

Statement by  
the scientific advisory board on the subject area of  
consumer policy in the digital world

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**I. Preamble**

(1) The paper starts from the premise that digitalisation is challenging the parameters of consumer policy: guiding principles, confidence and competence, in particular with regard to participation, access and transparency. These parameters must be readjusted. The possible new risks are set off by new opportunities, opportunities for formulating policies and opportunities in the field of consumer trading. In order to try to understand these opportunities, the aim must first be to describe the phenomena of digitalisation. It is only on this basis that it will be possible to clearly show the challenges to society which digitalisation brings with it and to then state what consumer policy can and must do in a digital world.

(2) The traditional guiding principle of the weak consumer requiring protection is being reassessed by the policy-makers and the legal sector. The digitalisation of market and society give particularly clear evidence of the ambivalence resulting from a process of social transformation, resulting in both risks and new opportunities for consumers. The digital world calls for consumers who use the opportunities they are offered, who participate in shaping the changing world and who do not view themselves as victims of change.

## **II. Consumer policy and the digital world**

### **1. Statement of problem**

(3) Digital consumer protection, i.e. consumer protection in the digital world, covers the phenomenon of digitalisation from the viewpoint of consumer protection. The roots of digital consumer protection are to be found in US-American protection of industrial property. Digital Consumer Rights (DCR) and Digital Rights Management Systems (DRMS) are aimed at the consumer's role in copyright protection proceedings and the use of copyrighted works.

(4) But the issues go further than this: Digitalisation influences not only market processes, but also the whole of civil society. Although concentrating on the consumer's standpoint means that at first the view on the issues is narrowed, due to the fact that the focus is on the role and the economic importance of consumers, this is offset by an expansion of view brought about by the fact that the processes and results of digitalisation show that consumer protection and consumer policy are no longer restricted to market processes. We interpret these phenomena broadly, i.e. the digital world is taken to mean not just the Internet in a narrow sense, but instead all digitalisation processes including the results, of which the Internet is one.

(5) The effect of digitalisation processes and results reaches deep into society. This influence begins with the division of society into users and non-users of Internet technology – the “digital divide”. Consumer policy, in particular, is focused on non-users, i.e. people who are, for financial and/or skill-related reasons, barred from access to digital knowledge. The technological cost of access (i.e.: hardware and software) is prohibitive for many households. The necessity of training continually to deal with the technology and with developments in the technology also represents a barrier. Finally, meta-knowledge is also required about the quality of the information sources which are available on the Internet, consumers being increasingly dependent on such sources. Added to this is the fact that there is an increasing dependency on hardware and software in many areas of life. The development of “digital

skill” is correspondingly an important prerequisite for social participation. However, certain consumer groups possess insufficient digital skill. This doubles the width of the divide between the digital and the analogue worlds: On the one hand there are de facto prohibitive barriers preventing certain age groups, social strata etc. from participating in the digital world, and on the other hand access may, to a greater degree than in the analogue world, lead to excessive use and greater conflicts with legal regulations, i.e. it may to a certain extent lead to “over-participation”.

## **2. Consumer policy actors in the digital world**

(6) Basically, all “classic” actors who now use the new forms of information, communication and contract, are part of the subject area of consumer policy in the digital world. Whilst suppliers’ new instruments and opportunities regarding price and distribution appear at first sight to be prioritised, the realisation is gradually dawning that consumer policy institutions can also make direct and indirect use of the digitalised world for their interests and duties and are to a significant extent already present as digital actors.

(7) We take actors in the digital world to mean initiators of communication processes or providers of information on the one hand, as well as recipients of information on the other. The interactivity of digital media means that a user constantly changes between these roles. The following actors are of importance when viewing the subject area from the standpoint of consumer policy; we differentiate between the following four groups:

- a) The *suppliers of goods and services* use digital media in marketing. The technical and innovative possibilities provided by digital media have revolutionised marketing and resulted in new forms of communicating with demanders (individualised mass communication), but also new methods of sale (e.g. media-supported direct sales, logistical solutions using RFID (radio frequency identification)), pricing (Internet auctions) and product policy (individualised mass production). By the same token, forms of co-production with consumers and “user-driven innovations” in product design are now possible due to the low transaction costs. Consumer policy in the digital world must react to these changes in suppliers’ marketing methods.
- b) The *demanders of goods* are, when regarded as actors in this area, both addressees of marketing activities and initiators of their own communication processes. To

this extent they now play a significantly more active role in shaping market activities, due to new, cost-effective and rapid means of interaction. Another new aspect is the vastly improved possibilities the media has opened up of interacting with other demanders, and the resultant increases in market transparency. This means that the phenomena of “word-of-mouth advertising” and “opinion leaders” gain a new quantitative and qualitative significance. This is the precept on which current discussions of the theory that consumer power has increased in the digital world are based (cf. for example the increasing dissemination of so-called web logs and forums).

