

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Scope of application
and general approach of the
new rules for contracts in
the digital environment**

WORKSHOP FOR THE JURI COMMITTEE



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LEGAL AFFAIRS

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IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee this paper evaluates the general objectives of the two European Commissions proposals of 9 December 2015. It analyses their scope and types of contracts covered or not covered. It concludes by asking if the proposed Directives are "fit for purpose" and whether further legislation is necessary.

This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI Committee

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LIST OF ABBREVIATIONS

- B2B** Business to business relationship
- B2C** Business to consumer relationship
- CESL** Proposal COM (2011) 635 for a Regulation on a Common European Sales Law (withdrawn)
- DCD** Proposal for a directive on certain aspects concerning contracts for the supply of Digital Content of 9 December 2015, COM (2015) 634
- OSD** Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods of 9 December 2015, COM (2015) 635

KEY FINDINGS

- **Directives on supply of digital content (including digital services) and online and other distance sales by traders to consumers.** The directives apply only to B2C contracts and deal only with the issues that are most likely to arise, such as non-conformity and remedies and the modification or termination of continuing contracts requiring digital services.
- **Increases and reductions in protection under Member States' laws.** The directives will provide useful additional protection to consumers, backed by public enforcement, but because they require full harmonisation they will also result in some significant reductions in consumer protection for domestic as well as cross-border contracts;
- **Digital content.** The Digital Content Directive will provide consumers with clear, accessible and largely appropriate rights and remedies. However, the seeming restriction of the consumer's right to damages for non-conformity to damage caused to the consumers' digital environment may lead to a serious loss of protection compared to existing (unharmonised) laws.
- **Online sales.** The Online Sales Directive contains useful clarification that failure to comply with an express undertaking amounts to non-conformity, and also gives consumers additional protection, in particular the right to terminate by notice; removal of any short period for notifying the trader of defects; and a longer presumption of initial non-conformity. But UK consumers would lose the immediate right to terminate and recover the price, and the right to damages for defects that appear only after 2 years.
- **Omissions.** The Digital Content Directive does not tackle the questions of whether consumers have the right to make second copies, to transfer digital content or to receive essential upgrades free.
- **Reducing psychological barriers to cross-border trade.** The directives have a narrow scope of application, leaving many questions still to be decided by unharmonised law. Thus they may be less effective in removing trader's concerns about 'unknown law' (as much psychological as real) than the much broader CESL would have been. Because the directives will apply to all transactions and require full harmonisation, they will produce more interference with the laws of the Members States than the optional CESL would have done.
- **B2B contracts.** Encouraging B2B contracts, especially when one party is an SME, is vital to the Internal Market and should also be addressed.

1. INTRODUCTION

Following its withdrawal of the proposed Regulation on a Common European Sales Law ("the CESL")¹, the European Commission has proposed two new measures:

A Directive on certain aspects concerning contracts for the supply of digital content (which I will refer to as the "Digital Content Directive" or "DCD")² and

A Directive on certain aspects concerning contracts for the online and other distance sales of goods ("Online Sales Directive" or "OSD").³

The new proposed measures are very different from the CESL in form, scope and content. In general their scope of application is much narrower than that of the CESL, but they cover some issues that the CESL did not cover, and in many respects they are more intrusive upon the laws of the Member States than the CESL would have been, in the sense that they will result in a larger change in the Member State's existing consumer protection. The proposed DCD in particular offers important clarity and appropriate protection to consumers and from that point of view a measure of harmonisation is certainly to be welcomed; but at least from a United Kingdom perspective, both the DCD and the OSD, as full harmonisation measures, would result in significant reductions in existing consumer protection. The extent of the reduction depends on the correct interpretation of the proposed measures; the intended scope of some of the proposed articles not wholly clear.

It is important to realise that these proposals, though possibly appearing to largely technical measures addressing Internal Market issues, nonetheless will have major repercussions on the law - not only EU law but also the laws of the Member States. In some respects the Directives provide better consumer protection: in particular, the DCD lays down clear and accessible rules to govern the supply of digital content when, in many Member States, the law is inaccessible, unclear and, having been developed for other kinds of products and services, not necessarily appropriate. The OSD will also provide increases in consumer protection in some Member States. But because both directives require full harmonisation, both may result in significant reductions in consumer protection in many Member States, sometimes removing from consumers rights and remedies that consumers currently have under general principles of civil and contract law. Thus the Legal Affairs Committee should be centrally involved in the debate over these proposals.

In this Report I consider first the general aims of the two proposed Directives. I then consider the form of the proposed legislation; the scope of application of the two directives; and, in general terms, the topics that are and are not covered. (Details of the proposed provisions on conformity and remedies, and the provisions on the modification and termination of longer-term contracts for the supply of digital content are discussed in separate reports.) I then highlight an issue that is not covered by the DCD, the question of what rights the consumer will obtain under the end-user licence. I conclude by asking how far the proposed Directives are "fit for purpose", i.e. are suitable means of achieving their apparent aims; and whether in the future rules should be drafted to deal with online sales contracts and contracts for digital content made between traders.

¹ Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final, withdrawn by Commission Work Programme 2015: A New Start, COM (2014) 910 final (16 December 2014), Annex II item 60, p12.

² COM(2015) 634 final of 9 December 2015.

³ COM(2015) 635 final of 9 December 2015.

2. GENERAL PURPOSES OF THE PROPOSED DIRECTIVES

Increasing consumer confidence by ensuring adequate protection

Digital content. There is a widely acknowledged need for some legislation on the supply of digital content. In the UK and, I understand, in many other Member States it is generally accepted that when digital content is supplied to a consumer on a durable medium such as a CDROM, the transaction will be treated as a sale of goods and the conformity obligations under the sale of goods legislation will be applied to the digital content as well as to the physical medium⁴; but if the digital content is downloaded directly from the internet, the transaction is not one of sale of goods, (a) because there is nothing tangible and (b) because the consumer does not acquire ownership of anything, merely a licence (from the owner of the intellectual property rights, who may be the supplier or a third party) to use the digital content.⁵ In some Member State such contracts may be categorised as services; and even in the UK what I have termed the supply of digital services, as envisaged by Article 2 of the DCD, will fall within legislation on the supply of services. It is also likely that, if necessary, the courts of each Member State would fashion a remedy to deal with problems. So there is not a total absence of relevant law, and consumers are not completely without protection.

However, leaving the issues to be governed by general legislation on services and judge-made law is unsatisfactory. Firstly, it is hard for consumers to know what their rights are and equally for traders to know their obligations. The law should be readily accessible. Secondly, the rules are likely to have been developed for cases involving tangible, non-digital goods, or services in general, and may not always work well for transactions involving digital content.

