to the consumer before the transaction or later at the moment of transaction;
 - ODR should not be a prerequisite to another procedure;
 - There should be suspension of the requirement to bring judicial proceedings
 - In cases of fraud, ODR providers should, with the consent of the consumer, pass the claim on to enforcement authorities;
 - Expertise should be required;
 - Accessibility to user (e.g. visibility, checks on the parties involved, traceability, language issues);
 - Efforts to build confidence in the system (with authentication, security, privacy and confidentiality mechanisms).
- Solutions proposed aiming at **boosting consumer confidence**:
 - Some respondents advocated developing class actions for web litigation, while others were firmly opposed to this idea, since the injured party would not directly gain;
 - Develop ODR at the EU level;
 - Develop consumer rights;
 - EU should work with national regulatory authorities to improve the quality of claims handling;
 - Follow the recommendations of the Communication on out-of-court settlement;
 - Create a European mediator;
 - Create an online directory of existing ADR available (as currently in SE);
 - Communicate Regulation 861/2007 which institutes a European procedure for the resolution of small claims;
 - Publicise ODR in order to improve its functioning.
- In conclusion, ODR offers important advantages but respondents agreed that it should be better structured and developed further, possibly under the oversight of the EU. Moreover, there should be efforts to ensure that it is effectively publicised.