- c) The digital world has seen the formation of new market institutions which fulfil “*intermediary communication tasks*”. This includes the creation and maintenance of infrastructure necessary for the use of digital media, continued coordination of the users, and the pooling of market information such as flexible price and quality comparisons, in order to create transparency regarding price and quality .
- d) The fourth group of actors comprises the *consumer-policy institutions* themselves. They are on the one hand observers and participators in the digitally organised market processes due to the fact that they deal with the consequences of, and influence, the digital environment, observe the new requirements made of consumers, and support consumers in dealing with these requirements. On the other hand their communication, education and counselling policies mean that they are themselves also users of digital media; this has resulted in great changes in the shaping of consumer-policy instruments. Perfected databases and knowledge platforms (e.g. the “consumer protection compass”) have led on the one hand to more professional information transfer; on the other, but on the other to the participation of vulnerable consumer groups (for instance senior citizens, migrants) is being called into question.

(8) One particular concern of consumer policy in the digital world is the problem of the changing roles between suppliers and demanders e.g. at Internet auctions. A change in roles such as this, even leading to a possible merging of the two roles (suppliers, demanders) is expressed in a current phenomenon, namely that the consumer’s role is being extended or the traditional concept of roles in consumer policy discarded. This extension of the groups of protagonists is dealt with in the following section by way of an example.

### **3. Extension of the consumer's role in sales at Internet auctions**

(9) The sale of selected goods by consumers, either directly “private to private” or indirectly via the institutional second-hand trade, is a well-known phenomenon. The use of auctions on the Internet is, however, new.. While there are no representative data on the traditional sale of household goods, it can be assumed that overall it is a marginal phenomena in certain individual socio-demographic and goods-specific segments; however, good data, as well as economic and social analyses, already exist in respect of Internet sales activities. The results indicate that the use of the new medium is opening up new quantitative and qualitative dimensions which are to be regarded as an extension of the traditional role of consumers and which at the same time bring with them both opportunities and risks.

(10) 57% of private households in 2004 had Internet access at home. This equates to approximately 22.3 million “online households”. 21% of people using the Internet in private households offered goods and services for sale on a more or less regular basis in 2004; in 2002 only 10% did so. These mainly comprise people between 25 and 54 years of age. More recent data indicate that the figure is continuing to rise. At the beginning of 2006, it was ascertained that almost 30% of online-users in private households had offered products for sale at online auctions.

(11) There is a wide variety of different motives. In most cases it is a combination of factors: particularly significant factors include getting rid of goods no longer required or bad buys, the tension, perceived to be enjoyable, of offering goods for sale and watching the reactions of the bidders, and the possibility of achieving an additional income..

(12) The marketing behaviour presumably promotes – even without a huge expectation of profit - economic thought based on market logic. People participating in such auctions gain very practical experience and also abstract understanding of the way in which markets function and of the process of determining market value, i.e. a valuation beyond personal estimation. There are signs that there are transitions from occasional sales activities on the Internet to commercial online trade; this is in some cases planned, and in others unplanned. This development has gone much further in the USA. There, talk is already of a new form of entrepreneurship; such people are called “Mompreneurs” due to the large number of mothers who are using the Internet from home as a sales platform. It is at least possible that there will be a similar development in Germany. Irrespective of this, promoting economic skills and

extending consumers' scope of trade by means of offers for sales on the Internet are to be regarded as one of the opportunities the new medium, and use of the new medium, offers.

(13) Risks arise in connection with the sales activities, in particular from the possible legal and economic consequences caused by the tight-rope walk between the roles of consumer and entrepreneur. From a legal standpoint it is to be noted that the legislator gives a legal definition of the concept of consumer in § 13 of the German Civil Code (BGB), and of the concept of entrepreneur in § 14 section 1 of the German Civil Code (BGB). According to this definition the term consumer is regarded as meaning any natural person who engages in a legal transaction for a purpose that cannot be classified as pertaining to his trade or self-employed vocational activity. In contrast, the term entrepreneur is taken to mean a natural or legal person or a partnership with legal personality who or which, when engaging in a legal transaction, acts in exercise of his or its trade or self-employed vocational activity.

(14) The roots of both terms go back to requirements under European Community law and are consequently not subject in their interpretation to any purely national understanding, but instead to the principle of interpretation in conformity with Directives. According to the approach taken by the (supra-)national legislator, no one is per se a consumer or an entrepreneur. It is rather the respective transaction which must be examined. A cursory assessment of the current practice of the courts already shows that auction platforms on the Internet constitute one subject area which is making it especially difficult to draw a line between consumers and entrepreneurs. Mainz Local Court, for example, draws attention to the fact that the concept of entrepreneur in § 14 section 1 German Civil Code also covers work which is carried out merely on a part-time basis. According to the case-law, the existence of an organised enterprise is just as non-essential as the scope of the activity or on the intention to make a profit. It is rather sufficient if a person behaves in any manner which can be classified as constituting an entrepreneurial activity, including, for instance, the attempt to sell everything "that is no longer required in the household".

(15) The objective nature of the behaviour is the decisive factor in this regard. Mainz Local Court admits that a person who regularly offers goods on an Internet platform does not necessarily at the same time always act according to a plan. As it is a wide-spread practice to conduct private transactions via the Internet, in particular among the younger population. Nevertheless, if there are a high number of sales within a certain period, this may constitute prima facie evidence of planned and therefore commercial actions. In addition to this, the

person in question described himself as a "powerseller" and consequently created the external impression of being a professional seller.

(16) The label of "power seller" has consequently resulted, in more recent court decisions, in a person being classified as an entrepreneur within the meaning of § 14 section 1 German Civil Code with the pertinent requirements e.g. under law pertaining to distance sales.