I believe that only two Member States have so far adopted anything like comprehensive legislation specifically on the supply of digital content: the Netherlands and the United Kingdom. Consumers in those countries can be confident that they will have clear and adequate protection when contracting for the supply of digital content, whether they contract with a trader operating in their country or with a trader who directs its activities to the consumer's country: as we will see below, traders operating in or directing their activities towards consumers in those countries will therefore have to comply with the mandatory rules of the relevant legislation. In other countries legislation is lacking so that the law is relatively inaccessible and quite possibly inadequate.

Online sales. When a consumer making an online or other distance sale, the consumer is already protected by the requirements of the Consumer Sales Directive ("CSD").⁶ A consumer who buys from a trader operating in or directing its activities towards consumers in the Member State in which the consumer lives will also benefit from any higher level of consumer protection required by the law of that Member State. The CSD is a minimum harmonisation directive and many Member States in one respect or another go beyond the minimum that is required by the CSD.

⁴ *International Computers Ltd v St Albans District Council* [1996] 4 All ER 481, Court of Appeal.

⁵ See R Bradgate, *Consumer Rights in Digital Products, A research report prepared for the UK Department for Business, Innovation and Skills* (2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf.

⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Compared to the CSD, the OSD does contain some additional elements of consumer protection. These will be considered below. However, its main purpose must be to encourage development of the internal market by making it easier for traders to do business with consumers in other Member States. The DCD has this aim also.

Reducing the costs of cross-border trade

Members of the Committee will be familiar with the so-called "Rome I problem." Under article 6 of the Rome I Regulation,⁷ if a consumer contracts with a business in the country of the consumer's habitual residence, or with a trader in another country when the trader has directed its activity towards the consumer in the latter's country of habitual residence, the consumer is entitled to the protection of the mandatory rules of the law of his or her country of residence. This means that a business advertising its goods across Europe, for instance via a website "e-shop", must be prepared to deal with the consumer protection rules of each Member State. There are significant difference between these laws. Although there have been a number of harmonising Directives, most of these call for only minimum harmonisation, so Member States may give their consumers a higher level of protection; and there are many issues, such as the law on the kinds of loss for which the consumer may recover damages⁸, on which there are no general harmonising measures.

The European Commission has attempted to reduce the problems in two ways. The first is by requiring Member States to harmonise their law fully. In particular the Consumer Rights Directive of 2011⁹ ("the CRD") is in large part a "full harmonisation" directive. However, full harmonisation has frequently met with opposition. Members of the Committee will recall that the original proposal for the CRD¹⁰ called for full harmonisation of a wide range of issues, in particular including conformity and remedies in sale of goods and the control of unfair terms. I understand that the version of the CRD ultimately adopted had to be much narrower mainly because Member States that had adopted or retained higher levels of consumer protection than is required by the CSD and the Directive on Unfair Terms in Consumer Contracts¹¹ ("the UTCCD") were unwilling to reduce those levels, as would have been required by full harmonisation.

The Commission then turned to a second approach, an "optional instrument" for cross-border sales of goods and digital content. The CESL would have provided the parties with an optional, pan-European system that combined uniform law on most issues of law for the relevant contract with a high level of consumer protection. If the parties chose to use the CESL (or, more realistically, the trader proposed to use the CESL and the consumer assented to this in order to make the relevant purchase from the trader), the consumer protection rules contained in the CESL would have applied in place of the "domestic" rules of the state in which the consumer was habitually resident. The intention was that the mandatory rules of the CESL would give a high level of consumer protection, well above the existing minimum required by the relevant directives, though not necessarily as high as some Member States provide on particular issues.

This approach seemed promising, particularly as it would allow Member States to retain higher levels of consumer protection for domestic transactions, and also to allow traders

⁷ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

⁸ cf Case C-168/00 *Simone Leitner v TUI Deutschland*, ECR 2002, I-2631

⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹⁰ Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.

¹¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

and consumers who preferred to contract on the "domestic" law of the consumer's country to do so. Moreover, the proposal was to allow the CESL to be used also for sales of goods or digital content between traders, at least when one of the traders was an SME. Members of the Committee will recall that the Parliament voted by a large majority in favour of an amended version of the proposed CESL.¹² However, the proposal was withdrawn because opposition, or at least a lack of enthusiasm, in the Council.

So now the Commission has reverted to the full harmonisation approach, but this time the measures are more "targeted", in other words narrower and directed only at those topics over which the Commission believes traders find the most difficulty or where accessible and effective consumer protection measures are lacking.

Full harmonisation proposals thus raise again the issue of the degree of "intrusion" on the laws of Member States, and more concretely the extent to which consumers habitually resident in any particular Member State will gain or will lose protection as the result of either Directive. I have been asked to comment on this from the perspective of the United Kingdom and the common law in particular.

¹² European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 - C7-0329/2011 - 2011/0284(COD)).

3. FORM OF THE LEGISLATION

Full harmonisation can be brought about either by full harmonisation directives that must be implemented into Member States' law or by regulations that are directly effective. The Commission argues that a regulation would require more extensive legislation and that it will be easier for Member States to adapt their laws to comply with a Directive than to accommodate new Regulations.¹³

An advantage of a regulation is that the wording will be universal and any interpretations on the text given by the Court of Justice will be directly applicable, whereas a directive will be implemented in different ways in the various Member States. That means it may sometimes not be clear how or to what extent the Court's application of the directive to one Member States' law should apply to a different form of implementation in another Member State. Moreover, a regulation avoids difficulties for national legislators in knowing how far they can depart from the wording of a directive. With minimum harmonisation this is not such a problem as any doubts can be resolved by erring in favour of the consumer; but with a full harmonisation directive this is not possible, though no doubt in practice the Commission will allow a certain "margin or error" before it will see fit to raise the issue of non-compliance.

On the other hand, a regulation will necessarily be separate from the rest of the Member States' consumer legislation, which may make it harder for traders and consumers to find it and to see how it is to fit with the rest, whereas a directive allows Member States to integrate the new law into its system of consumer rights. It may also be correct that, in order to "fit" with the differing schemes in the various Member States, a regulation would require more detailed provisions.

Given the rather limited ambition of the current proposals, it is hard to argue that the Commission's decision to opt for directives is wrong.

¹³ Explanatory Memoranda DCD p 6, DOS p 8.

4. SCOPE OF APPLICATION

Personal scope

Supply and sales by traders to consumers ("B2C") only. The proposed directives are limited to B2C contracts under which the trader is the supplier or seller. The CESL would have applied to both B2C contracts and contracts between traders ("B2B") where at least one party was an SME. The reasons given by the Commission for making proposals only on B2C contracts for digital content are understandable. In relation to digital content, "... the vast majority of respondents support an approach including contracts between businesses and consumers only."¹⁴ With online sales, "[t]he large majority of legal professions' associations would favour harmonised EU rules and the same regime for B2C and B2B contracts"¹⁵ but consumer organisations did not support the inclusion of B2B contracts. One wonders if this was on the assumption that the rules would be identical for B2C and B2B contracts, which would not have to be the case. In any event, it is my view that the current proposals miss an opportunity to create wider instruments on both digital content and online sales that would make an important contribution to the Internal Market. I return to this at the end of my Report.

