

**FRAMEWORK CONTRACT: EVALUATION IMPACT ASSESSMENT  
AND RELATED SERVICES; LOT 2: CONSUMER'S POLICY**

## **Study on Digital Content Products in the EU**

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## ACRONYMS AND ABBREVIATIONS

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DAU	Daily active user (Facebook)
MAU	Monthly active user (Facebook)
P2P	Pay to Play
B2C	Business to Consumer
BBGs	Browser-Based Games
BD	Blue-ray Disc
CAGR	Compound Annual Growth Rate
CESL	Common European Sales Law
CRD	Consumer Rights Directive
DG SANCO	Directorate General Health and Consumers
DSD	Distance Selling Directive
ECJ	European Court of Justice
EST	Electronic Sell Through
F2P	Free to Play
FAQ	Frequently Asked Questions
Game Check	Check of information in regard to in-game-purchase
GR	Geographical Restriction
IPTV	Internet Protocol Television
MMO / MMOG	Massively Multiplayer Online Games
MS	Member States
n.a.	not available
TOR	Terms of Reference
UCP	Unfair Commercial Practices Directive
VOD	Video-On-Demand
Website Check	Check of information in regard to geographical restrictions
WP	Work Packages

## EXECUTIVE SUMMARY

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The use of digital content products has become an important part of the daily life of the modern European consumer and the market is still growing. However, with the new development, consumers also face new problems and the complaints of consumers that experience difficulties when buying or using digital content products is increasing.

Until recently, digital content products were not explicitly mentioned in EU-Directives or other EU-legislation and no specific consumer protection rules pertaining to digital content services existed.

In October 2011, the European Commission proposed an optional Common European Sales Law (CESL). In November 2011, the Consumer Rights Directive (CRD) was adopted. Both deal explicitly with contracts on digital content products. However, to protect the consumer and to meet consumer needs, it may be necessary in the future to develop further regulation on digital content products delivered online.

Also in 2011, a large-scale survey on “Digital Content Services for Consumers”, undertaken on behalf of the European Commission, analysed the specific problems consumers experience when purchasing digital content products. Lack of information and unclear/complex information combined were identified as the main issue, together with access problems. Further, but to a lesser extent, the study identified problems resulting from unfair contract terms.

The objective of this project was to compile a study on the European market for digital content products focusing on games, music, e-books and videos which can be downloaded or streamed.

The scope of the study includes:

- The online market for online games, music, e-books and videos.
- Coverage of all the 27 EU Member States.
- Digital content products offered through downloading and streaming.
- A selection of top ten websites for investigation for each Member State (best-selling products and popular trader sites).

It examines the content of the web pages of providers of the 4 relevant products to check whether they contain, in particular, information on geographical restrictions and the way that this is provided.

In another step, websites offering games that contain items to sell (in-game-purchase, Free 2 Play) are examined in regard to the question as to whether users of those games are appropriately informed about those purchase options before the transaction is entered into.

The results have been assessed by four categories: Best quality information provided, Good quality information provided, Average quality information provided, Insufficient quality information provided.

### **Business Analysis**

A Business Analysis of the suppliers, modes of supply and market has been undertaken based on the statistical material gathered from various sources through Internet research and using print-material. A number of relevant associations were contacted for further material and information. However, the market lacks sufficient transparency and only limited specific data is publicly available and/or available for free. There is a need for more research and data in regard to digital products, which are not supplied on a tangible medium but are delivered via download or streaming.

With the growing access to the Internet and the distribution of Internet devices, the use of the Internet and online services becomes more and more part of EU consumers' daily life's. The Internet is no longer only used for communication or as tool to gain information. Consumers enter the Internet for entertainment, for playing games, reading e-books, watching videos, listening music and/or to download respective media. According to expert sources, during the next 5 years global digital spending on entertainment and media will increase at a rate of 12,1% CAGR<sup>1</sup>, whereas non-digital spending will only increase by 2,8%. In 2016, 67% of total global spending on entertainment and media growth will be generated by digital spending.<sup>2</sup>

The online game market is one of the fastest growing markets in recent years and it is expected to grow further. Newzoo estimated that on 7 EU game markets (UK, Germany, France, Italy, Spain, Netherlands, Belgium) in 2011, spending on games at casual websites, Massively Multiplayer Online Games (MMOG) and social networks accounted for approximately € 4 billion. Spending on games to download was estimated at € 1,8 billion.<sup>3</sup>

Playing games on mobile devices and tablets have increased and is expected to grow further. "Free-to-play-games" (F2P) are a current, and are expected to be, a future trend within the gaming industry.

The important European market players are game companies such as Bigpoint, Wooga and King.com and platforms such as iTunes (Apple Inc.) and GooglePlay (Google Inc.).

The digital music market is steadily growing. The International Federation of the Phonographic Industry (IFPI) reported, that in 2011, the digital music revenue for record companies grew globally by 8%, and amounted to approximately \$ 5,2 billion (2010: 5%, \$ 4,6 billion). Recorded trade revenues from digital channels accounted for an estimated 32% of recorded companies' revenues (2010: 29%). In the EU, digital trade revenues accounted for 24,5% of total recorded music trade revenues, rising from 7,5% in 2007.<sup>4</sup>

A large share of digital revenues of the European digital music market derives from music downloads (single-track or album). Subscribing to music services has grown rapidly. It jumped from less than 5% of trade revenue in 2007 to about 15% by 2011. It is especially successful in Scandinavian countries.<sup>5</sup>

The strongest multinational player within the European digital (download) music market is Apple Inc. with its music store iTunes which offers its service in different local-language websites across all of the 27 European Union countries. Deezer and Spotify are taking the lead regarding multi-territory streaming services within the EU.

Currently, the e-book market within the single EU countries is estimated not more than 1% - 3% of the book market and often rather less. A considerable exception is the UK. For 2011, e-book sales to consumers increased by 336% in the UK. By value, the consumer e-book sales are equivalent to 6% of physical book purchases by consumers.<sup>6</sup>

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<sup>1</sup> Compound Annual Growth Rate.

<sup>2</sup> PWC, Global entertainment and media outlook: 2012-2016 (PWC 2012), <http://www.pwc.com/us/en/press-releases/2012/digital-now-embedded.jhtml>.

<sup>3</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>4</sup> IFPI, Digital Music Report, 2012, Digital Music Report, 2011, <http://www.ifpi.org/>.

<sup>5</sup> IFPI, Digital Music Report, 2012, Digital Music Report, 2011, <http://www.ifpi.org/>.

<sup>6</sup> The Publisher Association, press release Statistical Yearbook 2011, [http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618), 01.05.2012.

However, it is apparent that the trend towards a growth in the e-books market is emerging. More and more e-books are available and the sale of e-book devices increases. Book publishers increasingly offer digital content such as e-books and apps in addition to traditional printed books and enter into direct competition with the technology companies, such as Google and Amazon.

Within the European e-book market, all, or nearly all, of the European countries are covered by Apple Inc., which offers e-books at their national websites in all European Member States (27 websites) and by Google Inc. (25 websites). However, companies that focus more on local markets, providing e-books at websites for specific regions only, are also important players within the geographic markets.

According to the International Video Federation (IVF), in 2011, consumers spend € 1,2 billion on audiovisual content through digital/online platforms and services in Europe.<sup>7</sup> It increased by 20,1% compared to 2010. Spending on physical video media (DVD/Blue-ray Disc) amounted to € 8,3 billion, down 7,7% compared to 2010. Digital delivery over the Internet is still generating fairly small revenues but is growing fast.

Significant differences regarding the availability of online Video-On-Demand services within the EU Member States exist. Important market players offering videos are Amazon and Apple Inc.

The use of social platforms, i.e. online-platforms and applications which provide for the exchange of user-generated-content, is one of the most impressive trends in online-behaviour. In the future, the role of social networks such as Facebook, should be assessed as they provide platforms for businesses for marketing to a large number of audiences. They provide more and more options for content creators to develop and introduce new products or services, that can be offered directly to the community-user (e.g. by donation, subscription, sale).

Leading European companies by monthly and daily active users at Facebook are King.com, Wooga, Social Point (Games) and Spotify (Music).

### **Check of information in regard to geographical restrictions**

The key issue is that when buying or using digital content products online, access to a purchased product may depend on the territory. A customer, who bought a product online, available by downloading or streaming, in one country or territory might have no access to that product if he travels to another country or territory, where a geographical restriction applies.

Those geographical restrictions hinder the use of the product and may influence the decision of the consumer to buy it. They may be therefore qualified as one of the “*main characteristics of the goods or services*” in the meaning of Art. 4 (1) (b) Distance Selling Directive. It requires that notice of these restrictions be provided in a clear and comprehensive manner.

With the check of websites selling products of the 4 categories music, games, e-books and videos in regard to information about geographical restrictions 1001 websites were investigated – music: 203 websites, game: 405 websites, e-book: 235 websites, video: 158 websites.

From the 1001 websites investigated, at 726 websites no indication of geographical restrictions could be found. Three reasons were presumed:

1. No information is provided, because the product is world-widely available and no geographical restriction exists;

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<sup>7</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 7, Video market, p. 14 seq., <http://www.ivf-video.org> .



2. There are geographical restrictions; however the provider does not provide information as to that fact;
3. Geographical restrictions do exist and information about them is indicated, however, those could not be found during the check, e.g. they were concealed, indicated on a specific product page, not accessible within the framework of the present check etc.

These websites were excluded from further checks - since the quality of the information as such could not be determined.

On 275 websites information regarding geographical restrictions was provided. However, often those were not easy to find. Among these websites, the information was judged below standard in 12% of the websites offering music, 25% games, 21% e-books, 4% videos.

### **Check of information in regard to in-game-purchase**

The check of information in regard to in-game-purchase focused especially on games targeted at children. The topic became particularly relevant in connection with the so-called “free-to-play” games (F2P).

The issue is that those games are often advertised as “free-to-play” but in reality are not completely free to play. Those games are only free at the start of play or in a limited part. During the game the user is offered or required to buy virtual items, characters, equipment and alike to proceed with the game or to have a better or faster success, e.g. to reach a new level, to get an additional life, stronger weapons or other advantages such as time or suppression of advertisement. Those items, features and advantages have to be paid with real money.

Art. 6 of the Unfair Commercial Practices Directive (UCP) names, as one of the types, when an unfair business practice is given, “misleading actions” i.e., a commercial practice, that “*is untruthful*” or “*deceives or is likely to deceive the average consumer*” and “*causes or is likely to cause him to take a transactional decision that he would not have taken otherwise*”. In Art. 6 (1) (b) UCP it refers to the main characteristic of the product, in Art. 6 (1) (d) UCP to the price.

Further, No. 20 of the blacklist of practices included in the UCP states that it is considered unfair in all circumstances to *describe “a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item”*.

The report proposes a benchmark and sets out a number of criteria for examining under which conditions a free-to-play-game or website would involve an unfair commercial practice or practices.

18 different games offered across the EU in different language versions were examined in detail.

The games usually were advertised (eye-catchingly) as “free-to-play” or “Register now for free” and alike, whereas the information about the additional features and costs was hard to find. Often it was included in the general terms and only indicated in a general way without information about the specific items available and prices. Items and prices would only become apparent after subscribing into the “free-to-play” game or after playing a while at a very basic level. Only 13% of the websites checked were very transparent on the modalities for in-game purchases.

### **Recommendations**

Within the study it was discovered that not all websites contain information about geographical restrictions in regard to a digital content product purchased by the consumer. It appears that there is not much awareness that the issue of geographical restrictions may have a further impact at a later stage, i.e. when a consumer, who bought such a digital content product in one country travels to

another country, where geographical restrictions apply and access to the respective website and/or product is denied. It is therefore recommended to bring this specific issue explicitly to the attention of the provider.

It is further suggested that an investigation be undertaken whether geographical restrictions exist for the digital content products offered and how consumer complaints in this regard are handled.

The practice of in-game-purchases raises a broad range of issues regarding unfair commercial practices especially when they are targeted to children who do not understand the commercial context in which they are put when they receive in-game solicitation to improve their game capacities. Such risks should be brought to the attention of consumers and especially parents, which are often not familiar with online-games.

To address the issue of the vulnerability of children and young persons in spending money in an uncontrolled way for virtual items and without the knowledge or authorization of their parents: the means of payment (such as ordering those items per SMS and/or phone call, or while playing on-line by pre-registered payment card information) should be restricted and subjected to rules and regulations protecting children.

## INTRODUCTION

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With the development of the Internet and online communication a new market arises, with new products, distribution chains, business strategies and practices. The use of digital content products has become an important part of the daily life of the modern European consumer and the market is still growing. However, with this development consumers also face new problems and the complaints of consumers that experience difficulties when buying or using digital content products is increasing.

Until recently, digital content products were not explicitly mentioned in EU-Directives or other EU-legislation and no specific consumer protection rules pertaining to digital content services existed. Partly, those products were regarded as goods or services – in accordance with the traditional approach – and therefore held to be included within the scope of existing EU-legislation focusing on consumer protection and unfair business practices which had to be adopted by the European Member States into their national laws. Those legislative measures, as for instance the (former) Distance Selling Directive or the Unfair Commercial Practices Directive, provide – amongst other matters – special rights for consumers and set out legal requirements when selling products to the consumer but also contain general and special information duties and/or legal requirements when selling products or delivering services within the European Internal market. However, because of the particularity of digital content products or services, uncertainty regarding the application of the existing rules arose. Therefore, to some extent, those digital content products were excluded from the scope of the existing EU legislation and within the national legislation of the European Member States – even if similarities to more traditional, customary products and services would justify an equal application.<sup>8</sup>

The European and national legislators are aware of these developments and the need – to set up specific rules and legislation on digital content products.

In October 2011, the European Commission proposed an optional Common European Sales Law (CESL). This proposal deals explicitly with the contracts involving digital content products and provides specific sales rules. As a result of the Review of the EU Consumer Law *acquis*, in November 2011, the Consumer Rights Directive (CRD) was adopted. It has to be implemented into the national law of the European Member States by December 2013 and will be applied in all European Member States at the latest by June 2014.

This CRD regulates consumer contracts and deals explicitly – amongst other matters – with digital content products. It defines digital contents as “data which are produced and supplied in digital form”.<sup>9</sup> The Directive does not provide a qualification of digital content products that are delivered on a non-tangible medium (e.g. via download or streaming). It clarifies, however, that those are covered by the CRD regardless of whether they are delivered on a tangible medium or not. Digital content that is supplied in a tangible medium (CD, DVD) is considered by the CRD as goods.<sup>10</sup> The CRD provides particular information duties that are explicitly applicable for digital content products delivered on a tangible medium and/or those that are not delivered on such a medium (Art. 5 (2) CRD, Art. 6 (2) CRD). With regard to digital content not delivered on a tangible medium the Directive contains specific provisions in respect of the right to withdraw from the contract and the requirement, when such a right is excluded (Art. 16 m CRD).

This legislation can be seen as a first initiative, however further measures in this regard seem to be indicated and appear to be required. To protect the consumer and to meet the consumer’s needs, it

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<sup>8</sup> See below, scope of the website check and short overview of the legal base.

<sup>9</sup> Art. 2 (11) CRD.

<sup>10</sup> Recital 19 CRD.

may be necessary in the future to put more focus on the differences between digital content products delivered on a tangible medium and those delivered online. However, this initial inclusion of digital content products in the EU legislation is a good step forward towards an up-to-date consumer protection framework for digital content materials and its future development.

Also in 2011, a large-scale survey on “Digital Content Services for Consumers” undertaken on behalf of the European Commission, analysed the specific problems consumers are experiencing with digital services and the causes of those problems. The results of this survey fed into a comparative analysis of the consumer protection laws in relation to digital content contracts that was also conducted in 2011. Both studies contributed to the work on the proposal of a Common European Sales Law and the Consumer Rights Directive.

The survey on “Digital Content Services for Consumers” focused on several digital products and services, among them music, online games and media. For the purpose of this study, ‘digital services’ was defined as all digital content which the consumer can access either online or through any other channels such as CD or DVD, and any other services which the consumer can receive online. Thereby, excluded from the scope were any digital services used for business purposes.

The study “Digital Content Services for Consumers” identified several problems consumers have to face when buying or using digital content products. It divided the ways of detriment the consumer suffers into ‘personal detriment’ and ‘structural detriment’.

- Personal detriment (financial or non-financial) refers to the negative outcome a consumer experiences after having purchased or interacted with a product or service measured against a benchmark such as ‘reasonable expectations’. Those may arise e.g. from financial loss, loss of time, stress and inconvenience.
- Structural detriment refers to an *ex ante* loss of consumer welfare and considers consumers in the aggregate. Those may arise due to market failure (market power) and/or regulatory failure (e.g. regulatory restrictions on the supply of goods, especially from licenses, copyright law etc.).

The study found that the main sources of personal detriment are: lack of information and transparency; unfair terms and conditions; issues of quality and access; and privacy and security matters. The study discovered that the three main problems consumers face with digital service are access, lack of information and unclear and/or complex information. Particularly, lack of information and unclear/complex information combined were identified as the main issue experienced by consumers when purchasing digital content products.

Also, - but to a lesser extent - the study identified, amongst others, problems resulting from unfair contract terms. The results of the study imply that traders, when selling digital content products, especially do not fulfil the information duties and obligations required by the Unfair Commercial Practice Directive and the Distance Selling Directive (in the future: Consumer Rights Directive).

In June 2012, the Member States’ authorities, under the coordination of the European Commission, investigated websites selling digital content products. This joint investigation (referred to as a “Sweep”) focused mainly on online games, but also on music, e-books and videos. The sweep covers only those digital content products which are offered by downloading and streaming. Excluded from the scope of the investigation were digital products which are offered in a physical medium, e.g. CDs or DVDs. Within this sweep, the respective websites were checked in regard to: 1) misleading pre-contractual information related to the offer for digital products as well as 2) to unfair terms and conditions related to contracts and vulnerable consumer protection aspects. The authorities checked the compliance of those websites with the legal requirements and identified potential irregularities.

However, only few authorities checked the websites in regard to access limitations for the consumer who access digital content products from a website of another country ("geographical restrictions").<sup>11</sup> Another issue raised in the Consumer Survey, is the problem of the so-called "in-game purchase". The general concept of "in-game-purchase" is that these games are generally offered for free to play, but contain items and features that can be bought by the user during the game to be able to progress further in it.<sup>12</sup> This practice might, under certain conditions, mislead consumers, especially minors as "vulnerable consumers", and constitute an unfair practice. Again, only few authorities checked this aspect.

The objective of this project is to compile a study on the European online-market for games, music, e-books and videos, which can be downloaded or streamed. It analyses the European market in regard to these products. Further, it examines the content of the web pages of providers of the relevant 4 products to check whether they contain, in particular, information on geographic restrictions and the way that this is provided. In another step, websites offering games that contain items to sell (in-game-purchase, F2P) are examined in regard to the question as to whether users of those games are appropriately informed about those purchase-options before the transaction is entered into. The results were collected into a data base and grouped by four categories:

- Best quality information provided,
- Good quality information provided,
- Average quality information provided,
- Insufficient quality information provided.

The scope of the study includes:

- The online market for online games, music, e-books and videos.
- Coverage of all the 27 EU Member States.
- Digital content products offered through downloading and streaming.
- A selection of top ten websites for investigation for each Member State (best-selling products and popular trader sites).

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<sup>11</sup> See below, Legal Analysis and Website Check, Key Issue.

<sup>12</sup> See below, Legal Analysis and Game Check, Key Issue.



## I. Introduction

With the growing access to the Internet and the distribution of Internet devices, the use of the Internet and online services becomes more and more part of EU consumers' daily lives. The Internet is no longer only used for communication or as tool to gain information. It is increasingly used for buying products and accessing entertainment. Businesses shift to online channels - establishing new markets, with new products and services, which provide opportunities and challenges likewise.

The present business analysis focuses on the EU-digital market for the four product categories games, music, e-books and videos, that can be downloaded or streamed. It provides an overview of market-shares and market players, distribution channels and business models and points to specific criteria as to why markets are targeted.

However, the market lacks transparency. Businesses are very reluctant to disclose statistics on revenue on specific digital products and breakdowns into geographic areas. Also, researches and studies in regard to intangible products are only available to a certain extent. With the growing online-market, statistic providers and companies focus more and more on surveying the behaviour of consumers in regard to the use of specific products to download or stream. However, there is a need for more specific research and data in regard to digital products in intangible mediums, delivered via download or streaming.

### 1. Consumer spending on entertainment and media

According to the research of PWC, in 2011, global spending on entertainment and media rose 4,9%. It grew a little faster than 2010 (4,5% increase), but is still below gains in previous growth years. Global digital spending<sup>13</sup> on entertainment and media will continue to grow. It is expected that during the next 5 years digital spending will increase at a rate of 12,1% CAGR<sup>14</sup>, whereas non-digital spending will only increase by 2,8%. In 2016, 67% of total global spending on entertainment and media growth will be generated by digital spending.<sup>15</sup>

Global digital/non-digital spending		
Year	digital	non-digital
2011	28%	72%
2016	38%	63%

*Source: PWC<sup>16</sup>*

<sup>13</sup> PWC: "Digital spending consists of broadband and mobile Internet access; online and mobile Internet advertising; mobile TV subscriptions; digital music; electronic home video; online and wireless video games; digital consumer magazine circulation spending; digital newspaper circulation spending; digital trade magazine circulation spending; electronic consumer, educational, and professional books; and satellite radio subscriptions.", <http://www.pwc.com/us/en/press-releases/2012/digital-now-embedded.jhtml> .

<sup>14</sup> CAGR = Compound Annual Growth Rate.

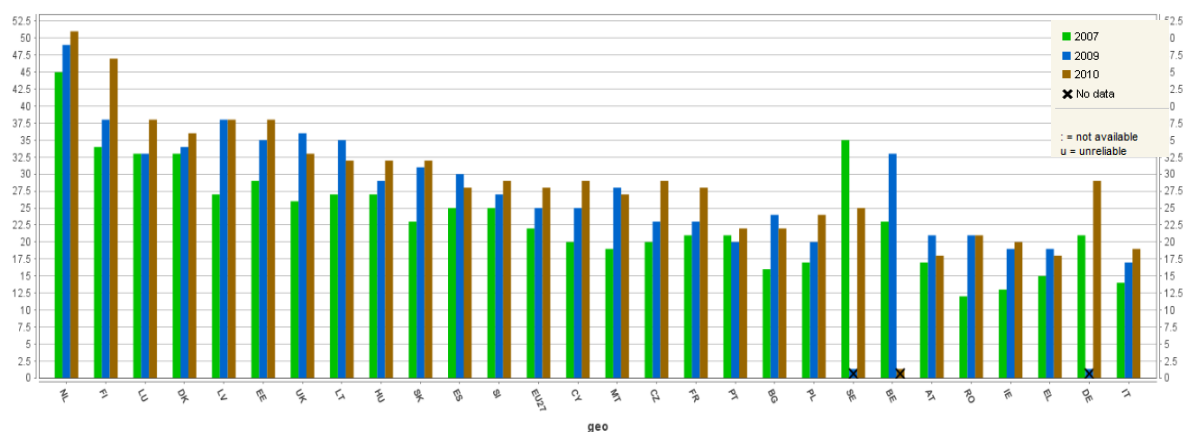
<sup>15</sup> PWC, Global entertainment and media outlook: 2012-2016 (PWC 2012), <http://www.pwc.com/gx/en/global-entertainment-media-outlook/data-insights.jhtml> .

<sup>16</sup> PWC, Global entertainment and media outlook: 2012-2016 (PWC 2012), <http://www.pwc.com/us/en/press-releases/2012/digital-now-embedded.jhtml> .

## 2. Individuals using the Internet for playing or downloading games, images, films or music

Eurostat-data from 2010 (the latest available) showed that, in 2010, 28% of Europeans used the Internet for playing or downloading games, images, films or music. The number steadily increased from 25% in 2009 and 22% in 2007.