(17) Consequently there is the danger, particularly on virtual marketplaces, that, beyond a certain threshold level of transactions, the consumer – perhaps even unconsciously – slips into the role of an entrepreneur or places himself under the protection of this role on account of the way he describes himself, and, for instance, becomes a potential victim of official cautions because he does not meet the statutory duty to provide notification of powers of revocation.

### **III. Asymmetries of information, participation and passive involvement in the digital world**

#### **1. Consumer confidence and consumer skills**

(18) The consumer is able to actively and beneficially participate in the digital world if two prerequisites are fulfilled: The consumer must gain the necessary confidence in the digitalisation process and he must have the necessary skill. *Consumer confidence and consumer skill* form the basis of a consumer policy which supports consumers and enables them to exercise their role as market participants actively and for the benefit of both sides of the market – in the sense of "aiding to exercise", not as protection against the opposing side of the market. At the same time it is in the interest of every reputable company to support this information and decision-making process in order to maintain and increase its own customer capital as a key economic parameter. This applies not only to individual contracts but also upstream and downstream along the entire value-added chain a company (supplier) is involved in with the intention of generating greater customer bonding via customer satisfaction and customer loyalty.

(19) A consumer policy which respects these mutual relationships will contribute to *strengthening quality competition* as a driving force of the economy. The digitalisation of the world is opening up potential new areas of action for consumer policy. However, a (fully) functional market requires *consumer confidence* to be established, maintained and if necessary extended. Ensuring that this takes place must be a priority in a digitalised economy and society. One of the pillars of consumer policy is consequently to actively participate in

the demand side in order to create and maintain consumer confidence. The second pillar is that of consumer skill, which, particularly in the digital age, may lead to society being divided into two: into those who have the necessary skills to tap into the digital world themselves and those who, due to a lack of basic skill, are at first unable to access this world. Enabling consumers to adopt an active role as market participants goes far beyond conventional ideas of protection and prevention, and beyond consumption-orientated sustainability considerations, and supports the interest which (respectable) suppliers and demanders have in the medium-term and long-term prosperity of their own national economy.

(20) The difficulties and challenges caused by digitalisation often lead to a rapid prejudgement of this development or, in contrast, to a glorification of the possibilities. A thorough analysis of the opportunities and risks requires an analysis grid which allows a rational assessment to be made. The areas of institutional economics and behavioural economics use a grid such as this; both these approaches are of fundamental significance for the development of consumer policy.

(21) Institutional economics regards the sphere (“financial sphere”) of economic elements, natural persons, associations, organisations and companies as comprising a large number of explicit and implicit contracts between the actors (suppliers, demanders) and their environment I (national) and environment II (supra-national). The degree to which the actors are informed about the contractual partner differs greatly (two-sided: *information* received by the consumer about the quantity, price and quality, and information about the consumer); this results in an information risk (uncertainty over quality in a broad sense), they may have a very different influence on the behaviour of the direct or indirect contractual partners e.g. the business policy of a company (*participation*, influence), and they differ in the way they participate in the financial or physical/psychological “fate” of the contractual partner (*passive involvement*).

(22) Based on this institutional economic approach (*asymmetries of information, participation and passive involvement*), a modern concept of consumers based on behavioural economics also takes into account *bounded rationality* (partially rational behaviour, in particular with regard to the perception and processing of information) in respect of all types of goods and services (goods and services relating to search, experience and confidence; and in particular contract goods and services). The basis premise is not (any longer) Homo Economicus with symmetrical access to information which, with “idealised uncertainty”, is absorbed and processed without delay and which leads to essentially rational, optimal and permanently updated decisions (even an economic subject such as this would fail due to the above-named asymmetries).

(23) The information and decision-making process which consumers undergo in the digital world as original demanders is determined in two respects by the information they receive. On the one hand, the direct information received from the direct contractual partners on the primary market, i.e. from the manufacturer, is of relevance; this information is transferred directly or indirectly (media, NGOs). On the other, information is also generated by upstream and downstream companies (suppliers) in the added value chain, e.g. by trade, but also by intermediaries who are involved directly or indirectly in the search for support and recommendation, with regard both to the selection from their circle itself and also to the information from the support and recommendation process. This shows that on the one hand direct relations may exist between both sides of the market (original suppliers <> final purchasers), but that on the other a national economy based on division of labour is marked in particular by *intermediary trade / exchange relationships*. Consumers as market participants conclude explicit or implicit contracts with suppliers, who themselves are only part of the value added chain. This process-orientated view of fragmented, hierarchical *intermediation chains* shows *inter alia* the degree of possible asymmetries of information, but above all the asymmetries of participation and passive involvement when the focus is not only on static one-off decisions. The development and the maintenance of market confidence and reputation capital is determined to a significant degree by all those involved in the intermediation chain, not only by the final contact. This provides further evidence of the long-term nature of contacts, which is a special feature of this area.

(24) "Consumers", as economic subjects, also appear in many different guises, although the following will mainly deal with the first-named aspect, in order not to go beyond the scope of this discussion:

- as a demander participating in the market;
- as a supplier of goods and services participating in the market, in particular as an employee, but also as a (private) seller of goods and services, usually between private people (C2C ("consumer to consumer")), but possibly also C2B ("consumer to business"); cf. the introductory example on extension in section I3);
- as citizens in relation to governmental and administrative integration (if applicable also supranationally).