"Territorial" scope

Domestic as well as cross-border contracts. The proposed Directives will harmonise the laws of the Member State for domestic transactions as well as for cross-border transactions. The CESL would have been confined to cross-border contracts.¹⁶

Types of contract covered

Services as well as sales of digital content. The OSD applies only to contracts of sale of goods. The DCD applies to sales of digital content that is downloaded, as the CESL would have done. Unlike the CESL, the DCD applies also to what I will call "digital services" services - i.e., to transactions under which a trader agrees to provide the consumer with access to data, or to provide other online facilities, over a period of time. DCD Article 2(1) provides

'digital content' means

data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,

(a) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and

(b) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.

¹⁴ Explanatory Memorandum DCD p 7.

¹⁵ Explanatory Memorandum OSD p 9.

¹⁶ CESL Reg Art 4. Member States would have had an option to permit the CESL to be used also for non-cross-border contracts, Reg Art 13(a).

Distance sales of goods only. The OSD applies only to online and other distance sales of goods (Article 1(1)). OSD Article 2(e) provides that

'distance sales contract' means any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded.

While the principal target of the Directive seems to be online sales, it is sensible to include situations in which the contract is partly negotiated by some other form of distance communication, such as where the consumer has made an enquiry by telephone, an exchange of emails or even by post, or the trader has replied using one of those media; and also to other sales where the contract is actually concluded over the phone, by email or by post. There is no reason to treat such cases differently and there is a strong reason not to do so. If the regime for online sales were different from that for other forms of distance sales, it is unlikely that either the trader or the consumer would realise that by using a different form of distance communication they would be altering the legal regime.

DCD covers on-premises sales. The DCD is not limited to distance sales. In practice many contracts for the supply of digital content will be made on line but there will be many that are concluded when the consumer visits a retail establishment. The trader may provide the consumer with an access code so that the consumer may download or access the digital content from a website, or with a copy of the digital content on a durable medium such as a CD or DVD. In this context, it is important to note DCD Art 3(3):

With the exception of Articles 5 and 11, this Directive shall apply to any durable medium incorporating digital content where the durable medium has been used exclusively as carrier of digital content.

Conversely, digital content supplied in this way is outside the scope of the OSD (OSD Article 1(3)).¹⁷

Digital content supplied in exchange for personal data. The DCD applies not only to digital content that is supplied to the consumer in exchange for a price but also when the digital content is exchanged for personal data. Article 3(1) provides:

This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.

It seems very sensible to include digital content that is "paid for" by the consumer by giving personal data. (In passing, I note that the UK Consumer Rights Act 2015 currently applies only to digital content for which the consumer directly or indirectly pays a monetary price, but the Secretary of State may extend the provisions to other contracts for a trader to supply digital content to a consumer, if the Secretary of State is satisfied that it is

¹⁷ DCD Arts 5 & 11 deal with delays in the supply of digital content and the consumer's remedy in the case of delay. These articles do not apply to digital content supplied on a durable medium because digital content on durable medium counts as goods for the purposes of the CRD, which deals with delay in supplying goods (CRD art 18).

appropriate to do so because of significant detriment caused to consumers under contracts of the kind to which the order relates.¹⁸⁾

It is not clear to me what "actively provides" is intended to cover. Recital 14 states

...this Directive should apply only to contracts where the supplier requests and the consumer actively provides data, such as name and e-mail address or photos, directly or indirectly to the supplier for example through individual registration or on the basis of a contract which allows access to consumers' photos. This Directive should not apply to situations where the supplier collects data necessary for the digital content to function in conformity with the contract, for example geographical location where necessary for a mobile application to function properly...

I assume that "active provision" by the consumer would include agreeing to the trader using cookies that will collect data about the consumer's preferences without further active input by the consumer; but that if the trader supplies ostensibly "free" digital content and then collects information without asking for the consumer's email address or consent, the transaction would not fall within the Directive. This might create a perverse incentive not to ask for the consumer's consent; and so careful thought needs to be given to this provision.

"Producer" liability. The OSD, like the CSD, does not require Member States to give the consumer direct rights against anyone other than the trader from whom the consumer buys the goods: it does not give the consumer direct rights against the producer of the goods or other in the chain of distribution.¹⁹⁾

I understand that the DCD is intended to be limited in the same way. When a consumer buys digital content, they are normally acquiring a licence to use intellectual property rights that belong to the supplier or a third party: the consumer acquires an "end-user licence". The licensor may be the trader with whom the consumer contracts, but equally the licensor may be a third party, with the trader in effect either granting the consumer the end-user licence on behalf of the third party or undertaking to ensure that the consumer will be granted an end-user licence by the third party. A similar analysis may apply when the consumer makes a contract for the supply of "digital services". I understand that there is no intention that the DCD should regulate the obligations of the third party that grants the end-user licence. However, I am not sure that, as the Directive is currently drafted, the end-user licence may not count as a contract for the supply of digital content, at least where the consumer has to supply the third party granting the licence with personal data, which may be as little as the consumer's email address. There is an exemption under Art 3(4) for

... personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose..."

¹⁸⁾ UK Consumer Rights Act 2015, s 33.

¹⁹⁾ Like Art 4 of the CSD, DCD Art 17 and OSD Art 16 require that if the trader becomes liable to the consumer because of a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions, the seller shall be entitled to pursue remedies against that person. Thus the trader must have a right to sue "up the chain of distribution". However, the relevant actions and conditions of exercise are left to be determined by national law, which is widely considered to render this provision toothless - national law may well allow the other parties in the chain to limit their liability in such a way as to leave the trader with only very limited rights, such as to have a refund of the price of the goods.

This might prevent the DCD from applying to an end-use licensor who asks for the consumer's email address merely because the licensor has undertaken to provide updates. But to say the least, to avoid coming under the obligations contained in the Directive, third party end-use licensors will have to be very careful not to ask the consumer for other information that is not strictly necessary for performance of the end-user licence or required by law.

5. ISSUES COVERED

As can be seen from the table below, the proposed directives deal only with certain issues that may arise under a contract for the supply of digital content or for the sale of goods:

	Digital Content	Online Sales	
Conformity	Y	Y	
Remedies for non-conformity	Y	Y	
Remedies for non-supply	Y	N	
Modification of long-term contracts	Y	N	
Commercial guarantees	N	Y	
Public enforcement	Y	Y	

Committee members who are familiar with the provisions of the CSD will see that in broad terms the OSD tracks the earlier measure. There are certainly some improvements over the CSD, and the provision on public enforcement is new. The DCD is broadly similar in coverage, though with some additions and some omissions.