### **Individuals using the Internet for playing or downloading games, images, films or music % of individuals aged 16 to 74**



Source: Eurostat

So

Individuals using the Internet for playing or downloading games, images, films or music								
% of individuals aged 16 to 74								
Country	2007	2009	2010		Country	2007	2009	2010
EU (27 countries)	22	25	28		Slovenia	25	27	29
Netherlands	45	49	51		Spain	25	30	28
Finland	34	38	47		France	21	23	28
Estonia	29	35	38		Malta	19	28	27
Latvia	27	38	38		Sweden	35	:	25
Luxembourg	33	33	38		Poland	17	20	24
Denmark	33	34	36		Bulgaria	16	24	22
United Kingdom	26	36	33		Portugal	21	20	22
Lithuania	27	35	32		Romania	12	21	21
Hungary	27	29	32		Ireland	13	19	20
Slovakia	23	31	32		Italy	14	17	19
Czech Republic	20	23	29		Greece	15	19	18
Germany	21	:(u)	29		Austria	17	21	18
Cyprus	20	25	29		Belgium	23	33	:(u)

Source: Eurostat

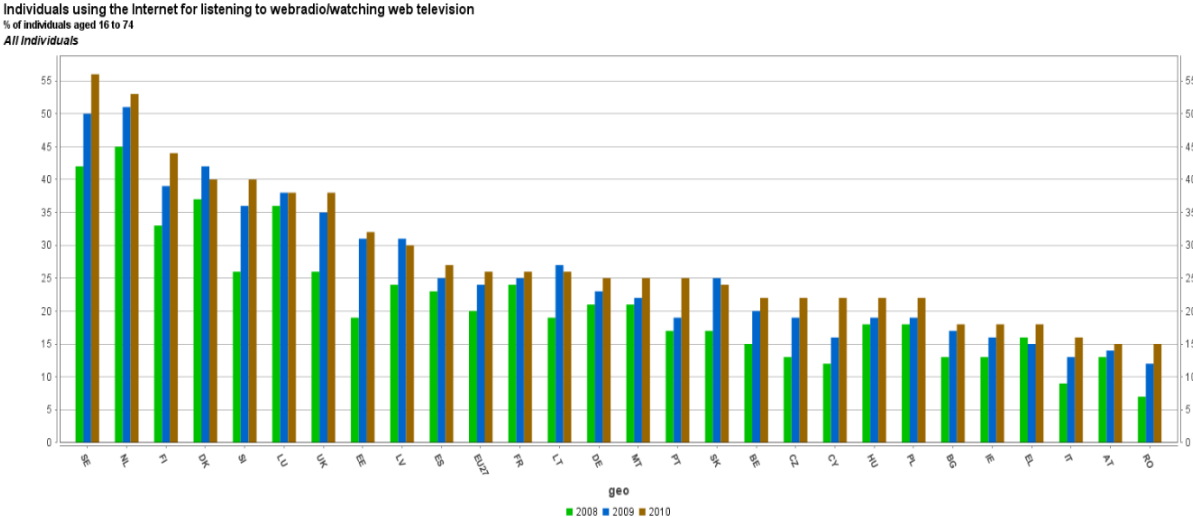


Compared to 2009, in 2010, the number of users increased in approximately 2/3 of all EU-countries. No changes were indicated in Latvia (38%) and Romania (21%). In the UK (36% / 33%) and Lithuania (35% and 32%), Spain (30% / 28%) Malta (28% / 27%) Bulgaria (24% / 22%) Greece (19% / 18%), Austria (21% / 18%) the number decreased.

### 3. Individuals using the Internet for listening to webradio/watching web television

From 2007 to 2010 (latest data available in Eurostat), the number of consumers who used the Internet for listening to webradio and watching web TV<sup>17</sup> also increased. Compared to 2009, in 2010 the number is growing in 22 of the countries, but went slightly down in Denmark (42% / 40%), Latvia (31% / 30%), Lithuania (27% / 26%) and Slovakia (25% / 24%). In Luxembourg (38%) no variations are indicated.

**Individuals using the Internet for listening to webradio/watching web television – % of individuals aged 16 to 74**



Source: Eurostat

Individuals using the Internet for listening to webradio/watching web television							
% of individuals aged 16 to 74							
Country	2008	2009	2010	Country	2008	2009	2010
EU (27 countries)	20	24	26	Malta	21	22	25
Sweden	42	50	56	Portugal	17	19	25
Netherlands	45	51	53	Slovakia	17	25	24
Finland	33	39	44	Belgium	15	20	22
Denmark	37	42	40	Czech Republic	13	19	22
Slovenia	26	36	40	Cyprus	12	16	22
Luxembourg	36	38	38	Hungary	18	19	22

<sup>17</sup> Data in Eurostat about downloads of movies are available for 2008.

United Kingdom	26	35	38	Poland	18	19	22
Estonia	19	31	32	Bulgaria	13	17	18
Latvia	24	31	30	Ireland	13	16	18
Spain	23	25	27	Greece	16	15	18
France	24	25	26	Italy	9	13	16
Lithuania	19	27	26	Austria	13	14	15
Germany	21	23	25	Romania	7	12	15
<i>Source: Eurostat</i>							

## II. Economic data - Market shares / Consumer spending

### 1. Games

The online game market belongs to the fastest growing markets since recent years and is expected to grow further in future.

As indicated in the Digital Agenda Scoreboard 2012, referring to data of IHS ScreenDigest, it is estimated, that the sale of downloadable core PC games will increase to 27,13 million in 2015, up from 2,14 million in 2007.<sup>18</sup> Video streamed games, i.e. fully streamed games services that do not require any downloading, are expected to increase to 7,7 million transactions in 2015 from 0,36 million transactions in 2011.<sup>19</sup> In contrast, sales of packaged games for personal computers are estimated to reach 35 million in 2015, compared to 69 million physical units sold in 2004.<sup>20</sup>

#### a) Number of gamers

According to the researches of Newzoo, focusing on 7 EU game markets (UK, Germany, France, Italy, Spain, Netherlands, Belgium)<sup>21</sup>, 132,200,000 active gamers were counted in 2011. The highest number of active gamers could be found in Germany with an estimated 36 million (up 38,5 million in 2012). It is followed by the UK with 31 million active gamers (up 33,6 million 2012) and France with 24 million (up to 25,3 million in 2012).<sup>22</sup>

Approximately half of this number is reached in Spain (2011: 15 million, 2012: 17 million) and Italy (2011: 14 million, 2012: up 18,6 million). The Netherland had 8 million active gamers in 2011 (2012: 8 million) and Belgium approximately 4,2 million (4,4 million in 2012).<sup>23</sup>

As estimated figures for 2012 show, it is expected that the number of gamers will increase in the future. More and more people play games via Internet. However, there are several differences between the countries. Furthermore, platforms to play are chosen by consumer depending on the time of the day, location and social settings and therefore a considerable overlap between playing on different platforms has to be borne in mind.<sup>24</sup>

<sup>18</sup> Digital Agenda Scoreboard 2012, Life Online, p. 32.

<sup>19</sup> Digital Agenda Scoreboard 2012, Life Online, p. 31 seq.

<sup>20</sup> Digital Agenda Scoreboard 2012, Life Online, p. 31.

<sup>21</sup> Estimated figures regarding the polish market are published for 2012.

<sup>22</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>23</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>24</sup> See Newzoo, Infographics 2011, 2012 and „Casual Games Audience Boosted by Mobile and Social Gaming“, 03.02.2011, [www.newzoo.com](http://www.newzoo.com).

In regard to online-games, those that are especially popular are games at casual websites<sup>25</sup> (e.g. GameDuell, King.com, Zylom, PopCap) with a share of approximately 60% of gamers in 2011 and at social networks<sup>26</sup> with a share of 54%. Here, the average audience is greater than for MMO games<sup>27</sup> with 35% in 2011.<sup>28</sup>

It is estimated, that the average number and percentage of people playing games will increase in future. A growth of gaming at casual website is especially estimated for France (2011: 38%, 2012: 57%). Approximately 50% of gamers downloaded games in 2011<sup>29</sup>. However, this number is expected to decrease in 2012.

Number (in million) and percentage of gamers per 'platform'																
	PC/Mac download				Casual Websites				MMO games				Social Networks			
	2011		2012		2011		2012		2011		2012		2011		2012	
GER	20	56%	15,9	41%	26	73%	24,1	63%	13	37%	12,9	33%	17	48%	17,4	45%
UK	15	47%	13	39%	22	69%	22	64%	11	35%	12	35%	18	57%	19	57%
FR	9	38%	8	32%	9	38%	14,3	57%	9	38%	7,6	30%	11	46%	12,2	48%
IT	7,6	54%	7,3	39%	8,7	62%	12,3	66%	5,1	36%	7,1	38%	9	64%	11,4	61%
ESP	8,1	54%	7,8	46%	8,6	57%	11,6	68%	6	40%	7,6	45%	8,9	59%	10,8	64%
NL	3,8	48%	3,0	37%	4,9	62%	5,1	65%	2,1	27%	1,7	22%	3,3	42%	3,3	41%
BE	1,9	48%	1,5	35%	2,5	63%	2,7	63%	1,5	38%	1,1	26%	2,2	63%	2,3	53%

Source: Newzoo, Infographics/ Keynotes<sup>30</sup>

Number (in million) and percentage of gamers per 'platform'												
	PC/Mac boxed				Console games				Mobile devices			
	2011		2012		2011		2012		2011		2012	
GER	26	73%	24,7	64%	25	70%	22,4	58%	22	62%	23,5	61%
UK	16	52%	16	47%	21	66%	25	76%	20	65%	24	71%
FR	13	55%	10,9	43%	18	75%	19	75%	13	55%	14,3	56%
IT	9,2	66%	8,5	46%	10,1	72%	13,3	72%	8,2	59%	12,1	65%
ESP	9,3	62%	7,9	46%	12,2	81%	13,0	76%	10,2	68%	12,9	76%
NL	3,7	47%	3,0	38%	4,4	55%	4,6	58%	3,2	40%	4,4	55%
BE	2,1	53%	1,9	43%	2,4	60%	2,6	59%	1,9	48%	2	46%

Source: Newzoo, Infographics/ Keynotes<sup>31</sup>

<sup>25</sup> Newzoo: Online “casual” games on game websites: These are games played on or downloaded from casual game websites including premium versions of games, downloaded from such sites (but not social networks such as Facebook), <http://www.newzoo.com/methodology-consumer-research/>.

<sup>26</sup> Newzoo: “Games on social networks: Social networks such as Facebook, Google Plus”, <http://www.newzoo.com/methodology-consumer-research/>.

<sup>27</sup> Newzoo: “MMO games: Massive Multiplayer Online (Role Playing) Games, often referred to as MMOs or MMORPGs (e.g. World of Warcraft, Dofus, SWTOR, League of Legends) and Virtual Worlds.” <http://www.newzoo.com/methodology-consumer-research/>.

<sup>28</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>29</sup> Newzoo: “Downloaded PC or Mac games: These are games that you download and install on your PC, laptop or Mac before playing (excluding MMO game downloads and premium “casual” games from casual game websites)”, <http://www.newzoo.com/methodology-consumer-research/>.

<sup>30</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>31</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

## b) Spending on games (time and money)

Counting the number of gamers does not say anything about the number of them that pay for gaming. According Newzoo, in 2011 only slightly more than half of the gamers (69,000,000, 52%) of the respective countries spent money on gaming.<sup>32</sup> In 2011, European gamers (EU 7) were estimated to spend approximately € 16,5 billion for games.<sup>33</sup> In 2012, it is expected, that the percentage of paying players and average spending will increase (except for Germany, where the percentage will drop slightly, but is still above the average).<sup>34</sup>

Active Gamers/Paying Gamers – estimated Number / %				
Country	2011		2012	
	Active Gamers	Paying Gamers	Active Gamers	Paying Gamers
	Germany	36,000,000	66%	38,500,000
UK	31,000,000	52%	33,600,000	64%
France	24,000,000	42%	25,300,000	51%
Spain	15,000,000	40%	17,000,000	53%
Italy	14,000,000	49%	18,600,000	50%
Netherlands	8,000,000	39%	8,000,000	45%
Belgium	4,200,000	43%	4,400,000	48%
<i>Source: Newzoo Infographics/ Keynotes<sup>35</sup></i>				

In 2011, to play via the Internet at casual websites (10%), MMO games (9%) and social networks (6%) accounted for approximately € 4 billion, i.e. a share of 25%. Spending on games to download was estimated at 11%, i.e., € 1,8 billion.<sup>36</sup>

However, in all countries, there is still a preference for console games. In 2011, console games accounted for a large share of 39%. The sale of boxed games went rapidly down in all of the selected European markets and is expected to rapidly fall further; in 2011 it had a share of 17%.<sup>37</sup>

With the spreading of smart-phone and table-devices, playing games on mobile devices (phone, tablets) increased, allowing people to play on-the-go, while moving. In 2011 it took a share of 8% and is expected to increase in the future.<sup>38</sup>

For 2012 it is expected, that the amount of money, gamers spent on games, especially at MMO games and in social networks, will have increased. Spending for games at casual websites is estimated to decrease or to stagnate. Particularly in France, where the number of gamers at casual websites has grown (see above), spending is estimated to go down (2011: € 280; 2012: € 250).<sup>39</sup>

People also spend generally more time on playing - especially at casual websites and games at mobile devices – which offer casual games and games to play for free. However, a distinction needs

<sup>32</sup> Newzoo, Keynote GDC San Francisco 2012, 19.06.2012.

<sup>33</sup> Newzoo, Keynote GDC San Francisco 2012, 19.06.2012.

<sup>34</sup> Newzoo, Keynote Browsergames, Slide: Share of total number of players and payers 2011 vs 2012, The impact of F2P, social and mobile gaming on spending behaviour.

<sup>35</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>36</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>37</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>38</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

<sup>39</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com), Infographics/ Keynotes.

to be made. Whereas “core segments”/platforms take more money than time, “casual segments”/platforms take more time than money.<sup>40</sup>

Money spent on games - Total and by 'platform' in millions € - estimated / Time spent in %								
Country	PC/Mac download		Casual Websites		MMO games		Social Networks	
	2011	2012	2011	2012	2011	2012	2011	2012
Germany	580	540	370	410	470	560	200	240
UK*	396	396	480	456	420	504	252	288
France	350	260	280	250	250	300	130	130
Italy	200	210	170	150	165	200	145	150
Spain	190	n.a.	175	155	130	240	130	135
Netherlands	57	52	52	53	52	64	31	32
Belgium	46	37	45	40	42	54	26	19
<b>EU 7 - Money</b>	<b>11%</b>		<b>10%</b>		<b>9%</b>		<b>6%</b>	
<b>EU 7 - Time</b>	<b>10%</b>		<b>15%</b>		<b>11%</b>		<b>16%</b>	
*UK	£ 330	£ 330	£ 400	£ 380	£ 350	£ 420	£ 210	£ 240
<i>(1 GBP = 1,199 EUR, 31.12.2011)</i>								
<i>Source: Newzoo Infographics/ Keynotes</i>								

Money spent on games - Total and by 'platform' in millions € - estimated / Time spent in %							
Country	Console games		PC/Mac boxed			Mobile devices	
	2011	2012	2011	2012		2011	2012
Germany	1,540	1,480	1,060	870		350	360
UK*	1,918	1,942	540	504		360	468
France	1,530	1,570	450	390		210	220
Italy	550	710	310	240		195	190
Spain	540	775	290	n.a.		145	180
Netherlands	232	257	64	61		44	54
Belgium	158	159	67	57		19	21
<b>EU 7 - Money</b>	<b>39%</b>		<b>17%</b>			<b>8%</b>	
<b>EU 7 - Time</b>	<b>23%</b>		<b>13%</b>			<b>12%</b>	
*UK	£ 1,600	£ 1,620	£ 450 L	£ 420		£ 300	£ 390
<i>(1 GBP = 1,199 EUR, 31.12.2011)</i>							
<i>Source: Newzoo Infographics/ Keynotes<sup>41</sup></i>							

Generally, consumer spending is up, but revenues per games and publisher are under pressure. According Newzoo, F2P-games currently dominate all platforms, except console games.<sup>42</sup> A recent

<sup>40</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com) , Infographics/ Keynotes.

<sup>41</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com) , Infographics/ Keynotes.

study of IPSO states, that free-to-play games accounted for 50% of the European games market in the last 12 months.<sup>43</sup> Most game publishers provide a mix of P2P and F2P business models, offering the consumer a choice. Thereby, according to Newzoo, more than half of the P2P gamers also spend money on virtual items. “Free-to-play-games” (F2P) are a current, and are expected to be, a future trend within the gaming industry.

Important European market players are game companies such as Bigpoint, Wooga and King.com and platforms such as iTunes (Apple Inc.) and GooglePlay (Google Inc.).<sup>44</sup>

## 2. Music

The digital music market is steadily growing. According to the International Federation of the Phonographic Industry (IFPI), in 2011, the digital music revenue for record companies grew globally by 8%, and amounted to approximately \$ 5,2 billion. (2010: 5%, \$ 4,6 billion).<sup>45</sup> Recorded trade revenues from digital channels account for an estimated 32% of recorded companies’ revenues (2010: 29%). In the EU, digital trade revenues accounted for 24,5% of total recorded music trade revenues, rising from 7,5% in 2007.<sup>46</sup>

A large share of digital revenues of the European digital music market derives from music downloads (single-track or album). Download stores (e.g. iTunes) account for most of the 500 legitimate services worldwide offering 20 million tracks.<sup>47</sup>

According to an analysis by Enders based on IFPI data, in 2011, digital track and album downloads accounted for 70% of digital trade revenues.<sup>48</sup> IFPI indicates that, e.g. in France, single track download sales increased by 23% and in the UK up 8% in 2011.<sup>49</sup> Also, digital album volume sales grew steadily, in the UK in 2011 up by 27% and in France by 23%. Globally, in 2011, approximately 3,6 billion downloads (single and album) were purchased, i.e. an increase of 17%.<sup>50</sup>

However, there is a trend to subscribing to music services (e.g., Spotify, Deezer), that has grown rapidly during recent years. It jumped from less than 5% of trade revenue in 2007 to about 15% by 2011.<sup>51</sup> According IFPI, subscription models are especially successful in Scandinavian countries, e.g. in the first 11 months of 2011, subscriptions accounted in Sweden for 84% of digital revenues. In other countries, as e.g. France, subscription revenues grew 90%.<sup>52</sup> Globally, in 2011 there were estimated to be 13,4 million paying subscribers to music subscription services compared to 8,2 million in 2010.<sup>53</sup>

A recent survey of Nielsen revealed that the most active markets for streaming providers are France and Spain. Here, on fixed platforms (computers), about 15% of the active Internet audience uses audio streaming services. The UK reached slightly above 10% of Internet users and less than 5%

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<sup>42</sup> Newzoo, [www.newzoo.com](http://www.newzoo.com) .

<sup>43</sup> ISFE/ Ipsos MediaCT , “GAMETRACK: results QUARTER 2 2012”, 17.09.2012, <http://www.ipsos.fr/sites/default/files/attachments/communiquedejeuxvideogametack2012.pdf> .

<sup>44</sup> See also further below, Social Media – Social Gaming.

<sup>45</sup> IFPI, Digital Music Report, 2012, Digital Music Report, 2011.

<sup>46</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 32.

<sup>47</sup> IFPI, Digital Music Report, 2012, p. 10, <http://www.ifpi.org/content/library/DMR2012.pdf> .

<sup>48</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 34.

<sup>49</sup> IFPI, Digital Music Report, 2012, p. 10.

<sup>50</sup> IFPI, Digital Music Report, 2012, p. 6.

<sup>51</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 34.

<sup>52</sup> IFPI, Digital Music Report, 2012, p. 10.

<sup>53</sup> IFPI, Digital Music Report, 2012, p. 11.

use streaming services in Italy and Germany.<sup>54</sup> A further growth of streaming services is expected, especially by launching new streaming services within the markets and expanding established services to further global markets.

Also of growing importance is the streaming of online music on mobile devices such as smartphones (Italy: 26%, UK: 20%, Germany: 16%).<sup>55</sup> However, the growth in digital sales still cannot compensate the decline of physical revenues and the general sales decline that the music industry has suffered in recent years.<sup>56</sup>

The following table provides an overview of the digital and physical music sales 2011 in selected European Countries.<sup>57</sup>

Selected EU countries - Digital - Physical Music Sales 2011									
Country	Market Shares in %		Trade Value 2011 in US \$			Change 2010/2011 in %			Digital Share
	2010	2011	Physical	Digital	Total*	Physical	Digital	Total*	2011 in %
Germany	8,6	8,9	1,145	225	1,474	-3,8	21,4	-0,2	15,3
UK	8,6	8,6	829	454	1,434	-14,1	24,7	-3,1	31,7
France	6,1	6,0	707	192	1,002	-10,4	25,7	-3,7	19,2
Italy	1,5	1,4	165	48	240	-11,0	26,3	-6,4	19,9
Netherlands	1,6	1,4	171	33	240	-10,5	47,7	-12,1	13,6
Spain	1,1	1,1	106	46	190	-16,7	21,1	-3,3	24,3
Sweden	0,9	0,9	69	69	155	-24,7	65,0	3,0	44,2
Belgium	0,9	0,8	105	18	140	-14,4	24,7	-10,2	12,8
Austria	0,7	0,7	83	21	119	-13,8	17,2	-7,3	17,6
Denmark	0,7	0,6	53	33	101	-16,6	-17,8	-14,1	32,5
Poland	0,5	0,5	70	4	81	-8,4	59,2	-7,0	5,3
Finland	0,4	0,4	48	12	72	-5,8	4,2	-1,9	16,5

\* Total trade value including physical and digital music sales, performance rights, synchronisation

Source: Bundesverband Musikindustrie e.V. Germany/ IFPI Recording Industry in Numbers 2012<sup>58</sup>

The strongest multinational player within the European digital (download) music market is Apple Inc. with its music store, iTunes, which offers its service in different local-language websites across all of the 27 European Union countries. Deezer and Spotify are taking the lead regarding multi-territory streaming services within the EU.

<sup>54</sup> Nielsen, Audio and video streaming in focus, November 2012.

<sup>55</sup> Nielsen, Audio and video streaming in focus, November 2012.

<sup>56</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 32, further, e.g., Leurdijl/Nieuwenhuis, The Music Industry (2012), p. 36 seq.; Dolata, The Music Industry and the Internet, SOI Discussion Paper 2011-02 (2011), p. 7 seq.

<sup>57</sup> Bundesverband Musikindustrie e.V. German, International, „Umsätze aus dem europäischen Musikverkauf, Abb. 32“, <http://www.musikindustrie.de/jahrbuch-international-2011> .

<sup>58</sup> Bundesverband Musikindustrie e.V. German, International, „Umsätze aus dem europäischen Musikverkauf, Abb. 32“, <http://www.musikindustrie.de/jahrbuch-international-2011> .

### 3. E-books

The e-book market is still a small market. Its market share within the single EU countries is estimated not more than 1% - 3% of the book market, and often rather less.<sup>59</sup> However, the market for e-books has grown rapidly in 2011 in the Netherlands, where e-books account for 3% market shares and are expected to grow to 7% in 2012.<sup>60</sup> A considerable exception is the UK. For 2011, the Publisher Association announced that e-book sales to consumers increased by 336% to £ 92m in the UK.<sup>61</sup> By value, the consumer e-book sales are equivalent to 6% of physical book purchases by consumers.<sup>62</sup>

Book Market - Market Share E-books %			
Country	Book Market Size	Market Share E-books	
		2011	Comments
UK	£ 3,2 billion <sup>63</sup> combined sales of digital and physical books <sup>64</sup>	6% <sup>65</sup>	All digital formats (e-books, audio book downloads, online subscriptions) accounted for 8% of the total invoiced value of sales of books in 2011, up from 5% in 2010. <sup>66</sup> Digital sales accounted for 12,9% of the total value of sales in January-June 2012, up from 7,2% in the equivalent period in 2011. <sup>67</sup>
Germany	€ 9,601 million <sup>68</sup>	1% <sup>69</sup>	2010: e-books accounted 0,5% of book market; 2011: € 4,7 million e-book sales (2010: € 2,0 million); 2011: 757.000 people bought e-books (2010: 540.000); <sup>70</sup>

<sup>59</sup> OECD (2012), "E-books: Developments and Policy Considerations", OECD Digital Economy Papers, No. 208, OECD Publishing, p. 35; Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>60</sup> Wischenbart, The Global eBook Market 2012, p. 32.