(25) Using this as a basis, the effects of digitalisation can be divided up into three areas: generation, search for, passing on and exchange of *information; supply and demand* of goods and services, medium-term and long-term *responsibility* for the value added process and its results.

## **2. Generation, search for, passing on and exchange of information: opportunities and risks in the digital world**

(26) Electronic post, e-mails as the “mother” of all “E`s” does not differ greatly at first sight from conventional post (snail mail). It transports texts, pictures, data, i.e. information, which was and is able to be sent by traditional means.

(27) At second glance, there are profound differences, at least in three regards: time/speed, reach/quantity and, connected with the first two, transaction costs. Transport and, connected with this, communication (transfer, exchange) is becoming extremely quick; thousands and millions of addressees can be reached at the same time and in parallel, and both of these aspects are possible without a notable increase in cost. This applies both to the private sphere and to the working world.

(28) From a consumer point-of-view, this means firstly the advantage of the very reasonably priced communication. However, this is accompanied by being doubly dependent: the consumer must have the necessary technical equipment, and it must be understood, serviced and maintained, and the often unconscious (social) pressure to use the technology and the fact that the consumer is always obtainable must be assessed and (psychologically) processed (access). There are also other aspects: when using the necessary hardware and software, consumers must comply with digital proprietary rights, which are usually not directly obvious, and accessing worldwide information networks also always means it is necessary to “secure property”, i.e. block access for those without authorisation (viruses, Trojans, bugs etc.). The newly attained freedom of information and communication may rapidly lead to a world of data piracy and computer hijacking marked by in some cases extreme asymmetries of information in which so-called spamming i.e. unwanted access to information by indeterminable or scarcely determinable sources is almost harmless compared with other potential scenarios.

(29) It was possible to apply almost all these remarks to digital (VoIP Voice over Internet Protocol) and mobile telecommunication and telephoning. While the phenomena related to E-Mail and digital telephoning are mainly located in the area of passing on and exchanging information, i.e. of communication, other phenomena are to be found in the more fundamental area of the generation of, and search for, information.

(30) There are three fundamental differences between the digital and analogue worlds with regard to making information available and searching for information.: Time / speed, reach / quantity and, connected with the first two, transaction costs. In contrast with traditional analogue methods, such as prospectuses, catalogues, telephone directories etc., the Internet makes it fundamentally possible, in a fraction of the time, to obtain the desired information, compare it or at the same time to incorporate even more and new information which would traditionally not have been able to be accessed, and all this at an unprecedented low cost.

(31) Such advantages can, however, only be obtained when information and search strategies are used; when using such strategies, consumers must not only be clear (focus) about their own (information) goals but must also remain constantly aware so that they do not lose sight of their actual "task" or problem (filter requirement). In other words: the advantage of the gigantic range of information may very quickly be transformed into a serious disadvantage if e.g. the quantity of information grows continuously and can scarcely be processed, and the perception and processing heuristics which necessarily result from this development lead to incorrect information. There is also the great lack of transparency regarding the sources which are "found": it is scarcely possible any more to select them according to whether they wanted to be found. Issues of access, use and "securing property" (including diallers) must also be taken into consideration. Focus / goal orientation on the one hand and filtering of information and assessment of the quality of the information sources on the other are consequently of ongoing significance if consumers participate in the digital (information) world.

(32) Finally, aspects such as the use and processing of the "data tracks" left behind by those looking for information also play an important role. The private sphere, including the protection of personal data, is affected directly if, via cookies or copy-protection programmes, even technically able consumers are scarcely able to detect that data are being read. Quite apart from sham information which is intended to trigger certain behaviour and data tracks. The potential risks go as far as theft of the user's identity.

(33) Last but not least, the distribution of opportunities to use the media is unjust. Although the transaction costs sink for both sides of the market, the supply side gains a considerable advantage in terms of information due to data mining and the fusion of data bases; this may then result in a gain in information-related power.

### **3. Supply and demand of goods and services**

(34) Digital business relationships, particularly in the context of Business-to-Consumer (B2C) relationships (possibly also offers made by private households (exchange, auctions etc., usually C2C) do not at first glance appear to really differ from traditional relations either. Just as in traditional relationships, contracts are concluded in digital relationships (order/purchase, delivery, payment) after an information phase relating to price, quality, risk and quantity. The “E’s” such as E-Business (generic term, general) or E-Commerce (market-related digital trade) and E-Trading (securities, stock exchanges) do not to this extent represent anything surprisingly new.

(35) Closer inspection and analysis, however, shows that two aspects are at least greatly altered, and that these dominate in the area of initiating contracts, concluding contracts, performance and consideration. On the one hand there are, from a company standpoint, far-reaching consequences for internal processes and the value added chain, and it is constantly necessary to react to changes and to make decisions extremely quickly (e.g.: advantages and disadvantages of direct selling without intermediaries/intermediate traders, high start-up /market entry investments, accelerated order processes, mean high delivery speed (logistics); the restructured and streamlined digital supply chain increases dependency on the functionality of the partners/ elements in the chain.