6. IMPACT ON THE LAWS OF THE MEMBER STATES

In this section I take the proposed Directives in turn, considering for each first increases in and clarification of consumer protection and, secondly, possible reductions of the protection, illustrating my points by reference to consumers' rights in the UK.

As most readers will be familiar with at least the outlines of the CSD, and as it serves as a model for the completely new provisions of the DCD, I will deal with the OSD first.

The OSD: increases in consumer protection and clarifications

The proposed OSD increases (or at least clarifies) the levels of consumer protection principally in seven respects.

"Subjective" or "express" requirements of the contract. The CSD provides that the goods must meet certain stated criteria, such as complying with the description given by the trader and being fit for the purposes for which goods of the same type are normally used, if the goods are to conform to the contract; and that if they do not, the consumer must have the remedies set out in the Directive. It is not clear, however, whether the consumer must have the same remedies if the goods do not conform to other requirements that are expressly stated in the contract (if there is a written contract) or were stated by either party. Art 4 of the OSD provides specifically that in order to conform to the contract, the goods must also meet any express requirements as to quantity, quality and description required by the contract, and possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.²⁰ Presumably performance stated in the contract would be covered even though not in a pre-contractual statement.]

Non-conformity of which the consumer was aware. Under the CSD, the consumer cannot complain of non-conformity in respect of a matter of which the consumer was aware, or could not reasonably have been unaware, at the time the contract was concluded. Under the OSD the goods must meet both the "subjective" and "objective" conformity requirements at the time of the conclusion of the contract unless the consumer knew of the specific condition of the goods and the consumer expressly accepted this specific condition when concluding the contract.²¹

Termination even for minor breach. Under the OSD a consumer who has received non-conforming goods is expected first to seek either repair or replacement of the goods by the trader; and the consumer may resort to price reduction or termination of the contract only if neither repair nor replacement is possible, or if the trader is unwilling or unable to carry out the repair or replacement within a reasonable time and without unreasonable inconvenience to the consumer. This "hierarchy of remedies" follows the CSD, but one change in the OSD is that under the CSD the consumer has no right to terminate if the lack of conformity is minor: Article 3(6). "Minor" is open to a variety of interpretations. One is that it refers to non-conformities that are "substantial" though not "fundamental". In

²⁰ This refers to CRD art 6(5), which provides that information provided by the trader in compliance with the requirements of CRD art 6(1) "shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise."

²¹ This formulation is taken from the taken from CESL, Annex art 99(3).

Germany, in contrast, the implementing provision prevents termination only if the defect is trivial (*unerheblich*).²² The UK legislation does not impose any restriction at all on the consumer's right to terminate. Under the OSD the "minor" non-conformity limitation has been removed, which will probably give consumers in some Member States a broader right to terminate.

Termination by notice. In fact the English-language version of the CSD did not refer to the consumer having a right to "terminate" but to "rescind". A second change in the OSD is to refer to termination, and to provide that the right to terminate is to be exercised by notice given by any means. This is already the case in many Member States, including the UK, but not in all. In some Member States termination (or its functional equivalents) must be ordered by a court. Even if judicial proceedings in the Member State are relatively cheap and quick, having to go to court renders the remedy of termination of little use to consumers, so this change will be valuable to consumers.

Lengthened period for presumption of non-conformity. CSD Article 5(3) provides that any non-conformity that appears within the first six months is presumed to have been present when the goods were delivered, unless this is incompatible with the nature of the goods or of the lack of conformity. It will then be up to the trader to prove that the goods were in conformity when the risk passed to the consumer (normally, on delivery). Some Member States have extended this period significantly. OSD Article 8(3) extends it to two years. How significant this extension will be in practice is hard to guess. It is likely to apply principally when durable goods are bought new, as in other cases (used durable goods or non-durable goods) the trader will often be able to show that the presumption is not compatible with the nature of the goods or of the lack of conformity; and with sales of new durable goods the goods will often be covered by a commercial guarantee of a similar or longer period.

No notification period. Art 5(2) allows Member States to require the consumer to notify the trader of any non-conformity within two months of the date on which the consumer detected the non-conformity. The consumer will have no remedy in respect of defects not so notified. Some Member States have adopted this; others, like the UK, place time limits on certain remedies (such as the right to terminate: see below) but allow other remedies for non-conformity to be exercised (in particular, claims for damages) at any time within the prescription period. The OSD does not permit a time limit of the kind set out in the CSD. In principle this should benefit the consumer, though in practice it must often be hard for the trader to prove that the consumer had known of the defect for over two months before the consumer notified the trader.

"Public" (collective) enforcement. Probably the most significant change of all is that the OSD (and the DCD, see below) requires Member States to permit public and other bodies to act to ensure that traders comply with their obligations under the Directive. Thus Art 17 of the OSD provides that:

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative

²² §§ 281 I and 323 V BGB.

bodies to ensure that the national provisions transposing this Directive are applied:

public bodies or their representatives;

consumer organisations having a legitimate interest in protecting consumers;

professional organisations having a legitimate interest in acting.

These provisions are extremely significant. There is no doubt that in the United Kingdom, the parallel provision in the UTCCD,²³ which was implemented by giving enforcement powers to the Office of Fair Trading (in 2014 replaced by the Competition and Markets Authority²⁴) and other bodies,²⁵ have had a far greater impact on the terms that are offered to consumers than any litigation by individual consumers could possibly have had. However, the provisions in the DCD and OSD seem to have been added at the last moment - there was nothing like this in the CESL, nor was it covered in slides that were used in presentations of the Commission's plans for the OSD or DCD to stakeholders - and further thought may be needed on how it will operate.

Under the UTCCD the relevant body will normally be acting to prevent a practice - the continued use by traders, or the recommendation by trade associations, of terms that are part of a pre-formulated standard contract²⁶; and if the trader or trade association fails to change its practice, the appropriate body will presumably obtain an injunction to make them change their ways. It is possible that a trader will make a regular practice of failing to comply with its obligations under the DCD or the OSD; in that case an injunction will again be appropriate. However, the Article 17 of the OSD seems to apply equally to "one-off" breaches by traders that are not likely to be repeated. I suspect that the only way in which the responsible body could be given an effective power to ensure compliance would be by giving it the right to impose a fine or other monetary penalty on the trader. This might seem rather heavy-handed, particularly if the trader was not at fault (and many of the obligations are obligations of result, see further below). Presumably bodies empowered to act will seldom do so in the case of individual failings, but that cannot be ruled out. Indeed, just such an outcome has been reached in relation to the Unfair Commercial Practices Directive.²⁷ In case *C388/13 UPC Magyarország* the Court of Justice held that a single incorrect statement by a trader to a consumer amounted to an unfair commercial practice, and the penalty imposed on the trader was therefore upheld. Whether this should be extended to single failure to deliver conforming goods or to remedy non-conformity, is a question the Committee may like to consider.