<sup>61</sup> The Publisher Association, press release Statistical Yearbook 2011,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) , 01.05.2012; The Bookseller, <http://www.thebookseller.com/news/digital-8-2011-book-sales-value-says-pa.html> , 01.05.2012.

<sup>62</sup> The Publisher Association, press release Statistical Yearbook 2011,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) , 01.05.2012.

<sup>63</sup> The Publisher Association, press release, Statistical Yearbook 2011, 01.05.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) .

<sup>64</sup> The Publisher Association, press release, Statistical Yearbook 2011, 01.05.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) .

<sup>65</sup> The Publisher Association, press release, Statistical Yearbook 2011, 01.05.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) .

<sup>66</sup> The Publisher Association, press release, Statistical Yearbook 2011, 01.05.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) .

<sup>67</sup> The Publisher Association, press release, Digital Fiction Sales, 18.09.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2319:digital-fiction-sales-see-188-growth-by-value-&catid=503:pa-press-releases-and-comments&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2319:digital-fiction-sales-see-188-growth-by-value-&catid=503:pa-press-releases-and-comments&Itemid=1618) .

<sup>68</sup> Börsenverein des deutschen Buchhandels, Wirtschaftszahlen,

<http://www.boersenverein.de/de/portal/Wirtschaftszahlen/158286> .

<sup>69</sup> Börsenverein des deutschen Buchhandels, Markt mit Perspektiven - das E-Book in Deutschland 2011, 04.06.2012, <http://www.boersenverein.de> .



			2011: e-books accounted for an average of 6,2% of publishers total sales (2010: 5,4%; anticipated 2015: average of 17%). <sup>71</sup>
<b>Spain</b>	€ 2,772 million <sup>72</sup>	1% (trade) / 2,4% (incl. STM, el al) <sup>73</sup>	2011: 40,328 titles published in digital format (2010: 11,748); 2011: 81,169 digitized titles back catalogue (2010: 25,927); 2011: 52,005 titles released in digital format (2010: 25,567); 2011: € 72,58 million revenues from sales of books in digital format (2010: € 70,50). <sup>74</sup>
<b>France</b>	€ 4,587 million <sup>75</sup>	1,8% / 2% <sup>76</sup>	---
<b>Netherlands</b>	€ 1,168 million <sup>77</sup>	1,2% <sup>78</sup>	2012: title catalogue expected to grow to 16,000 titles with market share e-books 3% (7% estimated end 2012). <sup>79</sup>
<b>Denmark</b>	€ 540 million <sup>80</sup>	1-2% <sup>81</sup>	---
<b>Italy</b>	€ 3,408 million <sup>82</sup>	0,2% <sup>83</sup>	---
<i>Source: The Global eBook Market 2011/2012<sup>84</sup>; UK: The Publisher Association<sup>85</sup>; Germany: Börsenverein des deutschen Buchhandels<sup>86</sup>; Spain: Federación de Gremios de Editores de España<sup>87</sup></i>			

<sup>70</sup> Börsenverein des deutschen Buchhandels, Markt mit Perspektiven - das E-Book in Deutschland 2011, 04.06.2012, <http://www.boersenverein.de> .

<sup>71</sup> Börsenverein des deutschen Buchhandels, Markt mit Perspektiven - das E-Book in Deutschland 2011, 04.06.2012, <http://www.boersenverein.de> .

<sup>72</sup> Federación de Gremios de Editores de España, Comercio Interior del Libro en España 2011, July 2012, <http://www.federacioneditores.org/> .

<sup>73</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>74</sup> Federación de Gremios de Editores de España, Comercio Interior del Libro en España 2011, July 2012, <http://www.federacioneditores.org/> .

<sup>75</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>76</sup> <http://www.thebookseller.com/news/e-book-sales-1.8%25-French-market.html> .

<sup>77</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>78</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>79</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>80</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>81</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>82</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>83</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>84</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>85</sup> The Publisher Association, press release, Statistical Yearbook 2011, 01.05.2012,

[http://www.publishers.org.uk/index.php?option=com\\_content&view=article&id=2224&Itemid=1618](http://www.publishers.org.uk/index.php?option=com_content&view=article&id=2224&Itemid=1618) .

<sup>86</sup> Börsenverein des deutschen Buchhandels, Markt mit Perspektiven - das E-Book in Deutschland 2011.

<sup>87</sup> Federación de Gremios de Editores de España, Comercio Interior del Libro en España 2011, July 2012, <http://www.federacioneditores.org/> .

The e-book market in the EU 5 – Germany, France, Italy, Spain, UK (2008 – 2014) in billion euros							
	2008	2009	2010	2011	2012	2013	2014
printed	17,6	17,5	17,2	16,9	16,5	16,2	16
e-book	0,1	0,2	0,4	0,6	1,0	1,3	1,6

Source: DigiWorld Yearbook 2011, IDATE<sup>88</sup>

### a) Growth of e-books

It is apparent that the trend towards a growth in the e-books market is emerging. More and more e-books are available and the sale of e-book devices increase.

The major e-book-retailers currently<sup>89</sup> each offer at least 1 million e-books in several languages, including, but not limited to, English, Spanish, German and Russian in their e-bookstores. For example, Amazon offers in its Kindle-Shop 1,628,737 e-books<sup>90</sup>, Barnes and Nobles offer more than 1 million titles in their Nook-e-bookstore<sup>91</sup>, Kobo has more than 2,3 million e-books<sup>92</sup>, Google at Google-Play advertises over 2 million titles<sup>93</sup>, and Apple-iTunes offers 1,5 million books worldwide<sup>94</sup>.

Moreover, book publishers (content provider) increasingly offer digital content such as e-books and apps in addition to traditional printed books. In reaction to the developments in new technology and

<sup>88</sup> DigiWorld Yearbook 2011, Idate in "E-books market", p. 109.

<sup>89</sup> November 2012.

<sup>90</sup>

[http://www.amazon.de/s/ref=amb\\_link\\_168328267\\_34?ie=UTF8&page=1&rh=n%3A530886031&pf\\_rd\\_m=A3JWKAKR8XB7XF&pf\\_rd\\_s=left-2&pf\\_rd\\_r=02E1Q9BGWEDYH8DR554D&pf\\_rd\\_t=101&pf\\_rd\\_p=336182767&pf\\_rd\\_i=530886031](http://www.amazon.de/s/ref=amb_link_168328267_34?ie=UTF8&page=1&rh=n%3A530886031&pf_rd_m=A3JWKAKR8XB7XF&pf_rd_s=left-2&pf_rd_r=02E1Q9BGWEDYH8DR554D&pf_rd_t=101&pf_rd_p=336182767&pf_rd_i=530886031), visited 16.11.2012.

([English eBooks \(1.317.359\)](#), [French eBooks \(81.159\)](#), [German eBooks: 130.169](#), [Italian eBooks \(35.186\)](#), [Portugiesische eBooks \(8.025\)](#), [Spanish eBooks \(50.898\)](#))

<sup>91</sup> <http://www.barnesandnoble.com/help/cds2.asp?PID=8184>, visited 16.11.2012; All Books (By Title A-Z, number includes Apps as Mr. Perry, Angry Birds): 3.101.598:

<http://www.barnesandnoble.com/s/?sort=TA&size=30&store=ebook>; German: 16.892

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=GER&prc=0.01%2B&store=ebook&view=grid>, Spanish: 25

<http://www.barnesandnoble.com/s/?sort=TA&size=25&dref=1&giftguide=t&pro=1306&startat=1&view=grid>, French: 11.637

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=FRE&prc=0.01%2B&store=ebook&view=grid>, Russian: 26.458

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=RUS&prc=0.01%2B&store=ebook&view=grid>, Italian: 8.879

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=ITA&prc=0.01%2B&store=ebook&view=grid>, Dutch: 758

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=DUT&prc=0.01%2B&store=ebook&view=grid>, Portuguese: 2.479

<http://www.barnesandnoble.com/s/?sort=TA&size=30&fmt=EBOOK&lng=POR&prc=0.01%2B&store=ebook&view=grid> Finish: 557

<http://www.barnesandnoble.com/s/?sort=TA&size=30&lng=FIN&prc=0.01%2B&store=ebook&view=grid>, visited 16.11.2012.

<sup>92</sup> [http://www.kobobooks.com/about\\_us](http://www.kobobooks.com/about_us), visited 16.11.2012.

<sup>93</sup> [http://support.google.com/googleplay/bin/answer.py?hl=en-GB&hlrm=de&p=books\\_overview&answer=179839&rd=1](http://support.google.com/googleplay/bin/answer.py?hl=en-GB&hlrm=de&p=books_overview&answer=179839&rd=1), visited 16.11.2012.

<sup>94</sup> <http://www.apple.com/itunes/what-is/>, visited 16.11.2012.

business models, they are forced to get into direct competition with the technology companies, such as Google and Amazon.<sup>95</sup>

Also the Top 5 global book publishers ranked in 2012<sup>96</sup> (containing 4 European publishers; 1. Pearson (UK), 2. Reed Elsevier (U.K./NL/U.S.), 3. Thomson Reuters (U.S., The Woodbridge Company Ltd., CN) 4. Wolters Kluwer (NL), 5. Hachette Livre (Lagardère, FR)), have a strong focus on e-business and extended their portfolio to digital products and services, including e-books.

Pearson PLC, the largest global publisher 2011 according the ranking, generates 33% of its revenues (total sales) from digital products and services.<sup>97</sup> Pearsons company, Penguin, doubled its e-book revenues in 2011. It accounted 12% of Penguin's revenues worldwide (6% in 2010).<sup>98</sup> From 2008 to 2011, digital downloads of apps and e-books have totaled approximately 50 million.<sup>99</sup>

Penguin is currently discussing merger with Random House (Bertelsmann AG, Germany). This would lead them to be the world leading publisher (if anti-trust- approval is granted). Random House, ranking in 8th place of the world's largest book publishers, recorded continuous growth of e-books sales. In 2011, it announced triple-digit-percentage growth in terms of digital publishing revenue (which counterbalanced decreases sales of print books, especially in the English-speaking territories).<sup>100</sup> In 2011, the company offered nearly 40,000 e-books available in English, Spanish and German.<sup>101</sup> In one of its core market, the UK, the contribution of e-books grew by more than 400% (compared to 2010).<sup>102</sup>

Global Publisher Reed Elsevier gained in 2011, 63% of its revenue from electronic content and services (22% print, 15% face-to-face) compared to 2006, where revenue from electronic content was just 37% (51% print, 12% face-to-face). It will further expand its digital opportunities. In 2011, e.g., its company, Elsevier, provider of scientific and medical information, published 15,000 online books in its electronic platform ScienceDirect, with over 1,000 online books added each year. It further made available 950 health science books.<sup>103</sup>

In 2011, Wolters Cluver generated 71% of its revenues from online/electronic and software products, and services.<sup>104</sup> In the legal and regulatory market, for instance, more than 70 mobile products and apps were launched in 2011. There are now more than 2,100 e-books available.<sup>105</sup>

Hachette Livre (Lagardère, France) bought the french e-book distribution platform Numilog (launched in 2000) in 2008. However, in April 2012 it was announced, that the company sold it back to its founder and c.e.o.<sup>106</sup> In France, the e-book sector is still in the progress of developing and represents less than 1% of net sales in 2011.<sup>107</sup> In the UK, Hachette UK has 20% of the market share for e-books (13,9% for printed books). The expansion of the e-book market represents 4% of the overall

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<sup>95</sup> However, the business model is still traditional, see FAQ, Publishing Innovation, p. 23.

<sup>96</sup> See: "The Global 50: The World's Largest Book Publishers 2012", 25.06. 2012, <http://www.publishersweekly.com> .

<sup>97</sup> Pearson, Annual Report 2011.

<sup>98</sup> Pearson, Annual Report 2011.

<sup>99</sup> Pearson, Annual Report 2011.

<sup>100</sup> Bertelsmann, Annual Report, 2011.

<sup>101</sup> Bertelsmann, Annual Report, 2011.

<sup>102</sup> Bertelsmann, Annual Report, 2011.

<sup>103</sup> Reedelsevier, Annual Report 2011.

<sup>104</sup> Wolters Cluver, Annual Report 2011.

<sup>105</sup> Wolters Cluver, Annual Report 2011.

<sup>106</sup> See e.g., [www.thebookseller.com](http://www.thebookseller.com), 17.04.2012.

<sup>107</sup> Lagardère, Annual Report 2011.

print and digital UK market.<sup>108</sup> In 2011, the digital books sales accounted for 6% of Lagardère Publishing's total net sales.<sup>109</sup>

Focusing on territories, the number of e-books available from publishers in the UK is estimated at 1 million titles (including publishers from the U.S.). In Germany 195,000 titles were available in 2011 and in France about 100,000.<sup>110</sup>

E-books available from publishers		
Country	Titles Published per Year	E-book titles available from publishers
	2011	2011
UK	149,800	1 million
Germany	96,273	195,000
France	81,268	100,000
Italy	58,829	33,000
Poland	21,740	18,000
Spain	83,258	10,000
Netherlands	21,337	10,000
Denmark	7,000	7,000
Sweden	4,077	4,800
Slovenia	5,621	300

*Source: The Global eBook Market 2011/2012<sup>111</sup>*

### b) Digital Book World E-book Best-Seller List of global publishers

Since August 2012, Digitalbookworld (digitalbookworld.com) publishes a weekly “*Digital Book World E-book Best-Seller List*” of global publishers, identifying which publisher is selling the most e-books. It measures sales ranking over a week's time to reward books that are best-seller lists every day of a week versus just one day.<sup>112</sup> The bestseller ranks are observed from the following five top retailers: Kindle, Nook, Google, Kobo and Sony.<sup>113</sup>

Over a period of 11 weeks, starting from mid-August to October 2012, the top e-book-publishers were Random House with 85 appearances and Penguin with 62 appearances.<sup>114</sup> Both publishers also own all the number 1 titles of the best-selling e-book list. All their titles combined account for

<sup>108</sup> Lagardère, Annual Report 2011.

<sup>109</sup> Lagardère, Annual Report 2011.

<sup>110</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>111</sup> Wischenbart, The Global eBook Market 2011; Wischenbart, The Global eBook Market 2012.

<sup>112</sup> Digital Book World E-Book Best-Seller List, Methodology, <http://www.digitalbookworld.com/2012/digital-book-world-e-book-best-seller-list-methodology/>.

<sup>113</sup> Digital Book World E-Book Best-Seller List, Methodology, <http://www.digitalbookworld.com/2012/digital-book-world-e-book-best-seller-list-methodology/>.

<sup>114</sup> Power-E-book seller: August - October 2012, <http://www.digitalbookworld.com/2012/ebook-publisher-power-rankings/>.

more titles than all other publisher in the ranking list together.<sup>115</sup> Further to note is that titles of separate-self-publishing authors take an important place in the list – ranking before major publishers such as Amazon, Harper Collins and SohoPress.

Top 13 Overall E-book Publishers, August - October 2012								
Rank	Publisher	Appearances	No. 1 Titles		Rank	Publisher	Appearances	No. 1 Titles
1	Random House	85	5		8	Hyperion	8	0
2	Penguin	62	6		9	Amazon	6	0
3	Scholastic	35	0		10	HarperCollins	5	0
4	Hachette	29	0		11	Soho Press	4	0
5	Simon & Schuster	18	0		12	NeedtoRead Books	3	0
6	Macmillan	10	0		13	Sliding Hill Press	1	0
7	Self-published	9	0					

Source: [digitalbookworld.com](http://digitalbookworld.com)<sup>116</sup>

### c) Consumer Purchasing/Free e-Books

Also consumers are aware about the possibility to obtain e-books and e-books are popular to some extent. A recent international survey, conducted among Internet users of 10 countries – including the EU Member States, France, Germany, Spain and UK – asked respondents whether they had downloaded an e-book in the last six month before the survey (early 2012).<sup>117</sup> 21% of the respondents in the UK, Europe's leading e-book-market, indicated that they purchased an e-book compared to 13% in Spain and Germany and only 5% in France. Free e-books were downloaded by 30% of the respondent in the UK, 23% in Germany, 33% in Spain and 11% in France.<sup>118</sup>

E-book downloads – Free/Paid						
Country	Total population	Internet use	% of Internet users who have downloaded an e-book in the last six months		% of total pop who have downloaded an e-book in the last six months	
			In millions	%	Paid	Free
UK	62	82,0	21	30	17	25

<sup>115</sup> Digital Book World, Power-E-book seller: August - October 2012, <http://www.digitalbookworld.com/2012/ebook-publisher-power-rankings/>.

<sup>116</sup> Power-E-book seller: August - October 2012, <http://www.digitalbookworld.com/2012/ebook-publisher-power-rankings/>.

<sup>117</sup> Bowker Market Research, FAQ, Publishing Innovation 2012/2013, p. 13.

<sup>118</sup> Bowker Market Research, FAQ, Publishing Innovation 2012/2013, p. 14.

Spain	47	62,2	13	33	8	21
Germany	82	79,9	13	23	10	18
France	65	69,5	5	11	3	8
<i>Source: FAQ, Publishing Innovation 2012/2013, Bowker Market Research</i>						

However, there are some doubts, that e-books will displace printed books. It is expected in regard to some segments, such as cheap paperback books.<sup>119</sup> In the aforesaid survey, the majority of current downloaders of e-books indicated that the use of e-books does not affect their expenditures on print books.<sup>120</sup>

Within the European e-book market, whole or nearly all of the European countries are covered by Apple Inc., who offers e-books at websites in all European Member States (27 websites) and by Google Inc. (25 websites). However, companies that focus more on local markets, providing e-books at websites for specific regions (as e.g., buch.de international for Austria and Germany) are also important market players within the geographic markets.

#### 4. Videos

According to the International Video Federation, in 2011, European consumers spent in total € 9,49 billion on buying and renting video software on DVD, BD and via digital and online platforms and services.<sup>121</sup> Thereby, consumers spend € 1,2 billion on audiovisual content through digital/online platforms and services.<sup>122</sup> It increased by 20,1% compared to 2010. Whereas, spending on physical video (DVD/BD) amounted to € 8,3 billion, down 7,7% compared to 2010.<sup>123</sup>

In 2011, digital retail (EST) - the fastest growing sector - has grown by 46.6% and amounts to € 208 million and digital rental (Internet VOD) up 41.7% to € 117 million. Digital video consumption by subscription has risen by 26.5% and is worth € 40 million. TV VOD rose by 12,5% compared to 2010 and accounts for € 848 million.<sup>124</sup>

The European market on digital/online video consumption has grown rapidly in recent years and it is expected that it will grow further. However, as the figures show – the rate of growth is slowing. In contrast, the delivery of video on DVD/BD will further decrease. But, even if decreasing, the DVD is still the main video format for the consumer.<sup>125</sup> These factors are interpreted as an indication that the digital video platforms will grow to a substantial market, but not ultimately replace the delivery of videos on physical mediums such as DVD and BD.<sup>126</sup>

<sup>119</sup> OECD, Internet Economy Outlook, p. 34.

<sup>120</sup> Bowker Market Research, FAQ, Publishing Innovation 2012/2013, p. 15.

<sup>121</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 7, Video market, p. 14 seq.

<sup>122</sup> TV-based video-on-demand (TV VOD) and digital retail, rental and subscription services accessed via computers and Internet connected televisions, International Video Federation 2012, European Yearbook 2012, European video, p. 7.

<sup>123</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 7.

<sup>124</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 10.

<sup>125</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 10.

<sup>126</sup> See e.g., Screendigest, [www.screendigest.com](http://www.screendigest.com), "More declines for European Video in 2011": "sizable niche", 23.11.2012.

### a) Consumer Level Digital Video

The leading EU countries in digital video spending in 2011 are the UK (€ 176,7 million), France (€ 79,1 million) and Germany (€ 66,9 million).<sup>127</sup> They are also accounted as the major European home entertainment markets.<sup>128</sup>

CONSUMER LEVEL DIGITAL VIDEO							
The purchase or rental of movies and TV series delivered over the open Internet through transactional models (also known as EST, DTO, Internet VOD) or on a subscription basis							
Country	Total spending on digital video Euro m						%
	2006	2007	2008	2009	2010	2011	10/11
Europe	28,3	48,6	84,7	138,4	257,0	364,4	41,80%
UK	15,5	28,1	52,2	77,0	139,5	176,7	26,70%
France	6,1	9,3	13,7	24,8	50,1	79,1	57,80%
Germany	4,8	7,4	13,4	29,6	52,8	66,9	26,70%
Italy	0,2	0,5	0,6	0,9	1,9	8,2	324,00%
Netherlands	0,2	0,7	1,2	1,5	1,9	6,0	219,80%
Spain	0,0	0,1	0,4	1,0	2,1	5,9	177,10%
Sweden	0,4	0,5	0,8	0,9	2,1	4,9	134,40%
Ireland	0,002	0,017	0,1	0,2	2,0	3,6	80,40%
Denmark	0,2	0,4	0,7	0,7	1,2	2,1	71,10%
Belgium	0,0	0,2	0,4	0,4	0,3	1,3	304,10%
Finland	0,1	0,2	0,3	0,3	0,5	1,1	127,70%
Portugal	0,002	0,003	0,003	0,003	0,009	0,612	6355,20%
Poland	-----	0,01	0,05	0,08	0,13	0,4	213,80%
Hungary	0,0	0,03	0,05	0,05	0,06	0,11	89,10%

Source: International Video Federation 2012, European Yearbook 2012<sup>129</sup>

### b) Consumer Level TV VOD<sup>130</sup>

According to the International Video Federation, the largest generator of digital video spending is TV VOD (TV based video on demand). In 2011, it was worth € 848 million, up 12,5% compared to 2010.<sup>131</sup> In 2011, French consumers spent € 251 million on TV VOD. The VOD-Infrastructure in France is the most developed in Europe. In contrast, only € 187 million were spend by consumers in the UK, following on in rank 2, and not even half of this amount in Italy, with € 90,4 million. Only € 42,3 million was spent in Germany, ranking in 6th place, behind Belgium (€ 58,4 million) and Spain (€ 46,4 million).<sup>132</sup>

<sup>127</sup> International Video Federation 2012, European Yearbook 2012, <http://www.ivf-video.org> .

<sup>128</sup> International Video Federation 2012, European Yearbook 2012, European video, p. 8.

<sup>129</sup> International Video Federation 2012, European Yearbook 2012, <http://www.ivf-video.org> .

<sup>130</sup> The delivery of movies and TV content on a transactional (VoD, NVoD/PPV) basis via cable/satellite/IPTV services).

<sup>131</sup> The delivery of movies and TV content on a transactional (VoD, NVoD/PPV) basis via cable/satellite/IPTV services).

<sup>132</sup> International Video Federation 2012, European Yearbook 2012, <http://www.ivf-video.org> .