(36) On the other hand, tried-and-trusted processes and patterns have, from the consumer standpoint, (apparently) lost importance, i.e. processes and patterns relating for example to the selection of goods and services (physical presence vs. anonymity) or to the conclusion of contracts and payment (personal signature vs. digital signature, cash vs. electronic money or cyber cash), and new behaviour and decisions, with which consumers have had little experience, are becoming necessary. In the conventional surveys on obstacles to the use of digital trade, consumers regularly name in first place inadequate security regarding digital payments and inadequate security regarding the transfer and use of personal data. (Technical) handling problems in the use of information and search strategies (navigation) tend to be ranked below these in terms of severity as obstacles.

(37) These phenomena and basic problems are multiplied if use of the digital world is at the same time not restricted to national level, but – in accordance with its nature – also extends to cross-border level. There are other factors which exacerbate the information issues, for instance the fact that the consumers use a language other than their native language (e.g.

German >>> English) and, the potentially unclear legal framework of the supply State, insofar as there is any transparency at all regarding the country in which the supplier is located. Other problematic aspects include for instance the issues regarding the potential legal enforcement (“enforcement oases”). One aspect which appears particularly serious with regard to consumers' cross-border transactions in the digital world is the possible inability to determine suppliers who can (could) use digital cross-border transactions as “stealth trading” where the consumer does not notice that he is leaving the protective sphere he is familiar with.

(38) A variety of different encoding and signature procedures have now been developed for the purpose of preventing the possibility of deception etc. (double spending, data theft, (card no.), denying receipt). Judging by the fact that, at least in Germany, it took more than two decades until a significant percentage of daily payments were being made without cash, i.e. by ec/Maestro or credit cards, and consequently until people moved away from traditional patterns of cash payment, this change of pattern in payment behaviour appears to be one of the most serious problem areas. It is not just that the anonymity in making payments on the Internet can be viewed as a hindrance (even if payment by card in person does not differ essentially in terms of security or in particular as far as the consequences for the control of spending are concerned); it is rather that the new digital payment security measures alone, and the fact that consumers have to deal with different security requirements, mean that there is not likely to be a rapid confidence-building process.

(39) There are some conflicting issues regarding the insufficient security in the sending and use of personal data. On the one hand, consumers may (in theory) have greater control over the access to information gained by suppliers' marketing measures than they do in the world of traditional mass communication; on the other hand, new, Internet-supported technologies enable customers' interests and predispositions, their so-called personal profile, to be identified more accurately and the information to be focussed for the purpose of one-to-one marketing. In terms of institutional economics, it is not surprising that suppliers adopt this behaviour, so-called screening, as suppliers are at first confronted by a disadvantageous asymmetry of information. On the other hand, if consumer data are spied on, tracked and analysed on corresponding web-sites, this restricts the protection of personal privacy, and consequently of a consumer's ability to determine what happens with information. This results in an interesting phenomenon occurring when a person accesses the digital world, namely that the person must, voluntarily or to a certain extent unknowingly, surrender the monopoly over his own data to a greater extent than is necessary in traditional trade.

(40) One particular form this phenomenon takes is so-called viral marketing, which relies on linking free additional benefits to the advertising message, and *inter alia* is highly effective in electronic dissemination by means of personal recommendation (“amateur advertising”, “free text messages”, and, in a broader sense, also cold calling). Web logs and other types of

forums and platforms comprise another particular feature in this regard; although on the one hand people place almost any type of information on such sites – e.g. they are used to compare products or to share experiences, on the other hand it is not possible to assess the origin and quality of the information, and the sites also offer the opportunity to conduct disinformation almost without any control.

(41) Added to this is the long-term link to the supplier, meaning that consumers remain exposed to actions taken by the supplier, even long after the actual act of concluding a contract, e.g. so-called "after-sales" instruments being used for the purpose of reducing dissonance, for "customer-bonding" and for increasing the probability of repeat purchases via (cold?) calls. At the same time the cost-effectiveness of many information options (hotlines) may possibly “evaporate” over the course of time.

(42) Even beyond the area of direct E-business or digital trade, there is no end to the digital world. On the contrary, the conventional consumer world is by no means analogue. Digital methods of disseminating and storing information have long been used in traditional trade. On the one hand there are for instance a large number of more modern bonus and discount systems which differ greatly from the time-honoured method of affixing discount labels; these differences include the fact that customer data can be digitally recorded and stored and, if required, analysed in connection with commodity movements (tracking). On the other hand, such transaction-data analyses are perfected by combining them with the use of electronic payment procedures (credit card, ec/Maestro card, cash card) because the pertinent payment behaviour constitutes an essential jigsaw piece in creating a personal profile. These will be joined (shortly) by the RFID technology which enables product-specific data to be recorded even less noticeably, without even contacting the customer.

(43) The conventional analogue consumer world is undergoing changes, with new storage and processing technologies, such as CD/DVD and digital recording (DVD/HDD) and the integration of the analogue mass communication world of radio and television into the digital world of the PC, often together with telecommunication (ADSL, VoIP, mobile phone), which individual economic units are for various reasons only able to evade to a limited extent (cf. above: access problem/social pressure, but also turning off of the analogue, terrestrial TV). Consumers are robbed of some opportunities to make autonomous decisions, or they are not even expected to make such decisions due to a lack of knowledge. This applies for example to

the aspects of copyright protection named above, but also to the fixing of country codes on DVDs.