The OSD: reductions in consumer protection

As explained earlier, although the OSD broadly follows the CSD with the improvements and clarifications just noted, it may result in a reduction in consumer protection in some Member States. This is because the CSD is a minimum harmonisation directive and many Member States have chosen to give or retain higher levels of consumer protection. Thus in the UK the Consumer Rights Act 2015 and other relevant legislation gives consumers

²³ UTCCD art 7.

²⁴ UK SI 2014/549.

²⁵ See now Consumer Rights Act 2015, Sch 3 para 8.

²⁶ See UTCCD Art 3.

²⁷ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

significantly better rights than they would have were the OSD to be adopted. The principal ways in which consumers in the UK would lose protection seem to be as follows.

No immediate right to terminate the contract when non-conforming goods are delivered. Under the Consumer Rights Act 2015, if the goods delivered are not in conformity with the contract, the consumer has an immediate "short term right to reject" the goods and terminate the contract without first having to seek repair or replacement and with no deduction for use or decrease in value of the goods.²⁸ This right existed under earlier legislation, but the limits on its exercise, in particular the length of time after delivery in which the consumer could reject, was very unclear. Empirical research by the Law Commissions showed that consumers valued this right, which is simple and easy to understand and inspires consumer confidence, making them more prepared to try unknown brands or new retailers as well as providing consumers with an effective remedy when they have lost confidence in a product or retailer.²⁹ It was therefore retained in the 2015 Act, but clarified: the consumer now has a fixed period - in most cases, 30 days from receiving the goods - in which to exercise the right, which will be lost only if the consumer asks for repair or replacement.³⁰ (If the trader fails to repair or replace the goods, the consumer will then have the right to reduce the price or to exercise what is termed "the final right to reject" and terminate the contract. In this case the consumer will not necessarily recover the whole price.)

Thus if the OSD were to be adopted, UK consumers would lose a right that they value highly, at least when they were shopping online or at a distance. There is no reason to think that the immediate right to terminate is of less value in distance sales than in other sales.

Trader's "one go only". Section 24(5) of the Consumer Rights Act 2015, following a further recommendation of the Law Commissions,³¹ provides that a consumer who has asked for or agreed to accept repair or replacement may opt to terminate the contract if the goods still do not conform to the contract after one attempt by the trader to repair or replace them. This is a useful clarification of the consumer's rights but it may go beyond what is required by the OSD. Thus so it is unclear whether it could survive full harmonisation. This is an illustration of the "margin of error" issue mentioned earlier.

Two-year period. Under Article 14 of the OSD the consumer is only entitled to a remedy for a lack of conformity which becomes apparent with two years. In the light of Recital 32, which refers to "the period during which the seller is held liable...", it seems that this would prevent Ms from allowing consumers even a right to claim damages for non-conformities that arise after this period. In the UK there is no time limit on claims for damages other than the limitation (prescription) period, which will normally be six years from the date the goods were delivered.³² To my mind OSD Article 14 would be a very serious restriction of consumer protection, as many goods will be used for much longer than two years and defects in design (such as the safety of a car in an accident or the side-effects of drugs or "natural" remedies) may well not become apparent within two years. It is true that in some cases the consumer may still have a remedy against the producer or importer of the goods

²⁸ Consumer Rights Act 2015, ss 19 and 20.

²⁹ See *Consumer Remedies for Faulty Goods*, Consultation Paper (Law Com CP 188; Scot Law Com DP 139), esp paras 4.1-4.13; Report (Law Com No 317, Scot Law Com no 216, 2009), paras 3.1 – 3.35 and 6.9 – 6.12.

³⁰ See Consumer Rights Act 2015, ss 19, 20 and 22.

³¹ Law Com No 317, Scot Law Com no 216, 2009 above), para 6.21.

³² Limitation Act 1980, s 5.

under the Product Liability Directive,³³ but this will not apply to property damage of less than €500 nor to damage to the goods themselves. In any event, I do not see why the consumer should be deprived of a right to sue the retailer with whom the consumer dealt, who will normally be more readily accessible than the producer or importer.

The DCD: increases in consumer protection and clarification

As explained earlier, in most Member States there is no specific consumer legislation on the supply of digital content. The supply of "digital services" may be subject to general legislation on services, and no doubt the courts of each Member State would find that a contract for the supply of digital content which is not on a tangible medium imposes obligations of some kind on the trader, and would fashion some remedy for non-conformity, perhaps by analogy to their legislation of sale of goods, which in many Member States will apply when digital content is supplied on a tangible medium. Thus for most Member States it seems likely that the DCD will provide an important clarification of the law on the supply of digital content. However, even in those Member States it is important to consider whether the DCD will increase or decrease the level of consumer protection; and this is certainly important for Member States like the UK that have adopted specific legislation.

Insofar as Member States' courts in effect apply their legislation on sale of goods to the supply of digital content, and as far as that legislation follows the requirements of the CSD, the OSD's improvements and clarifications listed in the previous section also apply to the DCD and I will not repeat them.

The provisions of the DCD and the OSD should be parallel as far as this is feasible, to avoid traders and consumers having to deal with unnecessary differences between two sets of rules. Certainly this was the general approach taken in the UK for the supply of digital content: Chapter 3 of the Consumer Rights Act 2015 tracks quite closely the provisions of Chapter 2, which deals with the supply of tangible goods. So in this section I will highlight the principal differences between the provisions of the DCD and of the OSD, and also how the two interrelate, before turning to reductions in consumer protection in the UK that would result from adoption of the DCD.

Conformity: "subjective" requirements. (i.e. those that arise because of what was agreed or said on the particular occasion). Although there are slight differences in the wording and arrangement of DCD Art 6 and OSD arts 4 and 5 (differences which should be eliminated unless there is a demonstrable reason for them), the two are closely parallel save that Art 6 DCD covers features that are specifically relevant to digital content, such as "functionality, interoperability and other performance features such as accessibility, continuity and security", and also updating.

Conformity: "objective" requirements. (i.e. standards required by law) Digital content is also required to meet certain "objective" requirements, for example, being

"fit for the purposes for which digital content of the same description would normally be used, including...".

However, the protection provided by Article 6(2) is substantially weaker than that of OSD Article 5. This is because Art 6(2) applies only

³³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

"[t]o the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1 ...".

In contrast, under the OSD, as under the CSD, both the subjective and the objective criteria must be met: they are cumulative. It is submitted that DCD's additional qualification of the trader's obligations is quite unnecessary and may be dangerous to consumers.