<b>CONSUMER LEVEL TV VOD</b>							
<b>The delivery of movies and TV content on a transactional (VoD, NVoD/PPV) basis via cable/satellite/IPTV services)</b>							
	<b>Total spending on TV VOD Euro m</b>						<b>%</b>
<b>Country</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>10/11</b>
<b>Europe</b>	<b>466,2</b>	<b>516,9</b>	<b>604,3</b>	<b>649,6</b>	<b>754,5</b>	<b>848,4</b>	<b>12,50%</b>
France	104,8	104,0	133,4	169,2	215,1	251,1	16,80%
UK	156,5	178,9	189,4	173,3	183,3	187,0	2,00%
Italy	75,0	90,3	101,5	101,4	98,2	90,4	-8,00%
Belgium	6,5	11,2	20,1	35,4	49,0	58,4	19,20%
Spain	42,3	46,5	57,6	55,9	49,8	46,4	-6,70%
Germany	19,6	15,9	19,5	25,5	31,9	42,3	32,30%
Portugal	11,0	11,4	13,6	20	27,7	34,7	25,10%
Netherlands	5,2	8,4	11,0	15,1	21,5	29,0	35,10%
Poland	0,004	0,227	1,3	7,7	17,9	23,8	32,80%
Sweden	9,7	11,2	12,2	9,8	14,1	22,7	60,80%
Denmark	4,9	5,2	5,5	3,3	5,7	8,9	55,40%
Ireland	14,6	11,8	9,6	9,9	9,1	8,9	-2,60%
Hungary	0,0	0,03	0,22	0,49	1,1	1,95	77,20%
Finland	1,2	1,3	1,4	0,1	0,5	1,9	302,10%

Source: International Video Federation 2012, European Yearbook 2012<sup>133</sup>

According to the Digital Agenda Scoreboard 2012, in 2011, approximately 20 million IPTV subscribers were counted in the EU.<sup>134</sup> The absolute leader in terms of subscribers is France with half of the EU total, followed by Germany with 8% of the total. The numbers of the IPTV subscribers in the single EU-countries show that the IPTV-market is still to develop. In 2011, the penetration rate was estimated at only 4% of the population in the EU (compared to 27,8% broadband penetration and high speed Internet connection). However, for 2015, it is expected, that online television (video to TV) will account for 17% of all video traffic, being one of the fastest growing segments.<sup>135</sup>

With regard to the TV distribution platforms, the number of IPTV platforms in the EU27 increase steadily (as well as Pay DTT services). On the other hand, satellite packages and cable offers declined. Reasons are seen partly in the current consolidation in these sectors.<sup>136</sup>

<b>IPTV Operators - TV distribution platforms in the EU 27</b>	
<b>Year</b>	<b>in Units</b>
<b>2008</b>	66
<b>2009</b>	86
<b>2010</b>	91
<b>2011</b>	130

Source: MAVISE/European Audiovisual Observatory<sup>137</sup>

<sup>133</sup> International Video Federation 2012, European Yearbook 2012, <http://www.ivf-video.org>.

<sup>134</sup> Digital Agenda Scoreboard 2012, Life Online, p. 28.

<sup>135</sup> Digital Agenda Scoreboard 2012, Life Online, p. 28.

<sup>136</sup> MAVISE/European Audiovisual Observatory, Yearbook 2011, [www.obs.coe.int](http://www.obs.coe.int).

<sup>137</sup> MAVISE/European Audiovisual Observatory, Yearbook 2011, [www.obs.coe.int](http://www.obs.coe.int).





Consumer spending on digital video and TV VOD	
Country	Consumer spending on digital video and TV VOD
Belgium	€ 59,7m Comparison with 2010 21% Digital video/TV VOD split (%) 98 / 2
Denmark	Dkk 81,9m / € 11m Comparison with 2010 (local currency) 58,2% Digital video/TV VOD split (%) 81 / 19
Finland	€ 3m Comparison with 2010 214,4% Digital video/TV VOD split (%) 64 / 36
France	€ 330,2m Comparison with 2010 24,5% Digital video/TV VOD split (%) 76 / 24
Germany	€ 109,1m Comparison with 2010 28,8% Digital video/TV VOD split (%) 39 / 61
Hungary	forint 579m / € 2,1m Comparison with 2010 (local currency) 80,4% Digital video/TV VOD split (%) 95 / 5
Ireland	€ 12,5m Comparison with 2010 12,2% Digital video/TV VOD split (%) 71 / 29
Italy	€ 98,6m Comparison with 2010 -1,6% Digital video/TV VOD split (%) 92 / 8
Netherlands	€ 35m Comparison with 2010 50% Digital video/TV VOD split (%) 83 / 17
Poland	zł 99,9m / € 24,2m Comparison with 2010 (local currency) 38,3% Digital video/TV VOD split (%) 98 / 2
Portugal	€ 35,3m Comparison with 2010 27,2% Digital video/TV VOD split (%) 98 / 2
Spain	€ 52,3m Comparison with 2010 0,8% Digital video/TV VOD split (%) 89 / 11
Sweden	Skr 249,7m / € 27,6m Comparison with 2010 (local currency) 61% Digital video/TV VOD split (%) 82 / 18
UK	£ 315,8m / € 363,7m Comparison with 2010 (local currency) 13,9% Digital video/TV VOD split (%) 51 / 49
<i>Source: International Video Federation 2012, European Yearbook 2012</i>	

### c) Consumer

In a recent international survey by Accenture (February/March 2012), the share of respondents consuming video over the Internet<sup>138</sup> was indicated as follows: Spain: 14%, Italy: 14%, Germany: 13%, UK: 13% and France: 12%.<sup>139</sup>

According to a study of the marketing research institute, comScore, in April 2011 Germans watched on average 19,6 hours online-videos a month and thus are leading ahead of Spain with 18,4 hours, the UK with 17 hours and France and Italy with 12,8 hours.<sup>140</sup>

There are slightly different ranking occurs when measuring the average number of watched online-videos a month: again Germany leading with 186,9 videos followed by the UK with 166,4, Spain with 150,9 France 131,2 and Italy with 114,8.<sup>141</sup>

### d) Online-VOD Services / Market players

There are significant differences regarding the availability of online VOD services within the EU Member States. Leading markets, such as France, account for 44 services. Others, like Malta, Greece, Latvia, Finland, Estonia, Cyprus and Slovenia, do not have major domestic VOD services. The majority of domestic services are only presented in about a third of the countries, including Netherlands and Czech Republic).<sup>142</sup>

The market players are the Internet movie and TV content providers such as Apple Inc. (i-Tunes offers 45,000 films worldwide<sup>143</sup>) and Amazon (e.g., Prime Instant Video, offering 11,982 Movies/2,067; TV/7,603 (14,049) Rental/7,583; Purchase/6,466<sup>144</sup>; Lovefilm, e.g., Video-on-Demand: de: 2.382 titles, uk.: over 5.000 titles<sup>145</sup>).

Global leader Netflix (USA), providing Internet subscription services for movies and TV shows, accounted more than 25 million paid subscribers<sup>146</sup> (as a key driver of revenues) in the USA in 2011. In January 2012 it launched its streaming service in the UK and Ireland. In October 2012, it launched its platforms to Scandinavia (Sweden, Denmark, Finland, Norway), where streaming is very popular.

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<sup>138</sup> Total sample = 7,503; Total respondents consuming online video = 6,867.

<sup>139</sup> Accenture, Video-Over-Internet, Consumer Survey 2012.

<sup>140</sup> VPRT, <http://www.vprt.de/thema/marktentwicklung/marktdaten/mediennutzung/web-tv-und-vod-nutzung/content/online-videonutzung-d>.

<sup>141</sup> VPRT, <http://www.vprt.de/thema/marktentwicklung/marktdaten/mediennutzung/web-tv-und-vod-nutzung/content/online-videonutzung-d>.

<sup>142</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 47 seq., referring to the European Audiovisual Observatory.

<sup>143</sup> <http://www.apple.com/uk/itunes/what-is/#store>, 24.11.2012.

<sup>144</sup> [www.amazon.com](http://www.amazon.com), Amazon Instant Video, 24.11.2012.

<sup>145</sup> [www.lovefilm.de](http://www.lovefilm.de), 24.11.2012.

<sup>146</sup> See Netflix, Annual Report 2011, Netflix offers streaming subscription and DVD-mail subscription (USA).

### III. Data on business models (including distribution chain)

#### 1. In General on business models and distribution chains

##### a) Business models

The term “Business Model” is used for a variety of informal and formal descriptions of the main aspects of business including purpose, offerings, strategies, infrastructure and organizational structures, operational as well as trading practices, policies etc. to create, deliver and capture value. Business models have become much more sophisticated.

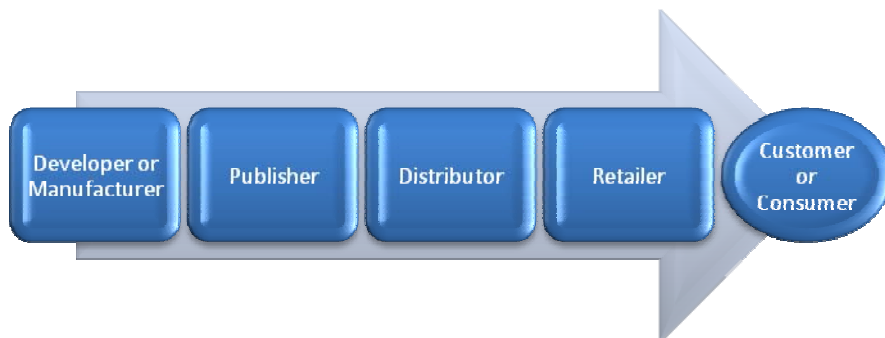
With the focus on global economy and e-commerce and because nowadays substantial shares of companies’ revenues and profits are likely to be generated beyond their own domestic markets, entrepreneurs created entirely new models to adapt their business process on existing or emergent technology and transfer their current business model to the digital environment.

But in this context it is also important to observe that most of the websites checked from the multi-Member State providers revealed that, excluding the language, they are replicating to other “geographic markets” the same style, web design and operating model of the website based at their headquarters. (e.g. Apple, Google, Microsoft). Commentators say that “many companies go too far in centralizing global functions in the interest of efficiency, resulting in excessive rigidity and standardization. The last decade and a half saw a focus on excessive centralization – an attempt to increase efficiencies that failed to address differences in local demand, languages and cultures.”<sup>147</sup>

##### b) Distribution chains

Distribution is becoming a key competitive asset in the Net’s digital content economy.

The traditional framework of the “Distribution chain” can be drawn as presented below:



Whilst there are differences between the functions of actors, their roles often overlap. For example: the developer is a person or company that designs and creates new final products. The publisher usually prepares the product and makes it available to the public (‘publish’ it), licensing the rights and the concept on which the product is grounded for handling the marketing and often even the distribution. Particularly noteworthy is that the publisher can also internally develop the product or order it from a manufacturer/developer. The distributor is the person or company that supplies the shops with products and the retailer (person or company) is the direct contact with the customer or consumer that sells the product to the public.

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<sup>147</sup> Strategy+business issue 68, p.8-9.

From that traditional perspective, the distributor is the key between the developer/publisher and the retailer because s/he owns the knowhow and logistic to spread and distribute the product in physical ways. The distributor has the structure and physical means (e.g. transport, staff, network) to reach a large number of retailers and therefore improve the competitiveness of the product.

However, largely due to the low costs involved in reproducing and distributing digital content over the internet, “**logistics**” have lost relevance. The switch to online distribution has drastically cut out the need for physical logistics. Manufacturing boxes, printing support (manuals, quick-guides), and organizing the infrastructure of distribution, inventory - physical control, carrier, and retail sales are obsolete.

Thus, “the traditional distribution chain in the business involving publishers, distributors and retailers has basically disappeared as there is no longer any need to duplicate physical products because these can be distributed over the network”.<sup>148</sup> The manufacturer or publisher, in many cases, directly distributes the digital content without the need for a distributor to act as intermediary between the publisher and the retailer. This leads to increasing revenue shares of developers and/or publishers, which were, in the traditional distribution framework, rather small.

For example, the literature specialized in the games sector points out that “the difference in online distribution models open attractive opportunities for developers.” “The shortening of the value chain means developers earn between 70% (distribution through an online shops such as App Store, PSN and XBAL) and 100% (direct sales to consumers through the developer’s own online shop) of the price paid by the consumer. The online business model is thereby more attractive to private investors.”<sup>149</sup>

This process has been labeled “**disintermediation**” i.e. that the model has cut out the role of the traditional distributor<sup>150</sup> and even retailers.<sup>151</sup> It does not mean that the traditional model of distribution does not exist anymore, but it has been progressively changed and reduced due to the development of new digital models of the “distribution chain”.

In general terms, allowing for the particularities of each product, this “distribution chain” framework also works for music, e-books and videos. However, some additional remarks are needed here.

A new process, called “**re-intermediation**” has produced new actors in the current “distribution chain”: Internet Service Providers (ISPs) and Internet portals.

Whilst the ISP is a provider of service, the “portal” is a provider of content.<sup>152</sup> In this context it is important to state, that digital content has an uncertain status as it is neither clearly goods nor clearly services.<sup>153</sup> To be categorized as a “portal” the provider must compile a mass content. It means a large amount of information and/or products offered to the public.

However, the distribution of digital content has lately been concentrated on these ISPs and/or Internet portals.

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<sup>148</sup> JRC-IPTS.JRC Scientific and Technical Reports.Born Digital/Grown Digital. EU 24555 EN-2010, p. 96.

<sup>149</sup> European Games Developer Federation (2011), p. 5.

<sup>150</sup> JRC-IPTS.JRC Scientific and Technical Reports.Born Digital/Grown Digital. EU 24555 EN-2010, p.96.

<sup>151</sup> JRC-IPTS.JRC Scientific and Technical Reports.Born Digital/Grown Digital. EU 24555 EN-2010, p.99.

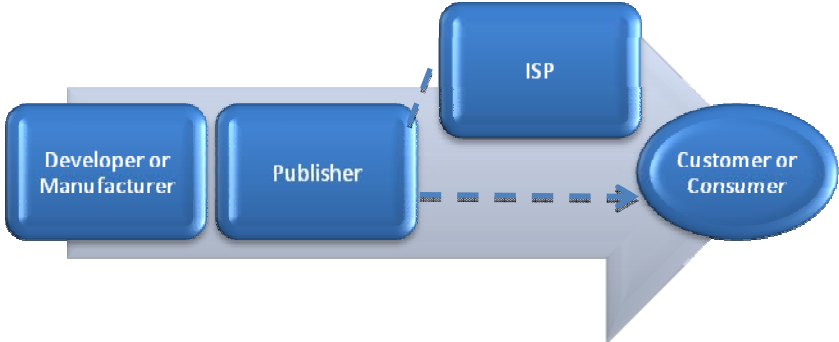
<sup>152</sup> Portal means a website that is used as a point of entry to the Internet, where information has been collected that will be useful to a person interested in particular kinds of things: a business/news/shopping portal.

<sup>153</sup> BIS| Department for Business Innovation & Skills. Enhancing Consumer Confidence by Clarifying Consumer Law. July 2012, p.129.

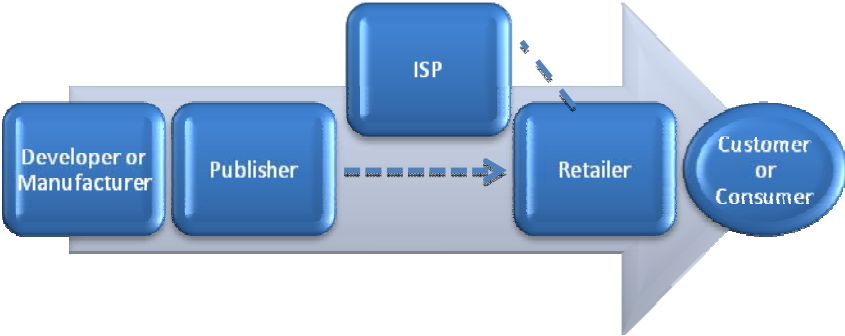
The combination of available digital tools and digital market places where users have the possibility to generate and exchange content has been quickly adopted by companies as a new way to do business. In this scenario, the traditional distributor has in fact either disappeared or has become an aggregator of digital content from different kinds of sources.

Under this scenario, the following pictures would represent the new “Distribution chain models”:

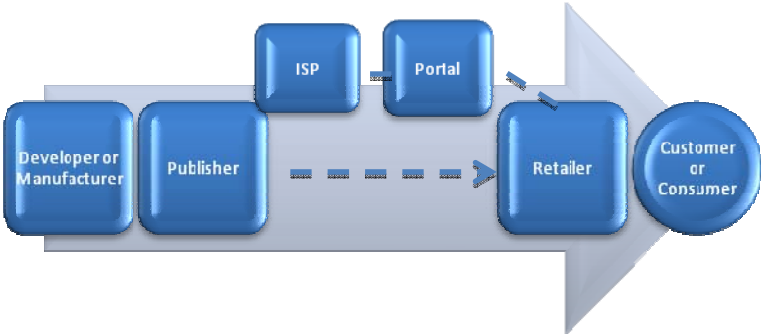
1. There is neither “traditional distributor” nor “retailer” because the developer/publisher develops and maintains his own website. (e.g. Apple App Store)



2. The developer/publisher offers the product through the retailer. The retailer owns its website (online shop). (e.g. Saturn, Media Markt)



3. The developer/publisher offers the product through the retailer. The retailer interacts with a portal where the product is available to purchase.



Accordingly, in the new “distribution chain models” the ISP is an essential actor as these are part of “enabling services” for the delivery of data and digital content from the internet to the user. Some of them even offer their own digital content, like apps or computer programmes, which are outwith the scope of this study and therefore, not considered within the new “distribution chain models”.

Business models, including distribution chains, for the 4 product categories can be described in detail as follow:

## 2. Games

Online games are generally played on different online-enabled devices such as consoles, personal computers (PCs), mobile phones, connected TVs or other portable devices. One of the reasons that online games have experienced an enormous rise is the growing number of devices.

Online games are divided into 2 categories: **browser-based games** (BBGs) and **client-based games**.

To play browser-based games, users need access to the Internet and a web browser to play directly on a dedicated or publisher's website. Sometimes pieces of software have to be installed on the client's PC. Some games make use of server-side scripting, sending requests to the server. The game is actually played on the server computer to which users connect through the browser, and this allows for more complex interaction among users. Continuous improvements in browsers and add-on software as well as in the speed and performance of networks could lead the browser-based games to reach same quality and complexity as client-based ones in a relatively short time.<sup>154</sup>

Client-based games need an application to be installed and run on the gamer's PC in order to function. This software can usually be bought or downloaded from the game's (distribution) website. The installed client software then connects either with other clients – peer-to-peer architecture – for strategy or action games for a small number of gamers or connects to the game server. The software usually allows better graphics and some more advanced features of the game, while on the other hand browser-based games are often rather simple in graphics and limited in complexity of the content. Massively Multiplayer Online Games (MMOGs) are generally based upon client-server architecture, as the persistent worlds must always be online and thus have to be run continuously on a server which allows users' clients to connect and play, by means of the client's locally installed software.<sup>155</sup>

As a result, various business models have evolved:

- (a) box sales (either along with one-off console or PC sales) and the possibility to provide users with some additional online content or features. By accessing online resources, users could get an improved experience;
- (b) dedicated or producer's platforms to download the game and pay a fee per game (pay-per-download); Mobile games are primarily deploying the pay-per-download model as users lap up applications from one of the many popular app stores (games as a service).<sup>156</sup>
- (c) dedicated or producer's platforms to play the game free of charge but financed by advertising;
- (d) dedicated or producers platform with game free of charge but sale of virtual goods ("freemium model"); The "freemium model" allows gamers to play the basic version for free but they can customize and improve game play by purchasing 'virtual goods' or enhanced functionality by a premium version. Thus, the focus is on the continuing average revenue

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<sup>154</sup> JRC-IPTS.JRC Scientific and Technical Reports.Born Digital/Grown Digital. EU 24555 EN-2010, p. 82.

<sup>155</sup> JRC-IPTS.JRC Scientific and Technical Reports.Born Digital/Grown Digital. EU 24555 EN-2010, p. 82, 83.

<sup>156</sup> Cartagena Capital newsletter January 2011, p. 2.

per user and life time value of the customer rather than the one-off retail price. Freemium models give the user the choice whether or not s/he purchases certain additional features within a game. As there are, in the beginning, no costs involved, a larger number of players can be attracted to the game through this model<sup>157</sup>, e.g. “Farmville” by Zynga<sup>158</sup> or MMOGs “Lord of the Rings” and “Dungeons & Dragons”. Most social and browser-based games as well as virtual worlds rely on this model for monetization. Important is the appropriate placement of virtual goods within the games for the (financial) success of the game.

- (e) producer’s platform with subscription (monthly fixed priced), e.g. game “World of Warcraft” by Blizzard Entertainment (publisher: vivendi);
- (f) platforms to play social games. e.g. Zynga’s “CityVille” which attracted 70 million active users within one month from launch. Even if they may be less sophisticated in terms of graphics and artificial intelligence in comparison to console / PC games, social games effectively engage gamers and monetize them by allowing ‘friends’ to play with each other and usage of intelligent social and behavioural paradigms.<sup>159</sup>

### 3. Music

The business models of the product “online music” are as follows:

- (a) download platforms to download single tracks or albums<sup>160</sup>:
  - (i) device-centric, e.g. Apple’s iTunes Music store tied to Apple’s devices iPod, iPhone etc.;
  - (ii) software-centric, online stores selling music supported by Windows Media player;
  - (iii) network centric, portable player and content are tied to a delivery channel<sup>161</sup>;
- (b) on-demand-streaming, usually sold on subscription, e.g. Scandinavian Spotify - either distributed on distributors website or in partnership with telecom companies for streaming on mobile phones or TV’s (e.g. Spotify and Telia in Finland and Sweden) or bundled with broadband services of Internet service providers<sup>162</sup>; Subscription services also take advantage of the “freemium” business model. Consumers are attracted with a “free” version supported by advertising before leading them into a “premium” version supported by advertising before leading them into a “premium” paid-for service with benefits such as no advertising, the ability to use it on a portable device or offline, additional features like limited downloads of tracks to own and better sound quality.<sup>163</sup>
- (c) platforms in social networks in partnership with subscription services, e.g. under Deezer’s and Spotify’s partnership with Facebook, new sign-ups to Spotify and Deezer come through Facebook and users then share their playlists with Facebook friends and thus enable artists and fans to legally share their music and make new discoveries more easily;

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<sup>157</sup> Cartagena Capital newsletter January 2011, p. 2, 3.

<sup>158</sup> JRC-IPTS. JRC Scientific and Technical Reports. Born Digital/Grown Digital. EU 24555 EN-2010, p. 86.

<sup>159</sup> Cartagena Capital newsletter January 2011, p. 3.

<sup>160</sup> OECD (2012), OECD Internet Economy Outlook 2012, OECD Publishing, p 178.

<sup>161</sup> Digital Music Distribution 2005, p. 2

<sup>162</sup> ICMP/ IFPI / GESAC, The Online Music Market in Europe – New Business Models and Consumer choice, p. 3.

<sup>163</sup> IFPI, Digital Music Report 2012, p. 12; ICMP/ IFPI / GESAC, The Online Music Market in Europe – New Business Models and Consumer choice, p. 4.



- (d) peer-to-peer (P2P) network services, legal music filesharing with DRM technology;
- (e) streaming from the “Cloud”, which means consumers purchase songs that are delivered to the “Cloud” and may be streamed to multiple devices, e.g. iTunes Match<sup>164</sup>;
- (f) broadcast radio;
- (g) basic webcasting;
- (h) interactive webcasting.

Next to music download services mobile operators in Europe have started offering music downloads and streaming directly to cell phones over their cellular networks. Mobile services providers themselves, or in partnership with streaming services providers, offer direct over-the-air downloads to cell phones, with the ability to transfer tracks to a personal computer. Some mobile services send music tracks to an email address. Mobile versions of online stores can also be accessed via cell phones over the wireless Web.

