

Digital distribution platforms introducing 14 day refund policies



Digital distribution platforms for apps, games and other content have recently changed their refund policies for virtual items. European users can now “return” their purchases within 14 days for any reason – or for no reason at all. These plans have caused quite a stir. Are consumer rights the next big thing coming from app stores? What is the motivation for this move? What exactly is covered by the users’ right to return their virtual purchases? And what are the consequences for other providers of virtual content, such as games, apps or digital media?

1 Why are 14 day return policies being introduced?

Because it is EU law. Distribution platforms are now implementing the legal requirements which have applied throughout Europe for about half a year. As of June 2014, all European member states had to implement new consumer rights regulations based on the European “Consumer Rights Directive” (CRD). The CRD has introduced several new obligations which affect publishers of apps, digital games and all kinds of digital content. The most important obligation was a revised “right of withdrawal”, which now explicitly includes virtual goods.

As a basic principle, the “right of withdrawal” allows a consumer to withdraw their contractual statement within 14 days after the purchase – without any obligation to give any reason. No questions asked.

Consequently, these new return policies are not really a surprise.

2 Does this also apply to all app and game providers?

Yes! The CRD applies in all European member countries. Consequently, all virtual content providers targeting European consumers have to comply with its regulations, including the introduction of a 14 day return policy also for virtual goods. Thus, all other virtual content providers targeting consumers within the European Union have to introduce a 14 day return policy for their goods.

For the purposes of the CRD, consumers are private persons who are acting outside any trade or business. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside a person’s business, that person is also considered as a consumer.

The CRD does not expressly state when and how it can be assumed that European consumers are actually targeted. Strong indicators can be prices presented in Euro, top-level domains from Europe, such as co.uk, fr or de, or availability of languages solely or almost exclusively appearing in Europe, such as for example German or Italian.

3 Are there any exceptions for virtual items?

Yes, there are. The CRD allows distributors of virtual items to ask their users to waive their right of withdrawal under certain circumstances.

Some providers have implemented this exception, too. One return policy states:

“Exception to the right of cancellation: You cannot cancel your order for the supply of digital content if the delivery has started upon your request and acknowledged that you thereby lose your cancellation right.”

This exception is quite powerful. However, this solution has one catch: it requires the users’ consent as according to Article 16 (m) CRD the right of withdrawal terminates immediately after the “contractual performance has begun” – i.e. the download or stream has started – and if the user has expressed prior consent, acknowledging the loss of his right of withdrawal.

4 What are the requirements for a valid exclusion of the right of withdrawal for virtual goods?

That is not entirely clear yet. Basically, there are two requirements:

As a first requirement, the CRD requires that users “express” their consent. However, neither the CRD nor the guidelines provided by the EU or the national laws have explicitly stated what exactly is meant by an “expressed consent”. Broadly speaking, there are three possibilities:

The highest risk remains if the exclusion is solely mentioned in connection with the return policy statement. The term “expressed consent” implies at least some kind of action which is not implemented if the exclusion is solely pointed out in the policy statement. In fact, users might not even take notice of the exclusion and the loss of their right of withdrawal in the buying process.

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The lowest risk would remain if providers required their users to expressly declare consent to immediately begin with their contractual performance, e.g. by implementing a checkbox or equivalent means. This approach has been chosen by some game distribution platforms. However, this is not only the lowest risk, but also the highest effort and might negatively affect conversion rate. Yet, consumer watchdog organisations and certification bodies have taken this conservative position.

A moderate risk remains if providers mention the exclusion and inform about the consequential loss of the right of withdrawal close to the finalisation of the buying-process, e.g. near the “Buy now”-button, as implemented by Google in its Play Store. On the one hand, this solution still does not ensure an explicit consent by the consumer. On the other hand, this solution ensures that the consumer was actually forced to take notice of the exclusion and its consequences. This way, the basis for assuming implicit consent is more substantiated.

As a second requirement, users have to be provided with an email confirmation of their consent. A confirmation shown on a website or in an app is not sufficient. This can be an issue for digital distribution platforms such as app stores and game platforms where app providers cannot influence the content of emails sent to the user after a purchase. However, at least Google, Steam and a few others apparently already provide a respective confirmation in their post-checkout emails for digital items.

5 What happens if the implementation of the exclusion of the right of withdrawal for virtual goods is not sufficient?

If the exclusion of the withdrawal right for virtual goods is not implemented in compliance with the regulations of the CRD, it is invalid. This means that the user still has his 14 day return period. Additionally, if the information about the right of withdrawal was not properly given, this period might even be extended up to one year. Users would thus be able to use the virtual item for the respective period and then return it – without any reasons. As if this was not enough, consumer watchdog organisations are waiting just around the corner to enforce CRD compliance, e.g. through cease and desist claims and court injunctions. Therefore, when considering the possible options for the implementation of the exclusion, the benefit of a riskier method should be considered and outweigh the consequences of a possible non-compliance with the CRD.

6 Action Items

- Review the sales process in the light of the CRD requirements
- Evaluate options to exclude the right of withdrawal and adjust the checkout process accordingly
- Review post-checkout emails and ensure that users are provided with all required information, including a confirmation of their consent with respect to the exclusion of the right of withdrawal
- Review terms and conditions and include the new consumer rights introduced by the CRD



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