Of course the trader must be free to define what is being supplied and any "objective" standards imposed should not require the trader to deliver digital content that will perform functions, or perform to higher standards, than it was reasonable for the consumer to expect in the light of what the consumer was told. But exactly the same is true with goods; and the problem is dealt with by providing that the goods must

"be fit for all the purposes for which goods of the same description would ordinarily be used."

The words underlined mean that the consumer cannot demand more than the trader indicated that it would supply. This formula (which in any event is repeated in digital content: DCD Article 6(2)) has worked perfectly well for the supply of goods, including digital content that is supplied on a durable medium, and there is no necessity to add the words "[t]o the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content ...".

Moreover, those words are potentially dangerous. The way that digital content or goods are described refers to the general nature of what the trader offered to sell, as this reasonably appeared to the consumer, whereas the words quoted refer to the detailed terms of the contract. It is true that under DCD Article 6(2), the express terms of the contract will be relevant only if they are stated "in a clear and comprehensive manner", but there is no requirement that they be prominent, so they may be just part of the trader's general terms and conditions. We must all know from our own experience that consumers are very unlikely even to look at lengthy terms and conditions, let alone read them with any care, before they conclude the contract. At the very least the consumer should be able to require that the digital content is fit for all the purposes for which digital content of the same description would ordinarily be used, and complies with relevant industry standards, without being expected to read the small print of the contract to see if the express terms qualify or restrict the trader's "objective" obligations.

It is also true that the trader is under a duty under the CRD, to give the consumer information as to

"the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services"

and that information given by the trader to comply with this duty will form part of the part of the contract (CRD Article 6(5), referred to in DCD Article 6(1)(a)). This would probably require the trader to point out the fact that the digital content will not, for example, perform some function that digital content of the same general type will perform. But the individual consumer does not have a remedy if the trader does not give the information that is required.

Delay in supply. The DCD establishes a "default rule" that the trader must supply the digital content immediately after the contract is concluded (Article 5(2)) and, if the trader fails to do so, the consumer has an immediate right to terminate the contract (Article 11).³⁴ There is no equivalent in the OSD itself; however, in the cases of sales of goods, the CRD provides a default period of 30 days for delivery and sets out detailed rules as to when the consumer may terminate the contract for delay.

"Digital services". As already pointed out, the DCD covers not only the supply of digital content but also the supply of what I have called "digital services". Therefore the DCD contains a number of additional provisions dealing with this. In outline, these cover:

- failure to supply, both initial and during the agreed period (Article 10(a) and (c))
- conformity and remedies
- the consumer's right to terminate for failure to supply services during the agreed period (Article 11), and what the consumer who terminates must pay for (Article 13)
- Modification of long-term contracts
- Right to terminate long term contracts without any default on the part of the trader

These issues will be considered by the other Reporters. However, one point should be made here. This is that the obligations as to conformity of digital services are the same as those for the supply of digital products. In many Member States, including the UK, the responsibilities of a trader supplying digital services over a period of time will be governed by the general law of services. This difference is important because in most Member States the obligations of a service provider are only to use reasonable care and skill ("*obligations de moyen*") rather than stricter liability as for goods ("*obligations de résultat*"). The result will be that the trader will be liable without fault. This is a significant increase on consumer protection.

The other significant difference from the OSD is that under the DCD there is no time limit on notifying claims, or on the exercise of any of the remedies provided for the consumer, other than the national law's limitation (prescription) period.

Conversely, there is one respect in which the protection given by the DCD is less than that provided by the OSD in the case of goods. There is no provision in the DCD dealing with commercial guarantees. Commercial guarantees of digital products may not be common (though in some cases the terms of the end-user licence might amount to a commercial guarantee by the licensor) but it is not obvious why any guarantees that are given should not be subject to similar rules as for commercial guarantees of goods.

DCD: reductions in consumer protection.

Compared to the protection provided to consumers in the United Kingdom by the Consumer Rights Act 2015, there are some gains. First, UK law does not provide any mechanism for the public enforcement of the trader's obligations or the consumer's remedies. Secondly, because under the 2015 Act the supply of digital services is governed

³⁴ This does not apply to digital content that is supplied on a tangible medium: see DCD Art 3(3).

by the general services chapter (Chapter 4), the supplier is normally only responsible for using reasonable care and skill.³⁵ But in some respects there is, or may be, a reduction in consumer protection.

The first reduction is that under the Act, the "objective" conformity requirements for digital content are on the same pattern as under the OSD and the CSD: in other words, the digital content must be fit for the purposes for which content of that kind is usually supplied,³⁶ without any qualification such as "[t]o the extent that the contract does not stipulate..."

The second and potentially very serious reduction depends on the correct interpretation of DCD Article 14, which provides:

Right to damages

1. The supplier shall be liable to the consumer for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.
2. The Member States shall lay down detailed rules for the exercise of the right to damages.

('digital environment' means hardware, digital content and any network connection to the extent that they are within the control of the user: Article 2(8).)

Article 14 may be intended to require full harmonisation of only the consumer's right to compensation for damage to the consumer's digital environment, leaving damages for other losses to national law. But it seems to be the intention that Member States may not give the consumer any right to damages for other losses caused by either non-conformity or the trader's failure to supply digital content; it is only the detailed conditions of the exercise of the right to damages that is left to Member States. This is confirmed by the Recitals and the Explanatory Memorandum.

Recital 44 seems extraordinary: it begins by affirming the importance of the supplier's liability in damages but then suggests that the liability should be limited to damage caused to the consumer's hardware or software.

(44) The principle of the supplier's liability for damages is an essential element of the contracts for supply of digital content. In order to increase consumers' trust in digital content this principle should thus be regulated at Union level to ensure that consumers do not suffer a detriment if their hardware or software is damaged by digital content which is not in conformity with the contract. Therefore, consumers should be entitled to a compensation for damages caused to the consumer's digital environment by a lack of conformity with the contract or a failure to supply the digital content. However, it should be for Member States to lay down the detailed conditions for the exercise of the right to damages ...

³⁵ Consumer Rights Act 2015, s 49.

³⁶ Consumer Rights Act 2015, s 34(2).

The Explanatory Memorandum confirms unambiguously that Member States may not permit compensation for other kinds of loss caused by non-conformity or failure to supply. It states (on p 13):

Article 14 establishes a right to damages restricted to cases where damage has been done to the digital content and hardware of the consumer. However, it provides that Member States should lay down the detailed conditions for the exercise of the right to damages.