The European digital music market is largely dominated by the sale of download-to-own digital tracks and albums.<sup>165</sup> Important platforms for music downloads are iTunes, eMusic, Amazon.mp3 and 7digital, of which iTunes is clearly leading as the main distribution source<sup>166</sup>. However, the rise of subscription services for on-demand streaming pushed the digital growth. In 2011, subscription revenues accounted for about 15% of trade revenues (without revenue from advertising supported services.) This is especially visible in Scandinavia, where the success of the subscription services of new multi-territory business models such as Spotify and Deezer led to higher-than-average rates of digital music revenue growth.<sup>167</sup> Download service iTunes does not yet engage in the subscription business model but has launched iCloud, a service which stores data bought via iTunes and allows music to be consumed on all Apple devices owned by the user.<sup>168</sup>

In detail: modern technology allows for new possibilities in the distribution chain of downloading music such as

- (a) “**À la carte**” (also called “download-to-own”) in which a song/ an album is downloaded and paid for directly.
- (b) **Abonnement**, for which the user pays a monthly amount and afterwards downloads a certain number of titles a month.
- (c) **Flatrate**, which allows the consumer the use of a large music data base to download an unlimited number of titles by paying a monthly fixed price. In most cases the titles are protected by DRM-technology with the result, that - after the contract and thus the licence ends - the downloaded music cannot be played anymore. Furthermore, these titles must not be burned onto an Audio-CD. Some services undergo the duty to buy a licence by recording music titles off Live-streams of webradios with audio quality equal to CD-standards. Through this technique may users legally get mp3-files without DRM-protection within a flatrate.

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<sup>164</sup> IFPI, Digital Music Report 2012, Expanding.Choice. Going Global, p. 10.

<sup>165</sup> IFPI, Digital Music Report 2012, Expanding.Choice.Going Global, p. 10.

<sup>166</sup> EST59529, “Die Content-Flatrate”: eine Lösung für das Problem illegaler Tauschbörsen?, p. 29 – <http://www.europarl.europa.eu/studies>.

<sup>167</sup> ICMP/ IFPI / GESAC, The Online Music Market in Europe - New Business Models and Consumer choice, p. 3; Digital Agenda Scoreboard 2012, p. 25.

<sup>168</sup> JRC Technical Reports. The Music Industry 2012, p. 5.

- (d) **Free of charge downloads or price chosen by consumer**, possible for several reasons. It may be either to push advertisement for the artist or his/her album or live concerts<sup>169</sup> or brand; to build up a stronger connection with the fan-society; or because commercial marketing for an extremely specialized music section does not seem profitable. In addition, it is a way to offer an exchange platform for amateur/hobby musicians or because of practicing ideology (Open-source-movement). Related to this, new “Netlabels” often are specialized in free of charge offers or “free music”. Others take advantage of the lower distribution costs of a digital offer and sell the music for a price to be chosen by the consumer or free of charge and financed by advertisements on the platform.

As for now the online music market is complicated. Each song and album is offered at a different price at the various payment-services and even within these services prices are changing during period of time.

#### 4. E-books

The business models for e-books are:

- (a) B2C-Platforms to download e-books, e.g. Amazon<sup>170</sup>, iBook, Audible;
- (b) platforms for self-publishing e-books by authors<sup>171</sup>, e.g. Kindle Direct Publishing (KDP)<sup>172</sup>, or in parts as the book is evolving and in this way financed;
- (c) platforms for download of e-books free of charge;
- (d) “Mobile” Libraries, lending e-books<sup>173</sup>.

Since e-books in most of the cases need special devices (e-reader) to use the e-books, growth of revenues also depends on success of selling the devices or enabling consumers to read the e-books on their mobile devices which they already own, like tablets or smartphones.

For instance, Amazon, with its device “Kindle reader” under sole wholesaler Amazon control, launched in the UK, France, Germany, Spain and Italy and offers in addition “Kindle apps” for all the major mobile computing platforms: iOS (i.e. the iPhone, iPad, iPod Touch, Mac Computers, Black Berries), Android, Windows Phone and RIM.<sup>174</sup>

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<sup>169</sup> IpsosMediaCT, Making Money in a Digital World , p. 20

<sup>170</sup> OECD (2012), “E-books: Developments and Policy Considerations”, OECD Digital Economy Papers, No. 208, OECD Publishing, p. 27

<sup>171</sup> OECD (2012), “E-books: Developments and Policy Considerations”, OECD Digital Economy Papers, No. 208, OECD Publishing, p. 31

<sup>172</sup> Wischenbart, The Global eBook Market: Current Conditions & Future Projections 2012, p. 43.

<sup>173</sup> OECD (2012), “E-books: Developments and Policy Considerations”, OECD Digital Economy Papers, No. 208, OECD Publishing, p. 32

<sup>174</sup> Article “Amazon pushes digital content on many gadgets” - [www.trust.org/trustmedia/news/amazons-pushes-digital-content-](http://www.trust.org/trustmedia/news/amazons-pushes-digital-content-)

Google's e-bookstore (Google Play) provides products and services in more than 100 languages and in more than 50 countries, regions, and territories. On one of the Google domains, users can find information in many different languages and in many different formats.<sup>175</sup>

E-Books, bought from Apple's iBooks store are only available on special iOS-devices (iPad, iPhone, iPod Touch). Apple launched the iBooks store in all EU markets, though with a varying inventory and sold 40.5 million iPads in 2011 (Global unit sales 2011).<sup>176</sup>

## 5. Videos

As with the other products, the content of the online product video is delivered per download or streaming service. Streaming in this sense involves downloading and using content "on-demand" as it is needed.

The business models for the sale of online videos are similar as for the other product categories

- (a) platforms for digital content rentals, on which the film is downloaded / streamed for a specific period of time (up to 30 days or 24 or 48 hours) and DRM technologies prevent playback after agreed rental period<sup>177</sup>;
- (b) platforms to download movies to own and pay-per-item, e.g. Apple's iTunes store; either with or without the right to record the movie on DVD. Content portability is often restricted<sup>178</sup>;
- (c) producer/broadcaster platforms to stream movies from libraries or archives of TV stations<sup>179</sup> or AppleTV or Zattoo<sup>180</sup>; usually sold on subscription on the basis of monthly or yearly fee. DRM technologies prevent the video from being watched after the subscription expires; The video version of the "freemium model" attracts consumers with a package of "free" ad-supported channels and gives the option of paying more and receiving premium content without advertising.<sup>181</sup>
- (d) advertising-based free of charge streaming of videos, mostly applied to independent or low-budget productions.
- (e) free-of-charge streaming or downloads of limited movies for marketing reasons.
- (f) platforms for hosting self-made online videos of users, e.g. YouTube.
- (g) platforms in social networks in partnership with online video services, e.g. Facebook and YouTube.

Consumers may download or stream from a variety of platforms, including Internet-enabled television, PC's, console game player or smartphones.

Two distribution chains are common:

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<sup>175</sup> Google Annual Report 2011, p. 10.

<sup>176</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 51.

<sup>177</sup> OECD (2012), OECD Internet Economy Outlook 2012, OECD Publishing, p 177.

<sup>178</sup> OECD (2012), OECD Internet Economy Outlook 2012, OECD Publishing, p 177.

<sup>179</sup> There are about 7600 TV-stations within the EU- EST59529, "Die Content-Flatrate": eine Lösung für das Problem illegaler Tauschbörsen?, p.32 – <http://www.europarl.europa.eu/studies>.

<sup>180</sup> website: <http://blog.wiwo.de/ungedruckt/2012/07/30/ranking-die-wichtigsten-web-videoanbieter-in-deutschland/> .

<sup>181</sup> IpsosMediaCT, Making Money in a Digital World, p. 28, 29.

Producers/Rights holders → Agents Aggregators → Operators of VOD-platforms and services → Distributors of platforms and services → Manufacturer of equipment and materials → End consumers<sup>182</sup>

or

Content owners / Providers → Content aggregation and distribution → Content delivery, e.g. via e-mail → content viewing.<sup>183</sup>

Specialized networks help distribute digital video content over the Internet by ensuring both high availability and high performance, e.g. YouTube.

## IV. Criteria for choosing the targeted countries

### 1. How providers target several countries

There are numerous ways by which the company/provider can target several markets. It is also tied to their business model. Some are attracted by big markets that offer a considerable source of revenue and a profit pool, but on the other hand they may also face a high level of competition that might affect the revenue. Other companies use the absence of competition of smaller, less sophisticated markets that enable business to grow in the medium/long term. Different ideological points of view are clearly possible from the very beginning inasmuch as where economists see market failures, entrepreneurs see opportunities. Moreover such markets are still somehow connected because resources may flow through them in many different ways.

The Multi-Member State providers observed by the website check revealed interesting preferences in this regard. Whilst Apple and Google covers nearly all the 27 EU Member States, for the four product categories, Microsoft only offers so far, to the same EU market, three of the four products (games, video and music) through its distribution channels “Xbox” and “Zune”. It is also noted that Microsoft’s websites addressed to particular markets such as Cyprus, Estonia, Lithuania, Latvia and Malta only offers games.

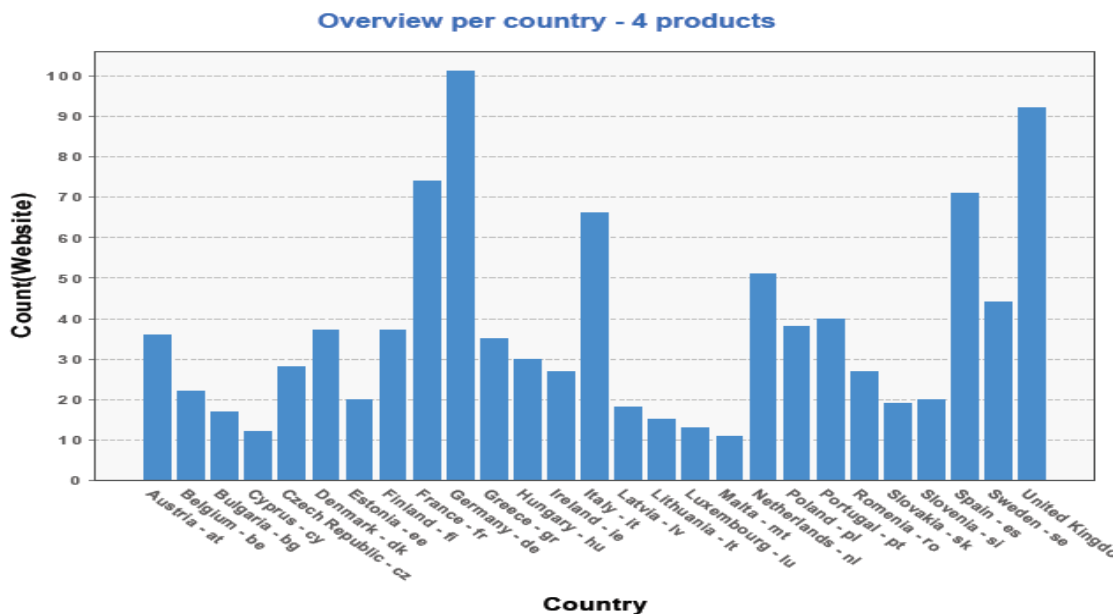
A recent study for the Commission pointed out that, based on current trends, consumers in Bulgaria, Cyprus, Estonia, Hungary, Lithuania, Latvia, Romania, Greece, Luxembourg, Malta and Slovenia would have access to few online services.<sup>184</sup> The same document stressed that many providers avoid smaller markets where the incremental cost of obtaining additional licences outweighs expected income. Whether Microsoft’s exact reasoning for only offering games in those markets meets or not this conclusion is a matter for further investigation. However, it is herein clear that, in respect of the four product categories many of the websites checked (240 companies among 1001websites) avoided these markets. See the graph below:

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<sup>182</sup> EST59529, “Die Content-Flatrate”: eine Lösung für das Problem illegaler Tauschbörsen?, p.33, 34.

<sup>183</sup> EST59529, “Die Content-Flatrate”: eine Lösung für das Problem illegaler Tauschbörsen?, p. 40.

<sup>184</sup> EU – Impact Assessment. Brussels, 11.7.2012.SWD (2012) 205 final, COM (2012) 372 final, p.159.



## 2. Important Criteria

Since the focus of this report is on online products - meaning media content such as games, digital music, e-books and videos which are delivered per online mediums, the most important criteria is the availability, quantity and quality of Internet access and supply of network bandwidth capabilities within the different markets (including Internet access at home for PC, handheld devices, wifi hotspots etc.). As the statistics show, the proportion of households in the EU with access to the Internet reached 73% in 2011, but differing obviously in share between Member States. Whereas in countries like the Netherlands, Luxembourg, Sweden and Denmark more than 89% of the households have Internet access the percentages were 50% and below in Bulgaria, Romania and Greece.<sup>185</sup>

Especially when it comes to downloading an article or software from a website, broadband Internet access saves substantial time and hence most likely money, since it enables higher speed when browsing and performing activities over the Internet. In 2011, more than two thirds (68%) of households in the EU had used broadband connections but with even more significant disparities between countries - Sweden (86%), Denmark (84%), the Netherlands (83%), UK (83%), Finland (81%) leading, countries like Greece (45%), Bulgaria (40%) and Romania (31%) again tailing with shares well below 50%.

In addition or as a result of the availability of broadband Internet access, the percentages of individuals who used the Internet regularly were above 80% in six Member States: Denmark, Luxembourg, the Netherlands, Finland, Sweden and the United Kingdom. The shares were below 60% in seven Member States: Bulgaria, Greece, Italy, Cyprus, Poland, Portugal and Romania.<sup>186</sup>

In detail, this technical criterion of Internet access within the different markets is even further divided as follows:

- (a) Internet access: whether people are able to connect and use digital technologies (broadband, handheld or wireless connections).

<sup>185</sup> Internet use in households and by individuals in 2011, Eurostat, statistics in focus 66/2011, p. 2.

<sup>186</sup> Internet use in households and by individuals in 2011, Eurostat, statistics in focus 66/2011, p. 2.

- (b) The level of digitization: it tends to be measured through other factors such as:
- (i) Pricing (affordability)
  - (ii) Network speed (the rate of data through put)
  - (iii) Usability (ease of use – the ease with which people can get online and use applications)
  - (iv) Service reliability (the quality of connection)
  - (v) Quantity (IP address per 100 inhabitants)<sup>187</sup>
  - (vi) Countries are categorized in four stages of digitization: constraint, emerging, transitional and advanced. The five developed “Geographic markets” herein confirmed by the website checks being: Germany, United Kingdom, France, Italy and Spain are classified as advanced countries in regard to digitization score. On the other hand, Cyprus, Estonia, Lithuania, Latvia and Malta are classified as transitional countries.<sup>188</sup>

In addition, for each of the products, different criteria are applicable.

### 3. Games

Market players of online games are quite independent from local markets for several reasons:

Browser-based games clearly represent a big advantage for users, who can access these games from almost any spot with available progressively fast and efficient (broadband and) computing resources connection in the EU. By skipping the need to install software applications on the specific PCs where the games are to be played, browser-based games free the users from being dependent on their own computers, and allow them to play in a variety of situations and places and independently of country borders and distances.

Because of this, market players are not restricted to single EU markets and there is no real need to actually target a certain country. In addition, this “freedom” for the users is in many cases (excluding IP) also extended to legal aspects (such as license and copyright terms) and to maintenance: all aspects that relate to updates - new improvements, patches, bug eliminations, extensions – are all addressed directly on the server which provides the game. Lastly, browser games even provide an answer to a security issue that is still perceived as important in the whole of Europe: people are still reluctant to download material from the Internet.<sup>189</sup>

The larger players such as BigPoint, Gameforge, gPotato, 6waves and Perfect World have now developed a portfolio of higher quality games and attempt to effectively cross-promote them. The idea is to send a particular user – independent of nationality – the exact game where s/he is likely to spend the most money. Higher quality games require higher budgets and longer development cycles. Social gaming is now in the big business phase.<sup>190</sup>

However, on the other hand, once the content is presented to people in their own language it becomes more relevant to the communities in which they live and work; often referred to as “local content”. Individuals are mainly concerned with information that is relevant to them. Therefore, if

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<sup>187</sup> To measure the IP address is more relevant than the number of personal computers, inasmuch as the latter might not be necessarily connected to the Internet.

<sup>188</sup> Source: Booz & Company.

<sup>189</sup> JRC-IPTS. JRC Scientific and Technical Reports. Born Digital/Grown Digital. EU 24555 EN-2010, p. 82.

<sup>190</sup> Cartagena Capital newsletter January 2011, p. 5.

content of the digital product is developed and available in the language and format that applies to the gamers, they are becoming more aware of it. Digital technologies are important tools for content creation and delivery at the local level and around the world. This is especially important since e.g. multi-player games even take advantage of users' creativity as content creators. Also through this way of local language service users exercise a greater choice and control over the content they consume.<sup>191</sup>

In addition, financial reasons influence the success of the online gaming market in more ways than one. Next to the costs (mostly flatrate) of an Internet (broadband) connection the game must be affordable. The growing success of the "freemium model" games also led to a growing penetration of micropayments. Now that virtual goods sales have taken off, online and mobile payment firms reap the rewards. Europe already has well developed mobile payment channels, but it varies between the national markets within the EU.

Next to the technical matter of better connectivity the financial criterion of affordable devices play a major role. With increasing smartphones usage and superior user experience as well as gained public acceptance the gaming market is increasing its revenues.

#### 4. Music

Multi-territory e-commerce suppliers often choose to supply the EU by establishing themselves in the market offering the most favourable fiscal (VAT) environment. In the case of e-commerce in digital cultural products like digital music, VAT is currently assessed on a country-of-origin basis in business-to-consumer (B2C) transactions. This means the benefit of e-commerce in terms of its contribution to fiscal receipts is not uniformly shared in the EU. The European Commission is already aware of this and would welcome / is working to initiate a VAT – harmonization.<sup>192</sup> Because of the different Vat rates most of the leading multi-territory digital music retailers settled in Luxembourg to take advantage of the reduced rate of VAT of 3%<sup>193</sup> on digital products. E.g., leading music service - Apple's iTunes - is based in Luxembourg, but selling a wide variety of content (tracks and albums) to consumers across Europe from that base with the attractive 3% VAT rate. This provides an enormous advantage over 'local' suppliers based in other member states where VAT rates are significantly higher. At the end of 2011 iTunes reached out across Central and Eastern Europe to become the second online music store available to consumers in every country in the European Union after eMusic, with all of its tracks available through stores in different local-language websites across the region. Also at this time, the search engine Google launched its own licensed download store.<sup>194</sup>

Looking at the number of services available by country, there are significant differences between the top markets and the smaller markets. The UK has the largest number of digital music services, with more than 70, whereas smaller markets such as Cyprus, Latvia, Lithuania and Malta are served by just four. The latter four markets are 'small' in terms of the absolute level of expenditure on cultural products. This is a reflection of a number of factors, including piracy (which is a problem to

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<sup>191</sup> OECD (2012), OECD Internet Economy Outlook 2012, OECD Publishing, p 188.

<sup>192</sup> EU-Document: "Towards a simpler, more robust and efficient VAT system tailored to the single market" - [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/key\\_documents/communications/com\\_2011\\_851\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf) .

<sup>193</sup> EU-Document: "VAT Rates Applied in the Member States of the European Union" July 2012, p. 10. [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/how\\_vat\\_works/rates/vat\\_rates\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf) .

<sup>194</sup> ICMPI/ IFPI / GESAC, The Online Music Market in Europe – New Business Models and Consumer choice, p.4.

commercial supply across the EU), domestic market size, local investment, discretionary spend and local demographics.<sup>195</sup>

Mobile and geographical access are also important for digital music business as are prices and the size of the online catalogue.<sup>196</sup>

## 5. E-books

### (a) Different VAT on e-books and other books within the EU

Same VAT-rule-advantages as for digital music are valid for the digital cultural product e-book. Due to its online distribution, also e-book services choose to supply markets from the country with the most favourable VAT rate, namely Luxembourg. Luxembourg is the site of European headquarters for Amazon, Apple, Kobo, and Barnes & Noble. Of the European e-book sellers, only Google is based in Ireland for historic reasons.<sup>197</sup> But in terms of retailing of digital books there are even two critical areas: the differential application of VAT to the physical and digital product (book) within a specific country, and the differential application of VAT to e-books between countries.

VAT rates applied to physical and digital books throughout the EU differ. In the UK, physical books are VAT exempt<sup>198</sup>, but e-books have VAT applied at the standard rate, currently 20.0%.<sup>199</sup> On average, the VAT rate applied to physical books is 7.8%.<sup>200</sup> In contrast, every country applies VAT to e-books, generating an average rate of 20.0%.<sup>201</sup> Within the EU, two countries apply the same VAT rate to both book formats: France and Luxembourg. Different VAT rates cause higher pricing in comparison to the same pre-VAT price of the product. This hinders a uniform retail price from prevailing in all the markets within the EU.

Because of differential VAT rates applied to the same products by European countries, many of the leading retailers of books (and digital music as well as video) are established in Luxembourg. Local suppliers face disadvantages in relation to suppliers with the scope and scale to establish in Luxembourg.

- (b) Fixed pricing schemes for books including e-books (e.g. Germany, France or Austria)<sup>202</sup>.
- (c) Pricing schemes also apply to foreign language books as long as not meant for sale mainly in Germany. For imported titles from EU countries the pricing scheme is not applicable / valid as long as it is not an evasion sale<sup>203</sup>.
- (d) problems with shipping like customs<sup>204</sup>.

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<sup>195</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 35.

<sup>196</sup> OECD (2012), OECD Internet Economy Outlook 2012, OECD Publishing, p 167.

<sup>197</sup> Wischenbart, The Global eBook Market 2012, p. 4.

<sup>198</sup> EU-Document: "VAT Rates Applied in the Member States of the European Union" July 2012, p.14, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/how\\_vat\\_works/rates/vat\\_rates\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf).

<sup>199</sup> EU-Document: "VAT Rates Applied in the Member States of the European Union" July 2012, p.19.

<sup>200</sup> EU-Document: "VAT Rates Applied in the Member States of the European Union" July 2012, p. 4.

<sup>201</sup> EU-Document: "VAT Rates Applied in the Member States of the European Union" July 2012, p.19.

<sup>202</sup> Wischenbart, The Global eBook-Market 2011, p. 3.

<sup>203</sup> BITKOM, "E-Books und digitales Publizieren", p. 18.

<sup>204</sup> Wischenbart, The Global eBook Market 2012, p. 4.



- (e) Furthermore distributors are as of yet disinterested in serving smaller or more complex new markets, especially if national/local language of e-books is necessary. Some languages are still excluded, e.g. those running from right to left (Arabic).<sup>205</sup>
- (f) Availability of appealing, affordable e-book reading devices (earliest store openings in UK).
- (g) E-book sales are necessarily driven by device penetration. As such, revenues of e-books sales tend to gain after each Christmas season, as new device owners begin using their devices. This effect is magnified by the fact that a relatively small number of people buy the majority of books. In the UK, of 27 million adults, 22 million buy 10 books a year or fewer. This is 51% of the value of the market. 1.75 million buy 20 or more books a year and account for 25% of total market value. This means that relatively low device sales can drive what appear to be disproportionate e-book sales. Conversely, it also means that parts of the print market could be quite resilient – people who buy less than 10 books a year will be less likely to buy a Kindle, and are probably also less likely to be in the demographic that buys iPads. This is a contrast with digital music, where a device purchase was needed to listen to music anyway.<sup>206</sup>
- (h) Availability of a catalogue of a significant proportion of desirable titles as e-books, depending on their progress and investment in securing commercial deals with local publishers.<sup>207</sup>
- (i) Cultural reasons: different markets have different affinities for print, particularly in Germany and France where a strong national book culture exists with emphasis on the value of the book and reading. Thus, price regulations have been set up and a strong defence against what is defined as “external interference”<sup>208</sup>.