#### **4. Medium-term and long-term responsibility for performance processes and their results**

(44) Attention has already been drawn to the long-term nature of contracts which are concluded and to the “volatility” of information and promised performances. The special features of business relationships in digital trade, relationships which from a consumer standpoint tend to appear anonymous, and the de facto lack of knowledge about many suppliers, exacerbate the problem of creating a reputation, even beyond the problems connected with the individual transaction. This is not to say that there is de facto more transparency per se in many traditional forms of sale such as mail-order trade, stationary trade or door-to-door transactions, but the face-to-face perception appears dominant. It is therefore not surprising that at least some initial attempts are being made to solve these problems: by means of various forms of personalisation, e.g. via accompanying hotlines or call centres, as well as through the use of well-known personalities. Added to this is the fact that the legal framework is not always transparent, e.g. in transactions with suppliers from abroad (cross-border, virtual organisations which in the narrowest sense of the word prove to be purely fictitious or non-existent (no longer existent) when complaints are made). In the consumer's digital world, or at least increasingly digitalised world, it appears to be crucial for developing a reputation to at least understand the existing phenomena and consumers’ perception and behavioural processes.

(45) With regard to supplier behaviour in the post-contract phase in the digital world, there are as yet hardly any systematic data which would allow a more precise assessment to be made of the likelihood of suppliers still being available if there are cases of defective performances or to provide simple additional information / answer simple enquiries. However, there are some indications not only that there are sometimes no replacement parts, spares or add-ons for hardware and software after a very short period of time, but also that charges are being made for what was originally free information.

#### **IV. Challenges: Surviving and thriving among digits, bytes ...? Confidence, information, skills**

(46) The consumer-policy challenges resulting from this large range of already familiar phenomena relating to consumers using and experiencing the digital world can be divided up

into the same three, interrelated categories already used: *information* generation, search, transfer and exchange; *supply and demand* of goods and services; and – in the medium and long term - *responsibility* for the value added processes and the pertinent results.

(47) *Information* generation, search, transfer and exchange: The potential of the digital world of information, including the necessary processing and dissemination processes, is advantageous for consumers if there are no new asymmetries of information or areas of inadequate transparency which are even less visible than in the analogue world. As well as the aspect of access, other priority areas include being able to locate and enforce responsibility for generated and disseminated information. Added to this is the necessity of limiting “contamination” for participants/ users of the information network. If consumers gain the impression, albeit a perceived impression for which there is not necessarily any factual evidence, that the cost required may often exceed the possible benefit, use of the medium would probably be limited to people who like to take risks and those who, due to a lack of knowledge, inadvertently act in a risky manner. The openness of the digital world means that traditional governmental regulations based on prohibitions and requirements alone will be limited in their expediency and may well be cumbersome. Clarification is required regarding the extent to which self-regulating bodies (e.g. via administrators in forums or voluntary self-control, as with Wikipedia, instead of profit-orientated comments, as with Amazon) could have a sufficient effect in this area. Another unresolved issue is whether self-regulation via learning effects actually works or whether the self-healing forces of a market are overestimated – due for example to asymmetries of information and bounded rationality.

(48) *Supply and demand* of goods and services These considerations apply particularly to the specific transactions which follow the information phase. Initiation of contracts, conclusion of contracts, performance and consideration The secure transfer and consensual use of personal data alone requires reliable and independent institutions. It is not a matter of making greater demands than those familiar to consumers from previous processes. But in order to overcome the status quo (bias), it must be readily comprehensible and evident that digitalisation does not make the situation worse but instead rather improves the situation. This is particularly the case for electronic payment transactions which should be perceived by consumers to at least maintain the standard of conventional non-cash payment transactions (transfers, direct debits). The numerous recent pathological and criminal cases, e.g. phishing, show that people are still very susceptible to the dangers of the digital world. It perhaps helps to realise that, when

translated into the traditional non-cash world, the probably wide-spread behaviour customers adopt when exposed to phishing would equate to consumers giving a signed blank cheque to a person at their door who had pretended to be an employee of the local bank.

(49) All the digital transaction problems clearly indicate the necessity of consumers having informed and in-depth *consumer skills* enabling them to deal with everyday demands. The digital world alleviates problems caused by many of the negative phenomena of the analogue and traditional world, such as excessive consumption and over-indebtedness. Deficiencies recognised in this area should definitely be reduced or eliminated when consumers participate in the digital world, in order to make everyday life easier.

(50) *Responsibility* for the value-adding processes and their results: One problem in traditional consumer protection which has so far been underestimated is that of ensuring that contractual partners assume long-term responsibility for the duration of the contract and the contractual consequences, in particular in view of so-called intermediary chains, i.e. the inability, from the consumer's standpoint, to attribute performances to particular suppliers; this problem also exists to the same, if not to a greater extent, in the digital world. On the one hand this relates to the specific contractual chain along the value-adding chain and to transparency regarding tasks, skills and responsibility of those concerned. On the other, however, it appears necessary to regulate similar contractual components and elements in a standardised and comparable manner. A process of standardisation such as this imposes only a minor restriction on the variety of the digital world, and then allows a person to navigate through cyberspace with less risk and less frustration. This point should be reiterated in order to avoid misunderstandings: standards and consumer skills do not mean that all participants must understand the technical details which enable their space-ship or its warp-drive to work. Rather, the pilots should have (provide evidence of?) fundamental knowledge about how to navigate and should know about the general characteristics of the infrastructure which is to be used and about the repercussions it creates for the flight, at a cross-border level of course.