I find this removal of the consumer's right to compensation - a right that must already exist in one form or another in almost every Member State, if only as a matter of general contract law - seriously worrying. There may be cases in which the consumer suffers serious loss quite apart from any damage to hardware or digital content. I could understand a provision to restrict claims by consumers for loss of enjoyment, as was the case under the CESL Reg Article 2(c)'s definition of "loss" - though I would not support such a restriction. However, I think it is quite wrong to exclude liability for all other losses. Faulty software or a failure to provide digital services may force the consumer to incur other expenditure in order to fulfil urgent needs; and if the digital content is designed to enable the consumer to control his or her physical environment, it may even cause injury or damage to the consumer's other property. (In the last case, the producer of the software might be liable under the Product Liability Directive, but the application of that Directive to software is widely regarded as at least problematic.³⁷) Faulty goods may cause the same types of loss but it is not suggested that the trader's liability for damage caused by faulty goods should be limited - and with good reason. There is no need to protect suppliers of digital content in this blanket way. If they consider that it is essential to limit their liability, then they should have to do so in the same way as sellers of goods - that is, by including terms limiting their liability in their contract with the consumer. These terms will be enforceable if, and only if, they meet the test of fairness imposed by the UTCCD - which is only right and proper. There is no need to give the digital content industry blanket immunity for loss other than to the consumer's digital environment.

³⁷ See K Alheit, "The applicability of the EU Product Liability Directive to software", *Comparative and International Law Journal of Southern Africa* Vol. 34, No. 2 (JULY 2001), pp. 188-209, and further references cited there.

7. ARE THE PROPOSALS FIT FOR PURPOSE?

I have already noted that the current proposals, like the CESL, have two goals. One is to give consumers the confidence to make full use of the internal market by ensuring that wherever the trader with whom the consumer contracts with is based, the consumer will enjoy a high level of consumer protection. The other is to make it easier for traders to sell across borders. The Committee may wish to consider the extent to which the new proposals meet the apparent aims of the exercise.

Degree of consumer protection

The impact on Member States law and consumer protection of each proposed Directive is different. The DCD will provide consumers with rights and remedies that are accessible and, for the most part, suitable. Indeed in some respects (e.g. public enforcement; stricter liability for digital services) the DCD provides more protection to the consumer than the recent legislation in the UK. As few Member States yet have specific provisions on digital contents, full harmonisation of this topic will not result in significant reductions in consumer protection save on one respect - the exception being the restriction of the right to damages just discussed.

The OSD will also result in consumer protection beyond the minimum required by the CSD. However, in some Member States the full harmonisation requirement will result in a significant loss in consumer protection - in the UK, notably the loss of the immediate right to reject and the exclusion of any remedy when the non-conformity does not appear and is not notified to the trader within two years.

Coverage of issues

In this respect there is a major difference between current proposals and the CESL. The CESL sought to provide provisions on all the issues that were likely to arise in the making and performance of a contract. Recital 6 stated:

Differences in national contract laws therefore constitute barriers which prevent consumers and traders from reaping the benefits of the internal market. Those contract-law-related barriers would be significantly reduced if contracts could be based on a single uniform set of contract law rules irrespective of where parties are established. Such a uniform set of contract law rules should cover the full life cycle of a contract and thus comprise the areas which are the most important when concluding contracts. It should also include fully harmonised provisions to protect consumers.

The range of issues that will be fully harmonised by the proposed directives is much narrower than would have been covered by the CESL. So the number of differences between the laws of the Member States that may continue to worry traders will be greater under the current proposals than they would have been had the CESL been adopted.

In terms of substance, the two proposals do address the issues that are most likely to arise in the context of cross-border contracts for online sales and the supply of digital content. Moreover, I certainly do not suggest that the instruments should cover as many topics as the CESL, which in effect would have provided an almost complete "law of contract",

because for the transactions with which the directives are dealing with, some of the issues that were covered in the CESL seem unlikely to arise. One is threats; I simply cannot imagine traders exercising duress over consumers via the Internet. Another is mistake. There is almost no scope for mistakes as the nature of what is being bought to arise when the buyer is a consumer because the consumer has to be given so much information by the trader. I also wonder whether we need provisions on unfair exploitation – the internet is one place where price comparison is relatively easy. But before deciding, we would need to find out whether problems of exploitation have occurred in practice.

However, there are some areas of law in which possible differences between the traders' law and the mandatory rules of the consumer's state of habitual residence might still worry traders. Thus the laws on damages and on limitation vary substantially between one Member State and another; some laws allow the price for the goods or digital content to be challenged; and even the law on when a contract is formed and the effect of a mistake over the price or other terms, whether by the consumer or the trader, is not the same everywhere.

Even more importantly, the hindrance to cross-border contracts caused by differences between the laws of contract is probably as much psychological as it is real. It seems likely that traders, and in particular SMEs who cannot afford to take legal advice, are put off by "the fear of the unknown" as much as by actual differences between the various laws. The wider the coverage of the instrument, the greater the re-assurance to the trader that it will not meet some unexpected legal rule, and so the greater the encouragement to try selling to consumers in other Member States. One of the virtues of the CESL was the number of issues it resolved.

The Committee may like to consider which is more likely to solve the problems faced by traders interested in selling cross-border: the current approach of "targeted full harmonisation" or the "optional instrument" approach of the CESL, which dealt with so many more issues. It is arguable that an optional instrument, coupled with a minimum harmonisation directive on the supply of digital content in order to ensure that consumers purchasing digital content are protected by rules that are accessible and appropriate, would be a better way forward.

8. AN OMISSION: CONSUMERS' RIGHTS TO MAKE MORE THAN ONE DOWNLOAD, TO RE-SELL DIGITAL CONTENTS AND TO RECEIVE ESSENTIAL UPDATES

end-user licence from the holder of the relevant intellectual property rights, who may be the supplier or a third party. With goods, there is seldom a problem, as the rights (such as copyright in a book) are granted to whoever owns the book from time to time. But with digital content a host of new questions arise. For example, will the consumer have the right to download a copy of the digital content onto a second device? If and when the consumer no longer wants the digital content or the machine on which the consumer has installed it, does the consumer have the right to transfer the digital content to someone else, either on its own or when transferring the machine? If after some time a flaw emerges in the digital content, such as when a potential security problem emerges (which will not necessarily mean that the digital content did not conform at the time it was provided - the security threat may be a new one), and the end-use licensor produces a "fix", does the consumer have the right to be supplied with the up-dating material? It is essential to the consumer to know what those rights will be.

The DCD does not address these issues. Some of these matters may fall within the pre-contract information that the trader must give the consumer in order to comply with the CRD: the trader must provide information on "the main characteristics of the goods or services", "the functionality, including applicable technical protection measures" and "any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of".³⁸ Any information given in compliance with this duty will form part of the contract.³⁹ But it is not clear that this list covers all the issues mentioned and, in any event, the individual consumer has no remedy if the trader fails to give the information.