The market is dominated by integrated e-book platforms (Amazon, Apple, Kobo, Google), wherein the catalogue of e-books, the purchase and payment and then reading are controlled by a single company in all. These platforms handle the entire process of buying and reading a book:

- They maintain their own e-book store, which can be browsed from the device or on the web.
- When a consumer buys an e-book from this store, it becomes available automatically and immediately on the reading device.
- The reading device is either a dedicated e-ink device or a tablet or smartphone onto which a special app from the platform provider has been loaded by the user. Once set up, the platform is fully automatic: after pressing the ‘buy’ button next to an e-book on an online store the book is available to read on the user’s device. Ease and simplicity of the process mean that companies offering e-books without such a platform, and requiring a sequence of manual steps to load an e-book onto a reading device, is much less attractive to consumers.

Each of these platforms uses its own proprietary digital rights management (DRM) system to encrypt e-books (despite the existence of a notional industry standard), and no platform can read the DRM

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<sup>205</sup> Wischenbart, The Global eBook Market 2012, p. 3.

<sup>206</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 49.

<sup>207</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 49, 52.

<sup>208</sup> Wischenbart, The Global eBook Market 2012, p. 53.

used by another (exception e.g. Apple devices with Kindle app). However, all of the major platforms will accept e-book files from third parties that do not use DRM. Most publishers apply DRM in order to try to reduce piracy.

## 6. Videos

- (a) Different VAT rates for sale of online videos within the EU. As stated above in the other categories, many leading retailers of digital videos are established in Luxembourg because of the differential VAT rates applied to the same products by European countries, with Luxembourg offering a reduced rate of 3% with the result that local suppliers of digital cultural products face disadvantage in relation to suppliers which are based in Luxembourg. For example, the European Audiovisual Observatory reports the existence of 264 online VOD services in the EU27. Luxembourg leads with 52 such services (20% of the total), of which one is to the home market and 51 target other markets.<sup>209</sup>
- (b) Different Advertising rules are valid (e.g. limits to advertising time) between EU-Member States and third countries providing services into the EU (no such regulations). The same applies for rules on protection for vulnerable groups (e.g. minors).<sup>210</sup>
- (c) Affinity of the national film business within Europe.

The situation varies from one country to another: France is the only EU country where national films enjoy a relatively high market share (over one third of the market over the last decade); in Italy, Denmark and Sweden national productions usually account for one quarter of the box office; in the Czech Republic, Finland, Spain, Germany and the UK for between one fifth and one sixth; in all other European countries, US productions are often close to 80-90% market share.<sup>211</sup>

## **V. The impact of social and commercial platforms**

### 1. Use of social platforms/ social networking

The use of social platforms, i.e. online-platforms and applications which provide for the exchange of user-generated-content, is one of the most impressive trends in online-behaviour. Eurostat-Data revealed that 38% of people in the European Member States (EU27) using the Internet participate in social networks for private purposes, such as creating a user profile, posting messages or other contributions to Facebook and Twitter. The leading countries are Denmark, Latvia, Sweden and the UK, where half (50%), or more than half of people use these platforms. In Romania, with the lowest participation rate, 25% of Internet users participate in social networks.

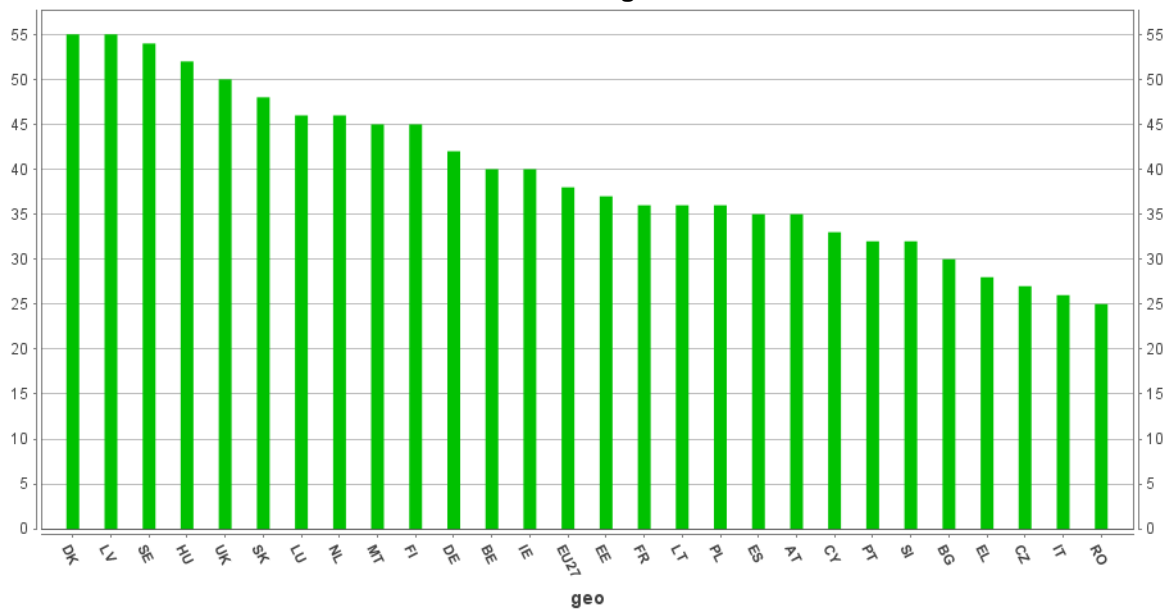
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<sup>209</sup> Enders Analysis, Digital Europe, Diversity and Opportunities 2012, p. 30.

<sup>210</sup> Report of the EU Media Futures Forum: "Fast-forward Europe" June 2012, p. 5, point 5.

<sup>211</sup> Europe Overview: Annexes, p. 230.

**Individuals using the Internet for participating in social networks.<sup>212</sup>**  
**% of individuals aged 16 to 74**



Individuals using the Internet for participating in social networks % of individuals aged 16 to 74				
<b>EU (27 countries)</b>	<b>38</b>		<b>Estonia</b>	<b>37</b>
<b>Denmark</b>	<b>55</b>		<b>France</b>	<b>36</b>
<b>Latvia</b>	<b>55</b>		<b>Lithuania</b>	<b>36</b>
<b>Sweden</b>	<b>54</b>		<b>Poland</b>	<b>36</b>
<b>Hungary</b>	<b>52</b>		<b>Spain</b>	<b>35</b>
<b>United Kingdom</b>	<b>50</b>		<b>Austria</b>	<b>35</b>
<b>Slovakia</b>	<b>48</b>		<b>Cyprus</b>	<b>33</b>
<b>Luxembourg</b>	<b>46</b>		<b>Portugal</b>	<b>32</b>
<b>Netherlands</b>	<b>46</b>		<b>Slovenia</b>	<b>32</b>
<b>Malta</b>	<b>45</b>		<b>Bulgaria</b>	<b>30</b>
<b>Finland</b>	<b>45</b>		<b>Greece</b>	<b>28</b>
<b>Germany</b>	<b>42</b>		<b>Czech Republic</b>	<b>27</b>
<b>Belgium</b>	<b>40</b>		<b>Italy</b>	<b>26</b>
<b>Ireland</b>	<b>40</b>		<b>Romania</b>	<b>25</b>
<i>Source: Eurostat</i>				

According to comScore, globally, social networking sites reach 82% of the worldwide online population. The time users spend tripled in recent years and accounts for at least 24%.<sup>213</sup> In the past, it was mostly younger people that used social network platforms. More recently, older people

<sup>212</sup> Eurostat, In the last 3 months before the survey, for private purposes. Participating in social networks: creating user profile, posting messages or other contributions to Facebook, Twitter, etc.

<sup>213</sup> Latin America, Europe, Middle East Africa, ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 5.

have started to use social networks.<sup>214</sup> People aged 55 and over account for the fastest growing group of social network users.<sup>215</sup>

## 2. Access

Social media websites are mainly accessed via a classic web-site through a fixed-line Internet connection. An examination of access-tools by the Facebook and Twitter audience in the UK revealed that mobile browser and app audiences account for less than a third of the classic web audience.<sup>216</sup>

Facebook and Twitter Audience Across Classic Web, Mobile Browser, and Mobile App Channels, UK			
Facebook	Total Unique Visitors	Twitter	Total Unique Visitors
Classic web:	32,3 million	Classic web:	8,3 million
Mobile browser:	10,2 million	Mobile browser:	1,2 million
Mobile app:	2,8 million	Mobile app:	0,6 million
<i>Source: ComScore GSMa MMM and Media Metrix, UK, October 2011<sup>217</sup></i>			

However, the access to social networks via mobile devices is increasing. According to comScore, in October 2011, 24% of the total mobile population of the five leading European markets (France, Germany, Italy, Spain, UK) reported accessing social networks on their mobile devices.<sup>218</sup> Thereby, the highest penetration was in the UK, with 35,4% of mobile users.

Social networking penetration among mobile users	
Country	% of total mobile audience
UK	35,4%
Spain	25,3%
France	22,8%
Italy	22,1%
Germany	17,8%
<i>Source: ComScore MobileLens<sup>219</sup></i>	

<sup>214</sup> ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed; Digital Agenda Scoreboard 2012, p. 14 seq.

<sup>215</sup> ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 12.

<sup>216</sup> ComScore, It's a Social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 22.

<sup>217</sup> ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 22.

<sup>218</sup> ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 20.

<sup>219</sup> ComScore, It's a social World – Top 10 Need-to-Knows About Social Networking and Where It's Headed, p. 20.

### 3. Social Networks – and Facebook

Social media can be global, such as Twitter and Facebook. However, they can also be based on national characteristics. They can be general but also focus on a particular interest (photo sharing, music, books etc.)

The leading social network in Europe – and also the global leader – is Facebook. By the end of September 2012, Facebook announced more than 1 billion monthly active users worldwide.<sup>220</sup> Thereby, 600 million people monthly use mobile devices.<sup>221</sup> According Alexa-Statistic, Facebook websites rank in most of the European countries at number 2 (behind Google).<sup>222</sup>

### 4. Social Media Opportunities for Companies

Social media platforms provide several opportunities to companies. Companies may use social media to communicate with their clients, other institutions or the public. The increasing size of the audience at social networks allows businesses to develop new marketing strategies and business models, to monetize the content.

One of the most important reasons for businesses to use social media is to advertise their products and to promote themselves. Companies may use social networks to address specific customers or group(s) of customers, since users of those platforms provide personal data and disclose their interests.<sup>223</sup> They are platforms for marketing and to establish a brand in the community. It further may provide options for content creator to develop and introduce new products or services, that are offered directly to the community-user (e.g. by donation, subscription, sale).

Facebook, for instance, enables businesses to create a Facebook business pages, including referrals to websites and brand value support by “likes” (Facebook Like-Button) and paid advertising.

The potential for targeted advertising in the Facebook network is used by a number of companies to generate sales.<sup>224</sup> With view to the gaming industry, in its first public investor call since its IPO, on 26 July 2012, Facebook announced, that Electronic Art spent \$ 2,75 million to promote its game, Battlefield 3, on Facebook. It attributed \$ 12,1 million of their sales to these ads, i.e. 4.4 times returns on their Facebook marketing spending.<sup>225</sup> Further, the international games developer, Wooga, used a mobile News Feed to drive installs and its Diamond Dash game. It resulted in an increase of downloads by 26% in the U.S., 29% in Germany and 37% in France.<sup>226</sup>

Facebook has reassured that those campaigns are also attractive for smaller businesses. However, there are some skeptics as to whether the advertising model of Facebook will lead to the revenue investors expected.

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<sup>220</sup> Facebook, Q3 2012, Earnings Release, p. 1.

<sup>221</sup> Facebook, Q3 2012, Earnings Release, p. 1.

<sup>222</sup> <http://www.alexa.com/siteinfo/facebook.com>, November 2012.

<sup>223</sup> Digital Agenda Scoreboard 2012, Life Online, p. 17.

<sup>224</sup> According Facebook, independent analysis of more than 60 campaigns showed, that 70% of highly targeted campaigns delivered a return on ad spend of 3 times or better. 49% of those campaigns delivered a return of 5 times or better, Facebook, Q2 2012 Earnings Call, Transcript, p. 5.

<sup>225</sup> Facebook, Q2 2012 Earnings Call, Transcript, p. 5.

<sup>226</sup> Facebook, Q2 2012 Earnings Call, Transcript, p. 6.

## 5. Social media - social gaming

With the launch of the first games at Facebook by Zynga and Playfish (now EA), social games became an important part of the gaming industry. The concept of these games is, that it is easy to play, self-expressing and also provide social interactivities.<sup>227</sup> Generally, the games are free-to-play and are monetized through items to purchase. This concept could generate millions of monthly active users worldwide that could be attracted and revenues of more than \$ 200 million a year.<sup>228</sup>

The conditions and environment for the gaming industry has changed since then and revenues came under pressure due to greater competition and the release of more and more games in the same style. Also Zynga is currently in a crisis and under pressure to develop its business strategies.<sup>229</sup> However, gaming, social gaming and social platforms and F2P-business models are still seen as a trend, that will be sustainable in the future.<sup>230</sup>

## 6. Facebook-Developer Leaderboard

The potential to gain audience, demonstrate data available at AppData, the application traffic leaderboard hub for Facebook, iOs and Android developer community.

For example, in November 2012<sup>231</sup>, the Top 15 of the Facebook-Developer Leaderboard comprises more than one-third (6) of game developers.

The list is led by Zynga, the US-American game-developer, with 301,870,336 monthly active users (MAU) and 49,037,345 active users per day (DAU). Zynga is followed, after Microsoft and by King.com (UK), as the leading European game developer by audience at Facebook.<sup>232</sup> King.com ranks at number 3 in the list of the Facebook developers with 49,520,000 monthly active users (MAU) and 11,692,800 daily active users (DAU). King.com develops casual, social games and delivers them via the web, social networks and mobile. At Facebook, King.com currently runs 13 applications. In 2011, it launched games as “Bubble Witch Saga” at Facebook and experienced an explosive growth. Within the following month Facebook games became the major source of revenue.<sup>233</sup>

In regard to e-books it is important to mention Scribd, that ranked on number 13 with a MAU of 25,800,000 and DAU of 1,000,000. Scribd is a US-based social reading and publishing website. It allows its users to share written content across the Internet but also on mobile devices. Users may upload documents. Scribd, indicates that at its website has 25 million documents. 50% of its revenue is earned from ads, the other half from payment for features or specific documents/ e-books).<sup>234</sup> Leading Publishers, such as Random House, became partners of Scribd, to market and distribute their titles online.

Spotify, one of the leaders of the European music market, ranks on number 14 according the number of users at Facebook, with a MAU of 23,500,000 and a DAU of 7,800,000.

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<sup>227</sup> JRC-IPTS. JRC Scientific and Technical Reports. Born Digital/Grown Digital. EU 24555 EN-2010, p. 92 seq.

<sup>228</sup> JRC-IPTS. JRC Scientific and Technical Reports. Born Digital/Grown Digital. EU 24555 EN-2010, p. 93.

<sup>229</sup> See Zynga, Earning Results 2011/2012, <http://investor.zynga.com/results.cfm> .

<sup>230</sup> See above, economic data, games.

<sup>231</sup> 05.11.2012.

<sup>232</sup> King.com is a registered trade mark of Midasplayer.com Ltd.

<sup>233</sup> [www.king.com](http://www.king.com) , City A.M. “Web game firm King.com lifted by Facebook”, 09.10.2012.

<sup>234</sup> Scribd.com/press; TechCrunch.com; TC, „Social Publishing Startup Scribd gets a Facelift: New Website, New Logo, New iPhone App”.

Top 15 - Facebook Developer Leaderboard – MAU/DAU (05.11.2012)				
Rank	Name	MAU	DAU	Number Application
1.	<b>Zynga</b>	<b>301,870,336</b>	<b>49,037,345</b>	<b>94</b>
2.	<b>Microsoft</b>	<b>68,545,000</b>	<b>20,272,900</b>	<b>8</b>
3.	<b>King.com</b>	<b>49,520,000</b>	<b>11,622,900</b>	<b>13</b>
4.	Woobox	41,980,200	1,772,060	15
5.	<b>Electronic Arts</b>	<b>37,229,433</b>	<b>7,361,770</b>	<b>57</b>
6.	Instagram	37,200,000	14,400,000	1
7.	<b>Wooga</b>	<b>37,024,600</b>	<b>7,500,240</b>	<b>8</b>
8.	TripAdvisor	33,500,001	1,506,400	9
9.	Thunderpenny	30,660,000	1,100,000	12
10.	Yahoo!	30,629,424	5,331,607	724
11.	schoolFeed	28,800,000	6,300,000	1
12.	<b>Social Point</b>	<b>27,876,000</b>	<b>5,690,270</b>	<b>21</b>
13.	<b>Scribd</b>	<b>25,800,000</b>	<b>1,000,000</b>	<b>1</b>
14.	<b>Spotify</b>	<b>23,500,000</b>	<b>7,800,000</b>	<b>1</b>
15.	<b>Peak Games</b>	<b>22,916,200</b>	<b>8,026,810</b>	<b>23</b>
<i>Source: Research Contractor</i>				

## VI. Explanatory Summary

The market of digital products is at a dynamic stage and revenues are rapidly increasing within the EU, although at different rates for each of the categories covered by this study. Whereas the online games market is one of the fastest growing markets – followed by the digital music market – which contributes to the growth of the industry at large with changing business models, distribution chains and even the product itself, the market for e-books seems rather small and turnover is growing much more slowly. This may be due to better availability of broadband Internet access in Europe and the advent of online, social and mobile gaming with a wide audience of involved gamers/users and their share in evolving the games (e.g. MMOGs).

The focus of consumers across Europe is on small mobile devices with fast Internet access in order to enjoy purchased digital products anytime at any point in their spare time. Also it is clear that consumers are no longer willing to spend a lot of money right away for unknown products. Instead, they are expecting content free of charge “to try” the product first or as a way of service. Thus, e-commerce companies have to reinvent the way they do business continuously by evolving new business models and improving their products.

One of the most influential new business models is for 3 products (games, digital music and online video): the “freemium model”. This business model is giving the consumer a chance to try the product ad-supported with no or few initial costs and lead them later on to a (ad-free) premium version with enhanced functionality or better quality or allows for purchase of certain additional features per small “visual goods” (games).

Different VAT rates for B2C-distribution of digital cultural products in the single EU-Member-States are one of the most important factors holding back further development of the legitimate music, video and e-book-business.





## LEGAL ANALYSIS AND WEBSITE ASSESSMENT

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The website assessment consists of two parts, i.e. the Website Check and the Game Check.

The first part, the Website Check, focuses on information regarding geographical restriction and analyses the contents of the web pages of providers of online games, music, e-books and videos on the basis of Art 4(1) (b) Directive 97/7/EC (Distance Selling Directive, DSD).

The second part, the Game Check, focuses on “in-game-purchases” and investigates the offer of online-games on the basis of Art. 5 and Art. 6 Directive 2005/29/EC (Unfair Commercial Practices Directive (UCP)). Both Directives had to be adopted by the EU Member States into their national law and impose – amongst others – comprehensive information duties on the trader.

Not covered by this study are investigations in regard to other EU- or national legislation that may also be applicable or become relevant.

### I. Website Check

#### 1. Key Issue

The Website Check was carried out for the four digital product categories: games, music, e-books and videos that are offered by downloading or streaming. It focuses on a specific issue when buying or using those digital content products online. It refers to the problem that access of a purchased product may be limited and depend on the geographical location of the consumer who bought this product.

Online sellers, distributing their products over the Internet, may reach customers worldwide through their websites. However, the distribution of a product may be limited to specific regions. Reasons for those geographical restrictions are very often – but not limited to – copyright/licence rights. Technically, those geo-restrictions are usually established by identifying the IP-address of the user and blocking access.

Depending on the grounds and intentions of the restriction, those limitations may cover all products offered at the website, and access to the whole website is denied within a specific territory. But, they may also only refer to some of the products offered, e.g. a particular book or music track, if licences do not allow the distribution in a specific country. The customer located in this region will then not be able to use the product (e.g. no access to the specific website, no download possibility from that country).

Geographical restrictions may become a particular issue if a customer enters into a contract and orders a product online, available by downloading or streaming, from a country or territory with free access to the product. If he then travels afterwards to another country, where a geographical restriction exists, it might be that he will have no access to that product and not be able to download or stream it.

Those geographical restrictions hinder the use of the product and may influence the decision of the consumer to buy it. They may be therefore possibly qualified as one of the “*main characteristics of the goods or services*” and be covered by Art. 4 (1) (b) DSD.

## 2. Scope of the Website Check and short overview of the legal base

The Distance Selling Directive deals with the relations between a supplier and a consumer (B2C), Art. 1 DSD.<sup>235</sup> The scope of the Directive covers “distance contracts”, defined by Art. 2 (1) DSD.<sup>236</sup> This also includes sales via the Internet.

Regarding the object of the contract, the definition refers to the sale of goods and services, Art. 2 (1) DSD. It is disputed, whether and to what extent this includes digital content products, which are offered by downloading or streaming.<sup>237</sup> Those products are comparatively new and not mentioned in the DSD. They are now – for the first time – explicitly regulated by the new Consumer Rights Directive.<sup>238</sup> In some EU Member States they are considered as goods, in others as services, whereas in others as products *sui generis* with the consequence that different legal remedies apply.<sup>239</sup> However, taking a functional perspective, digital products may be qualified as goods or services within the meaning of the DSD and are, as such, covered by its scope – even or regardless of the fact that the legal consequences may vary depending on the specific qualification.<sup>240</sup>

The DSD imposes, among other obligations, specific information duties on the trader. Art. 4 (1) DSD defines pre-contractual information that has to be delivered to the consumer prior to conclusion of the contract. Further, Art. 5 (1) DSD determines that the consumer has to receive a written confirmation (or information in another durable medium) that certain information has been delivered.

The information duties imposed by the DSD aim to enable the consumer, on the basis of the information provided, to decide whether or not s/he wants to enter into a contract with the trader. The receipt of the necessary information should not be hindered by the use of the means of distance selling communication.<sup>241</sup> The information duties of the Directive are basically linked with a right to withdraw from the distance contract (Art. 6 DSD). In the case where that information is not delivered to the consumer as required, it takes effect on the period for exercising the right to withdrawal (Art. 6 (1), Art. 5 DSD).<sup>242</sup>

Within the framework of this study, the legal basis for the check was explicitly limited to Art. 4 (1) (b) DSD. Therefore, and most particularly, no check was made as to whether the consumer receives confirmation as required by Art. 5 (1) DSD or further provisions applied.

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<sup>235</sup> “Consumer” is defined as: “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”, Art. 2 (2) DSD.

“Supplier” means: “any natural of legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”, Art. 2 (3) DSD.

<sup>236</sup> “Distance Contract” means: “any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.”, Art. 2 (1) DSD.

<sup>237</sup> See e.g. University of Amsterdam, Digital Content Services for Consumer, Report 1: Country Reports, p. 2 seq.; University of Amsterdam, Analysis of the applicable legal framework, Final Report, p. 28 seq., p. 49; Schulte-Nölke/ Börger, Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive, p. 504.

<sup>238</sup> See Art. 6 (1) (a) Directive 2011/83/EU (Consumer Rights Directive).

<sup>239</sup> See e.g. University of Amsterdam, Digital Content Services for Consumer, Report 1: Country Reports, p. 2.

<sup>240</sup> See for a comparative analysis: University of Amsterdam, Analysis of the applicable legal framework, Final Report, p. 79, p. 81 seq.

<sup>241</sup> See also Recital 11 DSD.

<sup>242</sup> See for a comparative analysis and exemptions in regard to digital content products: University of Amsterdam, Analysis of the applicable legal framework, Final Report, p. 79, p. 81 seq.

### 3. Legal Base – Website Check

Art 4 DSD deals with pre-contractual information duties and provides a comprehensive list in Art. 4 (1) (a) – (i) DSD.