(51) It is therefore crucially important that there are sufficient incentives at all to develop consumer confidence and a supplier's reputation (in the medium to long term) in order to avoid the consequences of the limited operational capability of the markets (loss of ability to choose due to short-sighted action) to the detriment of all reputable market participants.

## **V. Consumer policy objectives in the digital world Consumer confidence and consumer skills**

(52) Consumers will only follow digitalisation on the market and in society if they have the necessary confidence in the use of this technology in key areas of life. This confidence is put at risk by asymmetries of information, participation and passive involvement. Confidence can only be successfully gained or regained if consumer policy formulates guiding principles and political instruments are geared towards implementing these principles.

(53) Examples of guiding principles for formulating consumer policy to deal with the risks and exploit the opportunities offered by the digital world include the following:

- **Creation of transparency** The key aspect here is to reduce asymmetries of information. Unnecessary technical complexity often makes access to digital technology more difficult. This applies in particular to the growing number of older users who are subjected to a constant process of adaptation. A digital world is only fit for everyday life if it is simple and able to be used without problem by the average consumer.
- **Creation of skills** Active participation in the market requires corresponding media skills; these skills are taken to comprise a consumer's total knowledge as well as his psychological, physical and social skills in respect of perceiving and tapping into the benefit of digital media for consumption. Use includes both the sending and receiving of information by digital media. Asymmetries of information and participation must be reduced in this area as well.
- **Ensuring freedom of choice and the ability to actively participate (opt-in or opt-out):** The consumer must always have the option of choosing between individual products and services (so-called interoperability) without being restricted by his respective software. The consumer must be provided with the ability to actively participate in the further development of the technology. For non-users, analogue / real alternatives should remain available for a transitional period (for instance in respect of dealing with authorities). Asymmetries of participation which are to the detriment of consumers must be reduced.
- **Guarantee of fairness of access:** The digital world must not split consumers into "users" and "losers". This risk exists if the digital world is only accessible for those who have the level of media skills required by the technology and determined by

manufacturers. Such potential asymmetries of passive involvement inhibit the development of consumer confidence.

- **Data sovereignty:** Consumers must, similar to the situation regarding industrial property law, have a right to their digitally available data, a right which must not be able to be used (commercially) without their consent. If the consumer grants his consent, it must be ensured that the consumer is sufficiently informed about how his data are to be used and can also inform himself. This calls for a reduction in asymmetries of participation and passive involvement as a necessary prerequisite.
- **Safeguarding use:** The development of commercial legal protection must not lead to a situation where consumers can no longer use the products and services they have purchased or to a situation where incorrect use leads to criminalisation. Potential asymmetries of passive involvement such as these inhibit the development of consumer confidence.

(54) The addressees of this policy comprise the consumers themselves and their associations, initiatives and organisations, as well as companies and the State. As consumer confidence is made up of at least three components: confidence in one's own skills and abilities, confidence in the quality and safety precautions taken by companies, and confidence in the State which takes the necessary measures to allow the consumer to move safely in the digital world. Consumer associations have the task of becoming actively involved in conveying and implementing the objectives.

(55) The above considerations regarding the reduction of asymmetries of information, participation and passive involvement help to avoid the problem of partial failure of the market due to adverse selection, when the only suppliers and demanders using the markets are of bad quality. Short-sighted market behaviour in this regard means nothing other than the triggering of external effects to the detriment of the majority of reputable suppliers and demanders in changing roles. It will of course not be possible to reduce the asymmetries at no charge; for this reason the external effects comprising damage to reputation and consumer confidence must be restricted in accordance with the cause. Developing consumer skills helps in this regard, as do State sanctions.

## **VI. Means and instruments of a digital consumer policy**

### **1. Risk-adjusted information policy and consumer opportunities**

(56) The risks to consumers arising from the digital world are many and diverse. Unjustified conclusions can be made if old and/or incorrect data are used, or data from other contexts. A lack of knowledge about the scope and type of stored data, and unjustified monitoring, cannot be controlled. The unauthorised publication of data, the lack of transparency, theft of identity, the discarding of “high-risk consumers” - all these aspects affect the consumer's autonomy and dignity.

(57) Data protection laws are currently being developed in Europe, in the EU. However, national consumer policy will still have the task of checking the existing regulations to see whether the regulations can prevent the risks which have become known so far. It seems reasonable to assume that the wording of the regulations has so far been too narrow (“law take a backseat role”). The growing tendency in German courts to exclude data protection from consumer protection is directly opposed to the real development. It is instead necessary to systematically incorporate consumer policy into data protection law. This cannot happen without examining existing regulations to see whether they are suitable for dealing with the challenges of the digital world.