I believe that the DCD should address these issues. I would suggest that, at a minimum, contracts to supply digital content should put the supplier under an obligation to ensure that:

the buyer is provided with future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, automatically and free of any extra charge;

the buyer will have a right to re-sell the copy of the digital content; and

the buyer will be supplied with a new copy of the digital content where, for whatever reason, the copy or copies originally supplied can no longer be used by the buyer.⁴⁰

unless the contract or pre-contract advertising makes it clear, in prominent and intelligible language, that the consumer is not to obtain one or more of these entitlements.

³⁸ CRD arts 5 and 6.

³⁹ CRD art 6(5) and DCD art 6(1)(a).

⁴⁰ This formulation is borrowed from Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final: 1st Supplement: Response to the EP Legislative Resolution of 26 February 2014, p 24.

9. BUSINESS-TO-BUSINESS AND BUSINESS-TO-CONSUMER CONTRACTS

The DCD and the OSD are limited to B2C contracts. This is understandable, as at least some of the opposition to the proposed CESL seems to have been generated by the proposed inclusion of business to business contracts. Moreover, those consulted reported fewer problems with transactions between traders. It can also be said that the differences between the laws of contract in the various Member States are less problematic for B2B transactions because there are fewer mandatory rules. However, the number of mandatory rules and the controls over B2B contracts varies enormously between Member States. The CESL proposal contained substantial protection for SMEs (in particular, controls over unfair terms that were not individually negotiated), which of course made it appear more threatening to national laws that have few controls (even though their domestic law would have remain untouched).

However, I believe that to leave B2B contracts entirely to one side would be to miss a real opportunity to provide a simple system by which traders may make simple online purchases without having to worry about withdrawal rights, inadequate information or unfair terms. This would make it significantly easier for traders, particularly SMEs, to do business with each other across borders, and thus would contribute to the development of the Internal Market.

A preliminary point is that in practice it will be very hard for a trader who is running a website to know whether the customer is a consumer or an SME, particularly if the SME is not a corporation. Many businesses are run from home rather than from an obviously business address, and there is no guarantee that the means of payment (such as a debit or credit card) will enable the trader to detect that the customer is a business. In practice, I suspect, most traders who operate a website that is open to consumers do not differentiate between consumers and business buyers except that the terms and conditions offered may be different.

I am not suggesting that even in a set of rules designed for SMEs, we should assume that business buyers should be given exactly the same protection as consumers. For example, I think that a trader selling to another trader should be entitled limit its liability for losses caused by nonconformity of the goods or delay in delivery, provided that this is done in a transparent manner. However, I believe that some of the differences between business to consumer and business to business sales - even in the CESL - were inappropriate.

Some rules about website trading in the CESL applied to any trader using a website (the rules derived from the E-Commerce Directive). However the rules derived from the Consumer Rights Directive naturally were applied exclusively to business to consumer contracts. With hindsight I believe that this was unjustified. In particular I now think that a business buyer, buying over the Internet, should have a right to withdraw from the contract (at least as a default rule) and should be provided with the same pre-contractual information as a consumer.

Withdrawal rights

The rationale for allowing a consumer to withdraw from a distance contract, or to withdraw an offer to buy, is that the consumer will not have had the chance to examine the goods

before buying them. This will often also be the case with a business buyer. In addition, if I am correct that traders find it very difficult to distinguish between consumers and business buyers, then in practice many web traders must allow the buyer to cancel the order whether or not the buyer is a consumer. However, I do not think that a business buyer over the Internet should have to check the trader's terms to see whether the trader extends this right to business buyers, nor rely on the trader's goodwill. I think that it would actively encourage business to business sales over the Internet if there were normally a right of cancellation.

It is true that a right of cancellation is not needed on every occasion, because the buyer may be buying goods which they have bought before. This is particularly likely when the buyer is a business as they are more likely to have bought the same goods on a previous occasion. Nonetheless, I would give trader buyers a right of cancellation, at least as the default rule. First, if buyers do not need the right to cancel, they will seldom exercise it and therefore it will cost the trader very little. Secondly, it would be possible to allow the business buyer to waive their right of cancellation, perhaps in exchange for a small discount in order to encourage them to do so. The magic of the Internet can easily be used to ensure that a business buyer can waive the right to cancel by having to click on a separate pop-up acknowledgement, perhaps at the time that they choose the delivery method. The pop-up box might also require the buyer to "self certify" that they are a trader, with a warning that trying to obtain a discount when you are not a trader amounts to fraud.

Pre-contract information

Similarly, it seems sensible to require a trader who offers to sell to both consumers and business buyers over the Internet to provide the same information for both types of buyer. Whatever is required, the Seller is likely to emphasise the positive aspects of the product as a way of encouraging sales. It is the negative aspects - for example, whether digital content is compatible with the buyers hardware or other software - which is less likely to be revealed and which therefore should have to be disclosed. It is of course true that a business buyer is likely to be better informed and more sophisticated than a consumer and therefore might ask more questions. However it seems to me that it would encourage business to business Internet sales if business buyers could have the same confidence that they have been given the information they need, and that the information is correct, as would be the case with a consumer buyer. Moreover, in practice the trader will be providing the required information anyway for consumer buyers - so there would be no extra cost in providing it for business buyers also.

B2B contracts for digital content

A large business buying digital content- such as a university negotiating a site licence to use a software program - can perhaps be expected to ensure that the terms of the contract set out clearly the supplier's obligations as to conformity and possible even the remedies that the buyer will have for non-conformity. But many business buyers of digital content will be SMEs, who do not have the sophistication to do this. Moreover, if a business is buying a small quantity of software, it is no one's interests to spend time and effort negotiating over such matters. Businesses in all Member States (including the UK) need a clear and up-to-date set of rules to govern the supply of digital content. This might be left to each Member State but given the importance of cross-border contracts for the supply of digital content, it would make much more sense to have European legislation

that applied to B2B contracts as well as consumers. This could be a directive, but an optional instrument would fulfil much the same aims while not limiting the parties' choice.

An optional instrument for B2B distance sales and supply of digital content

I am thus very glad to read that:

Contract law related problems in B2B relations, especially in relation to specific needs of SMEs, has been recognised in the Digital Single Market Strategy and will be analysed in the context of other actions announced in the Strategy.⁴¹

I very much hope that this will result in a proposal for legislation to govern the supply of digital content by one trader to another. However, I suggest that the Commission should go further.

I do not think that we should be trying to harmonise the laws of the Member States ("harmonise" in the old sense of requiring all States to adopt the same rule for both domestic and cross-border contracts) for business to business contracts, even for online sales or the supply of digital content. What is needed for B2B transactions would be an optional instrument. Optional instruments are unfortunately currently out of favour. I would invite the Committee to consider wheth

⁴¹ DCD Explanatory Memorandum p 11.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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