Art. 4 (1) (b) Directive 97/7/EC requires:

*“appropriate information to the consumer in good time prior to the conclusion of any distance contract on the main characteristics of the goods or services.”*

Geographical restrictions, as said above, hinder – depending on the location – the use of the product. These may influence the decision of the consumer to buy the product. They may be therefore qualified as one of the *“main characteristics of the goods or services”* in the meaning of Art. 4 (1) (b) DSD.

According to Art. 4 (2) of Directive 97/7/EC the information of Art. 4 (a) – (i) DSD have to be delivered in a:

*“clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.”*

The requirement *“clear and comprehensible manner”* describes the criterion of transparency. It is therefore concluded that the information listed in Art. 4 (a) – (i) DSD has to be presented together, in a compact manner, so as to enable the consumer to check whether all the information has been included (check-list).<sup>243</sup> However, in the framework of the present Website Check, the focus was on the information on geographical restrictions. Therefore, it was mainly checked as to whether the information regarding geographical restrictions was provided on the webpage. Whether this appears together with the other information required by Art. 4 (1) (a) – (i) DSD was left unaddressed within this framework.

As far as Art. 4 (2) DSD further states, that the information has to be *“in any way appropriate to the means of distance communication used”* it does not require – at this stage – that the information can be downloaded by the consumer or that the consumer can demand it to be available on a constant/ fixed medium.<sup>244</sup>

### 4. Assessment and Checklist – Website Check

The Website Check was developed against the background of the DSD and national legislation.<sup>245</sup> The DSD is a directive of minimum harmonization (Art. 14 DSD). It was therefore left to the discretion of the Member States to enact more stringent provisions to reach a higher level of consumer

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<sup>243</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 62.

<sup>244</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 62.

<sup>245</sup> For a comparative analysis see: University of Amsterdam, Digital Content Services for Consumer, Report 1: Country Reports; Schulte-Nölke/ Börger, Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive, p. 501 seq..

protection. It should further be noted, that the wording of the Directive is partly unclear and may be interpreted differently.<sup>246</sup>

The question that had to be investigated was:

*“If access to the already purchased product depends on the geographical location of the consumer (e.g. streamed music subscription), has that been clearly indicated?”*

The Website Check was divided into 3 Steps:

### Step 1: Website and Product

The first step involved the investigation as to whether the respective website contains products of the relevant category: games, music, e-book, videos offered through downloading or streaming. If products of the relevant category were found, the name of the provider/name of the website, the company/group and the website-URL was gathered.

<b>Country</b>	<input type="text"/>
<b>Product</b>	<b>Game</b> <input type="checkbox"/> <b>Music</b> <input type="checkbox"/> <b>E-book</b> <input type="checkbox"/> <b>Videos</b> <input type="checkbox"/>
<b>Provider</b>	<input type="text"/>
<b>Company/Group</b>	<input type="text"/>
<b>Website</b>	<b>URL</b> <input type="text"/>
	<b>Title</b> <input type="text"/>

### Step 2: Geographical Restriction

The second step asked whether the website contains geographical restriction(s). The investigation sought out whether such an information could be found anywhere on the website. Thereby, the relevant links and pages of the website were investigated as to whether they contained this specific information.

Especially examined were: product page/s, the faq-pages, help-and customer-support-pages and the general contract terms of the provider, if available on the website. If the provider stated on its website that no geographical restrictions exist, this was marked in the database. If no information on geographical restriction at all could be found at the website, 3 reasons were presumed:

1. No information is provided, because the product is world-widely available and no geographical restriction exists;
2. There are geographical restrictions; however the provider does not provide information as to that fact;
3. Geographical restrictions do exist and information about them is indicated, however, those could not be found during the check, e.g. they were concealed, indicated on a specific product page, not accessible within the framework of the present check etc.

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<sup>246</sup> See University of Amsterdam, Digital Content Services for Consumer, Report 1: Country Reports; Schulte-Nölke/ Börger, Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive, p. 502 seq.

Where it could not be discovered whether 1 or 2 or 3 was true, it was recorded that the reason could not be determined.

To a limited extent, 7 specific requests were made to the customer support of specific websites/providers in Germany. The responses usually contained the information that the products (e-books and games) are available worldwide and/or provided general information. Some clarified that for specific regions restrictions may exist and offered support in case that access is denied. To go further with those requests would have been to exceed the study and the time available.

To investigate independently, whether a geographical restriction exists – in cases where no such information could be found – would require doing the checks from different countries and also in regard to the different, specific products (see above). Those specific and very detailed investigations of the websites would exceed the framework of this study. Especially, if taken into account that on the websites hundreds and thousands of products are offered and restrictions might exist only for some products. Those could be discovered e.g. by a consumer survey and/or after an examination of consumer complaints referring to specific websites and providers.

<b>Geographical restriction is not indicated</b>	
<input type="checkbox"/>	Geographical restriction is not indicated
	<input type="checkbox"/> Access does not depend on location
<b>Reason</b>	<input type="checkbox"/> Access depends on location but no information
	<input type="checkbox"/> Reason could not be determined

It was assumed, that no information has to be provided, if no geographical restrictions exist. Therefore, of the websites investigated, those that had no geographical restrictions and/or do not provide any information to that effect were excluded from the ranking system – since the quality of the information as such could not be determined.

### Step 3: Geographical restriction is indicated

If information about geographical restriction was found, it was recorded and the way, how this information was provided checked on the basis of Art. 4 (1) (b) DSD.

<b>Geographical restriction is indicated</b>	
<input type="checkbox"/>	Geographical restriction is indicated

To determine the quality of the information and to rank the website according to the developed ranking system, the check was divided into 5 groups:

Group 1: Time

- Group 2: Language
- Group 3: Place on the website
- Group 4: Extra link or information field
- Group 5: Design of the text

Those groups were identified as relevant aspects, to determine, when information is clearly provided in accordance with the provisions of Art. 4 (2) DSD.

### Group 1: Time

The websites were checked as to whether the information was provided in “*good time prior to conclusion of the contract*”, Art. 4 (2) DSD. The Directive does not define this requirement in detail. However, it is widely agreed, that the consumer must be able – between the time he received the information and conclusion of the contract – to reflect on what the product is and whether it meets his/her needs.<sup>247</sup>

In Internet-sales it is usually the consumer, who determines the time of the conclusion of the contract.<sup>248</sup> Therefore, if the information is provided, it will be usually in “*good time prior the conclusion of the contract*”, as long as the process of purchasing the product has not yet been completed. However, the trader may use unfair methods, e.g. technical means to force the consumer to conclude the contract at an earlier stage – without giving him/her the possibility to first take notice of the relevant information. If the trader uses those means to shorten the period between providing the information and conclusion of the contract, the requirement “*good time prior the conclusion of the contract*” might not be fulfilled.<sup>249</sup>

**1. Time**

**Time = Information in good time prior conclusion of the contract?**

Yes                       No

### Group 2: Language

The Directive does not define in which language the information has to be presented to the consumer. However according to the requirement of Art. 4 (2) DSD, to present the information in a clear manner and according to the principle of transparency, generally the information would need to be provided in the regular language of the location of the consumer, to whom the offer is targeted.<sup>250</sup>

It can be argued, that it would be sufficient on international pages where products are offered to citizens of different countries, to provide the relevant information in English or another commonly used language. Here, the contractor took the view that language is a very important factor for the consumer. A consumer who does not understand the language in which the required information is

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<sup>247</sup> Schulte-Nölke/Börger, Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive (97/7), p. 529 seq.

<sup>248</sup> The offers at the website are generally not legally binding but rather an *invitatio ad offerendum*.

<sup>249</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 55.

<sup>250</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 62.

presented will hardly be able to understand its content and finally not be able to be informed about the product and to decide on that basis. The information duties imposed on the trader would fail and not meet their aim/purpose. Furthermore, some of the EU-countries integrated the language-requirement into their national law.<sup>251</sup> Therefore, it was concluded, that the language in which the information is expressed has to be – at least – in the language(s) of the country in which the consumer is based and where the products are offered.

Within the investigations of the websites it was therefore checked as to whether the information was provided in the language(s) of the country in which the consumers was based, i.e. the country in which the website indicates that the products are available for sale. The criteria applied as to whether a website sells to consumers of a specific country were, whether a country was explicitly indicated, e.g. by directly addressing the offer to citizens of a specific country or showing the national flag of a country on the page. Further criteria were the language of the offers/ advertisement at the website and the domain name.<sup>252</sup>

## 2. Language

Language = Information in the language of the consumer's country?

Yes

No

### Group 3: Place on the Website

Group 3, Place on the website, refers to the question, where the information is located on the website. Here, the contractor also suggested a very strict approach to traders' obligations that is not explicitly reflected in the provisions of DSD but can be interpreted from its provisions and the relations with Directive 93/13/EC on unfair contract terms

**a) Product page:** The element of transparency requires that the information of Art. 4 (1) DSD must be accessible from every page of the website.<sup>253</sup> Since the information of Art. 4 DSD establishes the basis for the consumer to make an informed decision as to whether to conclude a contract or not, he must be provided with easy access to this information during this process.

Under the key-word “product page” it was therefore checked whether the information was included in the specific product description next to the specific product the consumer chooses to buy or on a general information page which is accessible from every page of the website.

Therefore it is not sufficient if the information or a link to the information appears only on one page, e.g. only at the starting page.

**b) Top, bottom, side:** Transparency also requires that the link, leading to the relevant information, must be recognizable for the consumer when he accesses the webpage. The requirement was considered to be satisfied where the respective link was available on the top of the page, where the consumer could easily see it. Also considered as sufficient was where the link is on the bottom or

<sup>251</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 62.

<sup>252</sup> See for criteria e.g. ECJ, 7 December 2010, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09).

<sup>253</sup> Grabitz/Hilf, Das Recht der Europäischen Union, 40. Edition 2009, Rf. 62.



side (menu field right or left) of the website, without that the consumer having to scroll down too much. Treated as insufficient was where the consumer would need to scroll down several pages or have to examine the website very carefully to find a link or the relevant information.

**c) One click:** Also, to fulfil the requirement of transparency, it is essential that the access to the information is not too complicated. This would be the case if the consumer has to click several links and to access several pages, leading him finally to the relevant product information.

Within this check the criteria used was that the information has to be one click away from the general website page (for all products) or one click away from the page of the specific product the consumer chooses to buy (product description).

**d) Extra information, not included into the general terms:** The information duties of Art. 4 DSD (but also of Art. 5 DSD) are to be distinguished especially from the general contract terms of the trader. This follows – firstly – from the structure of the information system of the DSD and the scope of Directive 93/13/EEC. Secondly, the legal consequences of an infringement of the information duties determined by the DSD differ from the remedies in connection with the “general contract terms”. Further, following from the criterion of transparency, the consumer must be able to recognize, whether s/he is dealing with information duties or contractual terms.

Therefore, it is not sufficient for the trader to inform about the geographical restrictions within its general contract terms. This criterion was also investigated within the check.

**3. Place on the Website**

**Top, bottom, side**  
Information available on the top of the page  
or  
on the bottom or side (menu field right or left) but scrolling down is not necessary or necessary but short?

Yes                       No

**One click**  
Information available with one click on a link from the general website page (for all products)  
or  
one click on a link from the page of the specific product the consumer chooses to buy (product description)?

Yes                       No

**Product page**  
Information included in the specific product description next to the specific product consumer chose to buy  
or  
on a general information page accessible from every page of the website?

Yes                       No

**Extra information**  
Information not integrated in the general terms or conditions?

Yes                       No

#### Group 4: Extra link or information field

Group 4, Extra link or information field, refers to the name of the link or link button that leads to the respective information.

**a) Label:** Regarding this, it was checked as to whether the label of the link button indicated the content according to the expectation of the consumer. This requirement was fulfilled if the link or link button was labelled with “product information”, "legal information" and alike. It was generally considered as insufficient if the link was labelled e.g. with “help”.

**b) Link design:** Furthermore, it was checked whether the link was designed in a way that it could be recognized by the consumer e.g. “speaking link” (underlined or mouse over function).

#### 4. Extra link or information field

##### Label

Label of the link button indicates clearly the content according to the expectation of the consumer.

Yes  No

e.g.

- sufficient: “product information”, "legal information"

- not sufficient: "help"

##### Link design

Link used is easy to recognize (web design, "speaking link", e.g. underlined or mouse over)

Yes  No

#### Group 5: Design of the text

Following from the context and the requirement of transparency, “clear” information further includes the style or form in which it is presented. Under this aspect, the text of the information has to be designed in a way that is readable for the consumer.

**a) Size:** In this regard it was taken into account whether the **size** of the letters were big enough to read, especially, that no smaller letters were used compared to the other letters used for information provided within the same text or on the same page.

**b) Colour:** To be readable requires further, that the **colour** of the text is contrasted in a manner, that the text can be recognized – especially in contrast to the colour of the background of the page (e.g. not grey on grey).

**c) Position:** Further it was checked whether the information was **not hidden** and easy to find, especially, if other information was provided on the same page.

#### 5. Design of the text

##### Size

Size of the letter readable? (big enough to read; size not smaller than other information/text of the side)

Yes  No

**Colour**

Colour of information (letter) and the colour of the background legible? (e.g. not grey in grey)

Yes

No

**Position**

Text not hidden, easy to find in the description?

Yes

No

## 5. Ranking System – Website Check

Each websites that indicated geographical restrictions were examined in the framework set by with Art. 4 (1) (b) DSD and as described above. To summarize the results and to rank the websites, the following ranking was elaborated.

Each criterion of the Website Check was numbered with a specific score, indicating its importance in regard to the legal requirements for presenting the information itself and amongst each other. The maximum score that could be reached was 19.

The ranks were classified as follows:

Criteria	Score
1. Time	2
2. Language	2
3. Text design	-
a) Size	1
b) Colour	1
c) Position	1
4. Place on the website	-
a) Top/bottom/side	2
b) One click	2
c) Product page	3
d) Extra info	2
5. Extra Link or information field	-
a) Label	2
b) Link design	1
<b>Total Score</b>	<b>19</b>

Information	Score
Best quality information provided	18 to 19
Good quality information provided	15 to 17
Average quality information provided	9 to 14
Insufficient quality information provided	0 to 8

The websites, without geographical restrictions or where geographical restrictions were not indicated or where it could not be discovered, were excluded from the ranking system (see above).

## **6. Final Results – Website Check**

For the check of websites selling products of the 4 categories music, games, e-books and videos in regard to information about geographical restrictions 1001 websites were investigated.

For each product category the following numbers of websites were checked:

Product	Number Websites
Music	203
Game	405
E-book	235
Video	158
<b>Total</b>	<b>1001</b>

This list of websites is comprised of the top-selling websites of each country by popularity. However, for some products, it was not possible to find 10 websites for all EU-countries and/or markets.

### **a) Geographical Restriction not indicated**

From the 1001 websites investigated, 726 websites had no indication of geographical restrictions.

At the same time it was noticeable that those websites often had information about other access limitations such as technical requirements and information about Digital Management Rights (DRM), but territorial restrictions were not mentioned.

Further, it was particularly noticed that indications about geographical restrictions were especially missing on websites offering games and those offering e-books. In the case of websites providing videos, especially via streaming, information on geographical restrictions were available at about 1/3 of the websites investigated. Websites providing music at least nearly half of the websites checked included information on geographical restrictions.

Websites offering Music		%
GR not indicated:	104	51
GR indicated:	99	49

Websites offering Games		%
GR not indicated:	332	82
GR indicated:	73	18

Websites offering E-books		%
GR not indicated:	184	78
GR indicated:	51	22

Websites offering Videos		%
GR not indicated:	106	67
GR indicated:	52	33

Those websites that did not indicate geographical restrictions, or where these could not be found on the website, were excluded from the check (see above).

### **b) Geographical Restriction is indicated**

From the websites investigated, information on geographical restrictions could be found on 275 websites. These websites were examined according to the elaborated criteria and Website Check (see above). The results were summarized according to the ranking system (see above).

It can be noted that websites that are ranked with average quality information provided / insufficient quality information provided often included the relevant information in their general terms and conditions or behind misleading links. Furthermore, it was rather difficult to find the relevant information between those terms or other information.

Another issue was that the information often was available only after clicking several other links and pages.

Good examples were (e.g.):

- Information provided within the specific product description next to the product
- Information available on every page of the providers' website (link).

Insufficient examples were (e.g.):

- Information included in general terms or disclaimer/ non-liability clauses
- Information hidden behind links such as "customer support", "help".

At websites where information regarding geographical restrictions could be found, those were usually provided "*in good time prior conclusion of the contract*". This requirement causes generally no problems (Music 100%, Game 100%, E-book 86,3%, Video 100%).

With regard to the design of the text, the information usually was readable for the consumer in respect of the size, and colour of the letters (Size: Music 100%, Game 100%, E-book 86,3%, Video 98,1%; Colour: Music 100%, Game 100%, E-book 86,3%, Video 96,2%). However, the information itself was often difficult to find within the text (Position: Music 34,4%, Game 32,9%, E-book 41,2%, Video 46,2%).

Access to the information as such in regard to its location on the website causes only few problems (Top/bottom/side: Music 100%, Game 83,6%, E-book 90,2%, Video 98,1%; One click: Music: 83,8%, Game 84,9%, E-book 80,4%, Video 94,2%).

One of the main problems was that the information was often not available for the consumer at every stage of his/her decision progress, whether to conclude a contract or not. Not even half of the websites (Product Page: Music 32,3%, Game 32,9%, E-book 15,7%, Video 48,1%) met this criterion.

Further, often the information on geographical restrictions was included in the general terms or disclaimer clauses. Only 1/3 of the websites included it on a separate information page (Extra info: Music 33,3%, Game 20,5%, E-book 31,4%, Video 48,1%).

Furthermore, and also resulting from the aforesaid, the label of the link, containing the information, was considered as not sufficiently named/indicated (Label: Music 31,3%, Game 0,0%, E-book 21,6%, Video 36,5%; Link design: Music 6,1%, Game 1,4%, E-book 45,1%, Video 21,2%).

As far as the language requirement was considered relevant within this check, also this criterion was met by most of the websites (Music 74,7%, Game 98,6%, E-book: 82,4%, Video 98,1%).

#### aa) Websites offering Music

In regard to websites offering music, 99 websites were examined. The results by ranking are:

Information	Websites	%
Best quality information provided	15	15
Good quality information provided	3	3
Average quality information provided	69	70
Insufficient quality information provided	12	12

Music: 99 Websites			
Criteria	Number of websites that fulfil the requirement	Number of websites that does not fulfil the requirement	Percentage of websites that fulfil the requirement per criterion
1. Time	99	0	100,0%
2. Language	74	25	74,7%
3. Text design	-	-	-
a) Size	99	0	100,0%
b) Colour	99	0	100,0%
c) Position	34	65	34,3%
4. Place on the website	-	-	-
a) Top/bottom/side	99	0	100,0%
b) One click	83	16	83,8%
c) Product page	32	67	32,3%
d) Extra info	33	66	33,3%
5. Extra Link or information	-	-	-
a) Label	31	68	31,3%
b) Link design	6	93	6,1%

## bb) Websites offering Games

For websites offering games the quality of information was checked for a number of 73 websites. They were ranked as follow:

Information	Websites	%
Best quality information provided	0	0
Good quality information provided	12	16
Average quality information provided	43	59
Insufficient quality information provided	18	25

Game: 73 Websites			
Criteria	Number of websites that fulfil the requirement	Number of websites that does not fulfil the requirement	Percentage of websites that fulfil the requirement per criterion
1. Time	73	0	100,0%
2. Language	72	1	98,6%
3. Text design	-	-	-
a) Size	73	0	100,0%
b) Colour	73	0	100,0%
c) Position	24	49	32,9%
4. Place on the website	-	-	-
a) Top/bottom/side	61	12	83,6%
b) One click	62	11	84,9%
c) Product page	24	49	32,9%
d) Extra info	15	58	20,5%
5. Extra Link or information	-	-	-
a) Label	0	73	0,0%
b) Link design	1	72	1,4%

### cc) Websites offering E-books

51 websites offering e-books were examined. The results by ranking are:

Information	Websites	%
Best quality information provided	4	8
Good quality information provided	4	8
Average quality information provided	32	63
Insufficient quality information provided	11	21

E-book: 51 Websites			
Criteria	Number of websites that fulfil the requirement	Number of websites that does not fulfil the requirement	Percentage of websites that fulfil the requirement per criterion
1. Time	44	7	86,3%
2. Language	42	9	82,4%
3. Text design	-	-	-
a) Size	44	7	86,3%
b) Colour	44	7	86,3%
c) Position	21	30	41,2%
4. Place on the website	-	-	-
a) Top/bottom/side	46	5	90,2%
b) One click	41	10	80,4%
c) Product page	8	43	15,7%
d) Extra info	16	35	31,4%
5. Extra Link or information	-	-	-
a) Label	11	40	21,6%
b) Link design	23	28	45,1%



#### dd) Websites selling Video

52 websites offering videos were examined. The results are:

Information	Websites	%
Best quality information provided	17	33
Good quality information provided	8	15
Average quality information provided	25	48
Insufficient quality information provided	2	4

Video: 52 Websites			
Criteria	Number of websites that fulfil the requirement	Number of websites that does not fulfil the requirement	Percentage of websites that fulfil the requirement per criterion
1. Time	52	0	100,0%
2. Language	51	1	98,1%
3. Text design	-	-	-
a) Size	51	1	98,1%
b) Colour	50	2	96,2%
c) Position	24	28	46,2%
4. Place on the website	-	-	-
a) Top/bottom/side	51	1	98,1%
b) One click	49	43	94,2%
c) Product page	25	27	48,1%
d) Extra info	25	27	48,1%
5. Extra Link or information	-	-	-
a) Label	19	33	36,5%
b) Link design	11	41	21,2%

### **ee) Results Multinational Websites**

The websites of providers, running websites in different European Member States (multinational websites/providers) are usually structured similarly in the different countries and at first glance those differ only by its language. However, when examining the particular pages, it turns out that there are some more differences as, e.g. in regard to the content offered and number of products.

Also, in regard to the relevant question, whether information about geographical restriction is delivered to the consumer, websites/providers do not always perform equally well. This refers not only to the fact of how the respective information is delivered but also whether the information is provided or could be found at all.

This resulted in a few cases to different ranking results (see Music: Spotify, Musicload, Video: Zune) or respective websites were excluded from the check, if no information could be found (GR not indicated, esp., iTunes, Google play).

## II. Game Check

### 1. Key Issue

The Game Check focuses on “in-game-purchases”. The topic became especially relevant in connection with the so-called “free-to-play-games” (F2P). It is a current trend within the gaming industry. The issue is that those games are often advertised as “free-to-play” but in reality are not completely to play “for free”. The concepts vary in detail (e.g. free-to-play, pay-to-win, Freemium). However, it can be summarized that those games are only free at the start of play or to a limited extent of play. During the game the user is offered, or required, to buy virtual items, characters, equipment and alike to proceed with the game or to have a better or faster success, e.g. to reach a new level, to get an additional life, stronger weapons or other advantages such as time or free-advertisement.<sup>254</sup>

Those items, features and advantages have to be paid with real money. They are usually offered in a virtual item-shop, which is integrated into the game. The user that downloads the game or subscribes for it is often not aware of those features before playing the game, since information about the possibility/need to buy items and/or the prices for those are rarely provided in advance or are hidden.

It is no secret that games have or may have a special effect/influence on the user and that particularly – but not limited to – children are attracted by games.<sup>255</sup> Especially, when a user plays a game for a while and receives a certain level and progress, it will be more difficult for him/her to stop playing with the game. Under this influence, s/he becomes more attracted to buy those items and to spend money on it. Additionally, the “real” costs are often difficult to estimate, since the virtual-item shops offer the items in a virtual game-currency. The equivalent (consideration) of the “real” payment has to be transformed into this game currency and virtual items.