(58) Only a risk-adjusted information policy can guarantee consumers the possibility of actually being able to exploit the opportunities offered to everyone by the Internet. Consumers of the 21<sup>st</sup> century, who perhaps no longer correspond to the idea of the weak consumer in need of help, cannot be left to themselves. As even experienced, responsible consumers cannot assess the variety of risks themselves. What is needed is a preventative policy which must be all the more intensive the more the risks of the digital world affect groups of society which are in particular need of protection, such as children and the growing percentage of older people.

### **2. Training media skills**

(59) The development and training of media skills has a key influence on the role and function of consumers in the digital world. The central skill area comprises consumers' knowledge about dealing with digital media, which in turn comprises both declarative knowledge (knowledge of technical properties) and also procedural knowledge (knowledge of operational procedures). The technical innovation dynamics to a large degree necessitate the

ability and willingness to learn continually. This ability and willingness to learn are classified as psychological skills, as do the ability to grasp things and the ability to overcome learning barriers. Psychological skills as a skill area relate to demands made on motor skills and sensual perception, but are not of great significance as a target area for the teaching of media application skills. In contrast to this, social skill i.e. the ability to interact with other people, is of great importance because the possibility of interacting is an key characteristic of digital media and is used to initiate and practise learning processes. Media skill also covers knowledge about knowledge (“meta-knowledge”) i.e. the ability to correctly assess the quality and relevance of information on the Net and the reliability of the sources. Meta-knowledge means being able to focus and filter.

(60) The three dimensions of media skills – psychological, physical and social skill – can be related to the different phases of activity associated with consumption: the pre-contractual phase, the phase in which the contract is concluded, and the post-contract phase. Each of these phases makes different demands on users’ skills in the digital world. Information and communication platforms on the Internet can be used differently in the separate phases: as a search engine in the pre-contractual phase; as production guides in the contractual and use phase; and as an instrument for complaint and mobilisation in the contractual and post-contractual phase.

### **3. Informed choice and responsible innovation**

(61) Informed choice presupposes confidence and skill. Information campaigns about existing protective instruments and potential risks serve to re-establish and strengthen consumer confidence. However, such measures only attain their objective if they increase consumer skill. The aim of a risk-adjusted information policy must be to bring about transparent structures on the market and clearly recognisable responsibilities of those involved. The situation in reality is a long way away from this.

(62) Risk-adjusted information policy has an ex ante effect. This requires a fundamental realignment of thoughts and ideas. Responsible innovation requires the government, as well as consumers and their representatives, to provide public commitment while new systems and technologies are still at the development stage. The classic means of doing this is to set up consultation processes as already practised in Great Britain. This does not necessarily have to be done using legal regulations. Voluntary behavioural codices adopted by the relevant IT industries and developers can smooth the way for a rethinking process to take place. The aim

of the consultations must be to provide a *Privacy Impact Assessment* (PIA) of new technologies (obligatory in Canada), in order to ensure that corresponding consumer skill is developed along with the new technologies. *Privacy Enhancing Technologies* (PETs) which are already at the design phase could prevent potential malpractice.

#### **4. Open access**

(63) There are many developments which must be avoided or eliminated: social exclusion and restriction of opportunities in life (e.g. geo-demographic data), a worsening of contractual conditions for certain target groups, and all indirect and direct forms of discrimination.

(64) This aim cannot be achieved without the use of State political instruments. Traditional compensatory measures aim to balance the disadvantages. This is where the field of law plays an important role. Today, access to the digital world has the same status as ensuring a basic supply of electricity, water and gas. Just as every consumer has a right to be supplied with electricity and with water, he also has a right to have access to the digital world. This right is not limited to providing a technical connection. Access requires more; it requires the possibility and the ability to also be able to tap into the achievements of the digital world. This also applies to sectors of the population which are especially in need of protection. Only in this way will all have the opportunity to participate. Consideration must therefore be given to whether consumers can be guaranteed access, as is the case with energy supply and telecommunication.

#### **5. Fair and just use**

(65) The right of a person to determine the use of personal data, which is guaranteed by constitution, has not yet reached the digital world. As in the digital world it is not so much a matter of the reliability of the data transfer as of the fact that data are subjected to internal business processes and passed on for commercial purposes. The consumers must make their data available if they want to participate in the digital world, but they must then also be able to find out how their data are processed and assessed, whether they are passed on to anyone else, and if so, to whom. To this end, the relevant data-protection provisions must be examined to see whether and to what extent they meet the requirements placed on consumers by digitalisation.

(66) In recent years, the European Community has continually extended the protection offered to suppliers of digital, copyrighted content, usually without dealing with the repercussions for

consumers due to the restrictions imposed on private use. The legal development is moving towards an increasing criminalisation of consumers who do not comply with copyright protection. This development must be stopped and it must be made possible for consumers to enjoy adequate private use.

## **6. Combating bad business practices**

(67) What is required is increased investment in legal enforcement, in order to eliminate improper business practices. The use of existing consumer-protection rules to control licensing provisions and conditions of use, or to control the admissibility of marketing methods, requires resources which are still limited in their availability. One conceivable option would be to finance targeted campaigns which focus systematically on the risks of the digital world, and to use these to eliminate bad business practices and business practices which are already problematic under existing law.

(68) What is needed is an inventory of the existing governmental powers of control, in order to discover whether they meet the requirements of the digital world. This includes the imposition of more stringent requirements on companies to report on the measures taken to protect consumers.