By this mechanism, there is the risk that the user pays unreasonably high costs for those items and spends exorbitant sums – and this for a game that was announced as being “for free”. Further, the easy access to the shop increases the enticement for the user to buy those items. Usually the item-shop is integrated in the game and accessible just by clicking a button. Often the user is also encouraged to buy those items by advertisements that pop up during the game, e.g. when starting a new level.

Further, the payment methods are usually very easy to handle. Payment is available not only by bank transfer or credit card. More dangerous – and especially attractive for children – are the methods of allowing payment via phone, mobile or SMS by dialing a special number and receiving the bill via the bill for the phone or Internet-company. These modes of payment enable children to order items easily – without approval of their parents – and for the game-provider to circumvent respective protection rules.<sup>256</sup>

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<sup>254</sup> The games make this buying attractive and support the wish of the user, because they are often designed so that they are easy to play during the first levels. However, after a certain level the games become more difficult to play and - without those additional items - further progress is not or - practically not - achievable (pay-to-win). Other concepts offer certain items for free and other items/characters are only available against payments.

<sup>255</sup> See e.g. Pan European Game Information (PEGI).

<sup>256</sup> For instance, in recent cases German courts decided that those practices may be considered as unlawful (contract law, ordre public) and that the contracts are void, see e.g. LG Saarbruecken, 27.01.2012, 10 S 80/11; LG Saarbruecken, 22.06.2011, 10 S 99/10; different e.g.: LG Bochum, 29.04.2009, I-4 O 408/08, 4 O 408/08.

The practice of “*in-game-purchases*” raises several – not only – legal questions and needs clarification as for instance, but not limited to, in regard to the “*ordre public*”, including extortion of prices, and protection against video game addiction. To indicate a game as “*free*” and not inform about the available features and options to buy might be also misleading and therefore be an unfair commercial practice within the meaning of Directive 2005/29/EC, the Unfair Commercial Practices Directive (see particularly the blacklist No. 20 UCP).

## 2. Scope of the Game Check and short overview of the legal base

The UCP aims to protect the economic interests of the consumer against unfair commercial practices before, during and after a commercial transaction. It does not cover, for instance, protection against risks of safety and health. Further, it only regulates the relations between a trader and a consumer (B2C).<sup>257</sup>

The UCP prohibits in Art. 5 (1) UCP “*unfair commercial practices*” and provides basically a three-tiers-system to determine whether a practice has to be considered as such. Art. 5 (2) UCP contains a general clause defining the term. Furthermore, it provides two specific types of unfair practices, Art. 5 (4) UCP.<sup>258</sup> That is, if the practice is misleading (Art. 6 UCP, misleading action or Art. 7 UCP, misleading omission) or aggressive (Art. 8 UCP, aggressive commercial practice). In Annex I, the Directive provides a so-called “*blacklist*”, containing misleading and aggressive commercial practices which are, under all circumstances, regarded as unfair, Art. 5 (5) UCP. This list is exhaustive. Following from this structure, to examine whether a practice is covered by the blacklist prevails: if a practice is not listed within the blacklist, Arts. 6 - 9 UCP have to be considered. If those do not apply, the general clause of Art. 5 UCP has to be taken into account.

In regard to the concept of “*in-game-purchases*” different provisions of the UCP could apply – depending on the specific game and the way that it is advertised and offered. Particularly, if those games are advertised as “*free*”, number 20 on the blacklist could become relevant. It declares as a misleading commercial practice:

*“describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item”*

Further, in regard to games targeted at children, number 28 of the blacklist determines as an aggressive commercial practice:

*“Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.”*

Within the scope of Art. 7 UCP, and therefore a misleading omission, could fall e.g. a website where prices for a game are not sufficiently indicated.<sup>259</sup>

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<sup>257</sup> “Consumer” is defined by Art. 2 (a) UCP as: “any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.

“Trader” is according Art. 2 (b) UCP: “any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”.

<sup>258</sup> See also Recital 13 UCP.

<sup>259</sup> See especially, Art. 7 (4) (c) UCP; However, the differentiation to Art. 6 UCP may depend on the single case.

However, within the framework of this study, the ToR required explicitly the check of games and websites in accordance with Art. 5 (2), (3), Art. 6 (1) (b) and (d) UCP. Therefore, the focus of the Game Check is on the specific rules mentioned, regardless of other provisions of the UCP that could or would also come into consideration.

### 3. Legal Base – Game Check

Art. 6 UCP names, as one of the types, when an “*unfair commercial practice*” is given, “*misleading actions*”.

#### **a) Art. 6 UCP: “Misleading actions”**

Art. 6 UCP defines a “*misleading actions*” as a commercial practice, that

*“is untruthful”* or

*“deceives or is likely to deceive the average consumer”* and

*“causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”.*

The provision does not limit the ways in which the consumer might be deceived. It states clearly that it can be in “*any way*” and specifies that this also covers the overall presentation. The Directive lists specific actions that may be regarded as misleading (Art. 6 (1) (a) - (g) UCP). Relevant for this study are (b) and (d).<sup>260</sup>

#### **aa) Art. 6 (1) (b) UCP: Main characteristic**

Art. 6 (1) (b) UCP refers to the main characteristics of the product and provides a comprehensive list. There are different approaches to determine the main characteristics of a game. In respect of “in-game-purchases” the provider might state that the offered version of the game is only a basic version and not the full version of the game. Depending on its structure, it might become necessary, for instance, to buy items offered within the game to go further with the game at all or to achieve a better result (especially the “pay-to-win concept”), or to buy additional features to improve the game and to increase the attraction for the user while playing. Those can be especially seen in regard to its “*execution*”, “*composition*”, “*accessories*” and/or “*specification*”.

Following on from this, to ensure that the consumer is not misled when advertising or offering the game, the provider should at least be required to make the consumer aware of the specific limitation of the version of the game being provided and of having the possibility of obtaining additional features in return for payment within the same game, while playing. Otherwise it could be misleading

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<sup>260</sup> Art. 6 (1) (b) and (d) state: “1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: ...

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product; ...

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage; ...“

for a consumer, who expects – according to the presentation of the game – to receive a full version. He would not expect at the outset that the game requires additional items and especially not that, in order to have success within the game (e.g. receive a new level), to have to pay for features.

#### **bb) Art. 6 (1) (d) UCP: Price**

Art. 6 (1) (d) UCP refers to *“the price, the manner in which the price is calculated, or the existence of a specific price advantage”*.

In this regard it may be, on the one hand, for instance misleading, if the game is offered e.g. as free, without indicating that items are available against payment within the same game and necessary to improve the game or make progress within the game.<sup>261</sup> This becomes especially an issue in the case of “eye-catching” advertising.

On the other hand, it may for instance be considered as misleading if information about additional items and/or the prices for the additional items is indicated at the website; however those are hidden and/or not presented in sufficiently close connection with the offer e.g. “free-to-play”.

Since the provider/developer finances the costs of the game and his business by selling those additional items, he has a strong commercial interest that the consumer buys those. This may justify the application of a rather strict standard on the presentation of games to the consumer.

#### **cc) Decision of the consumer**

A person downloading a game does not necessarily expect that within the game items have to be purchased. Information about this could restrain him/her from downloading or subscribing to those games.

#### **b) Perspective of the “average consumer” and “vulnerable consumer”**

Art. 6 (2) UCP, as Art. 5 (2) UCP, refers to the *“average consumer”*.<sup>262</sup> The *“average consumer”* is – according to the definition developed by the European Court of Justice and as indicated in Recital 18 UCP, a person:

*“who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors”*.

In the case that a specific practice is targeted to a specific group of consumers – including children and teenagers – the practice is to be determined from the perspective of an average member of this group.<sup>263</sup>

Further, Art. 5 (3) UCP protects explicitly the vulnerable consumer.<sup>264</sup> These are consumers, who due to their physical or mental infirmity, age or credulity are especially prone to certain practices or

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<sup>261</sup> See also ANNEX I, number 20 UCP and above.

<sup>262</sup> See also Art. 5 (2) UCP.

<sup>263</sup> EC, Commission Staff Working Document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, p. 29.

<sup>264</sup> See also Recital 19 UCP; Art. 5 (3) UCP states:

“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally. “

products.<sup>265</sup> If the economic behaviour of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, the practice is to be assessed from the perspective of an average member of that group.

Children, but also teenagers, are vulnerable because of their age. Therefore, even if games may be targeted at adults and not directly to children, those may be attractive also for children and influence them. In the case of online-games this can be also regarded as reasonable to be foreseen by the trader. The concept of advertised and offered “free-to-play”-games may be clear to an adult. However, depending on the way that the game is presented, it may be misleading for a child or teenager.

For games, that are explicitly targeted at children and/or games where the trader could reasonably foresee that this game is likely to attract children, the perspective of the average child (as member of the group) has to be taken as the applicable standard to determine whether a practice is misleading or not.

### **c) Website targeted at children**

Whether those games and/or websites are targeted to children was determined by specific criterion (mentioned below). For the purpose of this study, “children” were defined as persons up to 14 years of age.

## **4. Assessment and Checklist – Game Check**

The checklist for the Game Check was developed against the background of the UCP and national legislation. The UCP is a Directive of full harmonization. Establishing a legal framework, the rules of the UCP are detailed enough to provide general guidelines. However, the wording of the UCP gives rise to interpretation – whereby the “final interpretation” lies with the ECJ.<sup>266</sup>

The specific questions that had to be investigated within the Game Check were:

- a) *If the product is a game, is the consumer clearly informed prior to the transaction of additional features which require additional payments?*
- b) *If the answer to question a) is NO, is the game targeted at children?*
- c) *If the answer to question b) is YES, does the trader allow children to access the product and then enable them to progress to a new level or to obtain an advantage or advantages in the game (for example, virtual equipment, extra lives etc.) only by making a new purchase?*
- d) *If the answer to c) is YES, what is the child encouraged to purchase and how much does it cost?*

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<sup>265</sup> EC, Commission Staff Working Document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, p. 30.; In regard to the question whether Art. 5 (3) UCP applies within Art. 6 UCP: Twigg-Flesner/ Parry/ Howells/ Nordhausen, Analysis of the Application and Scope of the UCP, p. 41 seq.

**Question a)**

**If the product is a game, is the consumer clearly informed of additional features which require additional payments, prior to the transaction?**

**YES**

**NO**

Question a) was the basis for the check in regard to the relevant rules of the UCP. The check was divided into 3 steps. If one of the questions defined within these steps was indicated with “No”, the answer to question a) was “No”. According to the answers given within these 3 steps, the website or games were ranked.<sup>267</sup>

**Step 1: F2P-Game**

The Game Check focuses on “in-game-purchases” and mainly on “free-to-play” games. Therefore it was first of all checked whether the game was offered without payment and contained additional items within the game to purchase. Games, that did not fulfil those requirements were not further regarded and excluded from the Game Check.

**Game**

**F2F-Game?**

Yes                       No

**Additional features/items available within the game (information at all)?**

Yes                       No

**Game's name**

**Website**    URL     Title

**Developer**

**Provider**

**Player/Downloads**

**Step 2: Information clearly indicated?**

If the game was available in a free basic version and contained items that require payments, the second step was to check whether the information about this was clearly indicated. The term “clearly” was defined according to the relevant rules of the UCP (see above). For the purpose of this check, to determine the term “clearly”, the information was examined especially in regard to its content and in regard to its form and place.

**(1) Indication, that features are available – Information at all:** Firstly, it was checked whether there was information at all on the website that the game requires payment for some items.

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<sup>267</sup> 1. Best quality information provided 2. Good quality information provided 3. Average quality information provided 4. Insufficient quality information provided.



**(2) Content:** Regarding the content it was examined, whether the wording of the information was understandable for the relevant group of users, in respect that the game is not a full version, but contains items to buy. Especially, that no poetic words were used that may divert from the fact that payments for virtual items require “real” purchases = money.

**(3) Form/Place:** The point “Form/Place” included the check as to whether the information was provided in the same manner as e.g. the advertisement “free” or “free-to-play”, especially that no small, unreadable print size was used. Within this framework it was further considered whether the information could be easily recognized together with or next to the word “free”, for example:

- sufficient: if the information is easy to find/ can easy be recognized together with the word “free” (not hidden);
- not sufficient: if the information is included in the general terms and conditions or further separate information pages or links

**Is this information clearly indicated?**

**1. Indication, that features are available – Information at all**

Yes  No

**2. Content**

Wording understandable?

Yes  No

e.g.

- no poetic words that may irritate

**3. Form/Place**

Information recognizable together with/next to the offer “free”?

Information is not hidden; no small prints, unreadable

Yes  No

e.g.

- sufficient, if the information is easy to find (not hidden)/ can easy be recognized together with the word free
- not sufficient is, if the information is included at the general terms and condition or further separate information pages/links

**Step 3: Time**

Step 3 regards the question, whether the information was provided prior to the transaction.

The aim of the provision of the UCP is to give the consumer the possibility to rethink his/her decision to order or use a product and/or service. The information therefore has to be provided before the consumer makes his/her decision. Since the question to check according the ToR refers to the time of transaction (prior the transaction), in the framework of this check it was examined, whether the information was provided before downloading the game or before subscribing into the game – considering this at the most latest stage, the consumer should be informed about payable features available within the game.

**4. Time**

**Information given prior to the transaction?**

Yes  No

e.g.

sufficient,

- if information available prior downloading the game

- if subscription is required: prior subscription/ or prior sending data/Login

- not sufficient, if provided after downloading or subscription, if the subscription is required.

**Overall-Result a): Information – Content – Form/Place – Time**

**Clear Information?**

Yes  No

**Question 2 b)**

If the answer to question a) is NO, is the game targeted at children?

YES  NO

To indicate, whether a game or website is targeted at children, the following criteria were used. The answer “Yes” was indicated if at least one criterion was fulfilled.

**Is the game targeted at children?**

**Explicitly indicated at the website / specific game?**

Yes  No

e.g.

- “Games for children”; “Suitable for children”

**General design is focusing on children; Use of cartoons for children / cute, friendly pictures?**

Yes  No

e.g.

- well-known cartoons from children movies, books, or TV-series ...)

- colorful and friendly; plain language

Age?

e.g.

- if indicated or “0”; “Age 0 – 99”, PGS

**Overall Result b)**

Website targeted at children?



Yes



No

**Question 3 c)**

If the answer to question b) is YES,

**Does the trader allow children to access the product and then enable them to progress to a new level or to obtain an advantage or advantages in the game (for example, virtual equipment, extra lives etc.) only by making a new purchase?**

YES

NO

Since the legal requirements, whether clear information was provided, were checked under a) (depending on the game including from the perspective of the child), question c) was interpreted to focus on the facts, i.e. whether a child would be able to access those games and whether advantages may be obtained during playing against payment.

Taking into account the issue of “in-game-purchases” - thereby the word “only” was not interpreted in a narrow sense, i.e. that to purchase items is the only possibility to succeed in the game – and no other opportunities are offered. The question was interpreted in a broad sense. The answer “yes” was always indicated, when items were offered or advantages available not only against payment but in addition to options of receiving those for “free” (e.g. by waiting a specific period).

The background is that the attraction for the child of those purchasing-options is equal – when s/he plays a game for a while. It is likely that s/he is not willing e.g. to wait until the next day / or to reach a specific number of credits to get progress – but is attempted to buy items and to shorten the waiting period and/or to succeed in the game.

“Yes” was therefore indicated, for example, also in the following situations:

- The child is allowed to play more than 1 level, e.g. 10, for free but the games provide 20 levels and to access the 10 other levels requires payment.
- There are possibilities to receive a new level earlier when buying items/features. However, the level can also be reached by waiting for a while (some hours or by reaching a score) (= time advantages).

**Does the trader allow children to access the product and then enable them to progress to a new level or to obtain an advantage or advantages in the game (for example, virtual equipment, extra lives etc.) only by making a new purchase?**



Yes



No

### Question d)

If the answer to c) is YES,

**What is the child encouraged to purchase and how much does it cost?**

Question d) deals with the item itself. Regarding this it was questioned what kind of items and advantages are offered for purchase. Further, the price of these items was searched. Where available and indicated, the prices are recorded per country and in the currency of that country. The prices are provided as a price category, indicating the lowest and highest unit. Depending on the payment methods – the check further indicates especially whether payments can be made easily by phone call and/or by sending an SMS.

<b>What is the child encouraged to purchase and How much does it cost?</b>	
<b>Product?</b>	<input type="text"/>
e.g.	
	donuts, weapons, gold, diamonds ... etc.
<b>How much?</b>	<input type="text"/>
	price (from – to)
	payment methods (esp., transfer, phone, SMS)

### 5. Ranking System – Game Check

The games were ranked according the 4 criteria: Information, Content, Place, Time elaborated within question a). Each criterion was numbered with a specific score, indicating its importance in regard to the legal requirements and amongst each other. The maximum score that could be reached was 5.

Criteria	Score
1. Information	1
2. Content	1
3. Form/Place	2
4. Time	1
<b>Total Score</b>	<b>5</b>

The ranks were classified as follows:

Information	Score
Best quality information provided	5
Good quality information provided	4
Average quality information provided	3 to 2
Insufficient quality information provided	0 to 1

## 6. Final Results – Game Check

For the Game Check, 101 websites offering 18 different games in several countries and where the games offer additional features and are targeted at children were examined.

It can be summarized, that the games usually were advertised (eye-catching) as “free-to-play”, “register now for free”, and alike, whereas the information about the additional features was hard to find. Often it was hidden in the general terms and only indicated in a general way. Further, generally the prices were only available after subscribing into the game or after playing a while. Those website/games were usually ranked with average quality information provided or insufficient quality information provided.

Good examples are (e.g.):

- Information in items next to the word “free”
- Full prices for items are indicated prior subscription

Insufficient examples are (e.g.):

- No information at all
- Information included in general terms

The games and websites investigated were ranked as follow:

Information	Games	%
Best quality information provided	13	13
Good quality information provided	0	0
Average quality information provided	46	45
Insufficient quality information provided	42	42

Information about the fact that games include items to purchase was available at the website or game in even less than 60% of the games or websites investigated. They were ranked – depending on the further criteria checked – “Best quality information provided” or “Average quality information provided”. None of the websites checked could be ranked “Good quality information provided”.

However, even if information was available at the website, this was not easy to recognize. Only 13% of the investigated websites or games that were ranked as “Best quality information provided” fulfilled this requirement (Form/Place). At other pages, information about features to purchase could only be found if the user investigated the whole website.

Few websites (4) ranked with “Average quality information” provided were unclear in their wording (Content). They were misleading in regard to the fact, that indicated credits or currencies (game-currency) require real money and payment.

42 websites were ranked with “Insufficient quality information provided”. On these pages, 31 websites contained information regarding items to purchase, but they was not clearly indicated at all in regard to content and place. Others (11 websites) did not fulfil one of the criteria checked.

Games: 101 websites			
Criteria	Number of websites that fulfil the requirement	Number of websites that does not fulfil the requirement	Percentage of websites that fulfil the requirement per criterion
1. Information	59	42	58,4%
2. Content	55	46	54,5%
3. Form/Place	13	88	12,9%
4. Time	90	11	89,1%

## RECOMMENDATIONS

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### I. Geographical Restrictions

Within the study it was discovered that not all websites contain information about geographical restrictions in regard to a product already purchased.

It seems therefore, on the one hand, that the provider might be aware of geographical restrictions at the outset, i.e. his/her rights to distribute the products within a specific territory and the access of consumers when located in that territory. However, on the other hand, it seems that there is not much awareness that the issue of geographical restrictions may have a further impact at a later stage, i.e. when a consumer, who bought a product within a country with no access-limitations travels to another country, where geographical restrictions exist and access to his/her product is denied. It is therefore recommended to bring these specific issues explicitly to the attention of the provider.

It is further suggested that an investigation be undertaken – for instance by interviews of specific providers or by examining consumer complaints (see above) – whether geographical restrictions exist for the products offered and how consumer complaints in this regard are handled (e.g., customer support).

### II. In-Game-Purchases

As pointed out in the introduction to the Game Check, the practice of in-game-purchases raises a broad range of issues not only those involving legal questions in regard to unfair business practices.

Most particularly, those games should not be marketed under such terms as “F2P“, “free-to-play“, that may be misleading. The business practices and its risk should be brought to the attention of consumer and especially parents, which are often not familiar with online-games.

Further, to address the issue of the vulnerability of children and young persons in spending money in an uncontrolled way for virtual items and without the knowledge or authorization of their parents: the means of payment (such as ordering those items per SMS and/or phone call) should be restricted and subjected to rules and regulations protecting children which may not be circumvented by the provider.

It is further suggested that a broader investigation be undertaken to investigate the business practices in regard to in-game-purchases, which appear in several ways. This should especially examine the means of payment (SMS, phone) and include, but not be limited to, infringements of the blacklist (UCP).

It seems that governments and consumer protection associations are generally aware about the issue of “in-game-purchases“. For instance, a recent study regarding the examination of the situation of the consumer in Germany,<sup>268</sup> carried out for the German Federal Office for Agriculture and Food (*Bundesanstalt für Landwirtschaft und Ernährung*),<sup>269</sup> raised the issue of In-game-purchases as a

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<sup>268</sup> Prognos, „Gutachten zur Lage der Verbraucherinnen und Verbraucher in Deutschland“, 02.07.2012.

<sup>269</sup> [http://www.ble.de/EN/00\\_Home/homepage\\_node.html](http://www.ble.de/EN/00_Home/homepage_node.html), The Federal Office is a federal institution under public law. It is directly accountable to the Federal Government, the Federal Office of Agriculture and Food

payment-model (*Erlösmodel*) in the framework of online-games. The study indicated, amongst other things, that it is often difficult for the user to discover in advance that the game, offered as “free-to-play”, includes features to pay. The calculation of the cost involved is only possible after playing the game; whereas, the development of costs depends on the user and the intensity of playing.<sup>270</sup> The study also mentioned that there is a specific risk (“*sunk costs*”) when the user wants to change the game, since it will usually not be possible to transfer the achievements (“*credits*”) reached with the previous game.<sup>271</sup>

Further, the Federation of German Consumers’ Organisations (vzbv)<sup>272</sup> runs the project “*digital consumer rights*”. The project, as is the federation itself, is financed by the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV).<sup>273</sup> Within the framework of the project, the vzbv regularly examines, amongst a range of issues it addresses, the opportunities provided by the Internet and informs and educates consumers about its risks. In this regard, for instance, it published specific information and recommendation for parents in regard to online-games and specifically raised the issue of in-game-purchases.<sup>274</sup>

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(Bundesanstalt für Landwirtschaft und Ernährung) and conducts its operations within the scope of business of the Federal Ministry of Food, Agriculture and Consumer Protection.

<sup>270</sup> Prognos, „Gutachten zur Lage der Verbraucherinnen und Verbraucher in Deutschland“, 02.07.2012, p. 207.

<sup>271</sup> Prognos, „Gutachten zur Lage der Verbraucherinnen und Verbraucher in Deutschland“, 02.07.2012, p. 209.

<sup>272</sup> [www.vzbv.de](http://www.vzbv.de), The vzbv is a non-governmental organization. It acts as an umbrella for 41 German consumers’ associations (16 consumer centres of the German states and 25 other social and consumer-orientated associations. Some influential non-governmental organizations, as for instance the European Consumer Centre Germany, act as supporting members, see website: [en.vzbv.de/About\\_us.htm](http://en.vzbv.de/About_us.htm) (visited 11.11.2012).

<sup>273</sup> Verbraucherrechte in der digitalen Welt, [www.vzbv.de/Internet.htm](http://www.vzbv.de/Internet.htm), [www.vzbv.de/Surfer-haben-rechte.htm](http://www.vzbv.de/Surfer-haben-rechte.htm) (visited 11.11.2012).

<sup>274</sup> See: „Kinderspielportale im Internet“, 20.10.2011.



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