

# The future of European contract law in the light of the European Commission's proposals for Directives on digital content and online sales

Hugh Beale

Professor at the School of Law  
University of Warwick

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## Abstract

The European Commission's proposed Directives, one on the supply of digital content to consumers and the other on online sales of goods to consumers, have two aims: to give fuller protection to consumers who buy digital content (in many Member States, consumers' rights are far from clear) or buy goods online, and to encourage more traders to supply consumers in other Member States. The Commission continues to be concerned that because when a trader deals with a consumer in the consumer's country of habitual residence or directs its activities towards that country, the consumer is protected by that country's law, traders will be deterred by differences between the laws of the Member States. The Commission's initial idea was to replace the current minimum harmonisation directives by a broad full harmonisation directive. When that ran into opposition from Member States, the Commission tried the "optional Instrument" approach, the proposed Common European Sales Law. After the CESL also failed, the Commission is now seeking full harmonisation on a limited range of issues. The two proposals contain useful new provisions but have some serious shortcomings. Both the European Parliament Committees and the Council Working Group seem to welcome the proposal on digital content, provided that some of the shortcomings are dealt with. The proposal on online sales is more controversial and has not yet been considered in detail by the Council. The paper concludes by querying whether limited full harmonisation of only B2C contracts is the best way to deal with problems caused by differences between the laws.

**Keywords**

digital content, online sale of goods, consumers, full harmonisation, B2C contracts, minimum harmonisation, CESL

**Topic**

European contract law

## *El futuro del derecho contractual europeo a la luz de las propuestas de directivas de la Comisión Europea sobre contenidos digitales y compraventa en línea*

**Resumen**

Las directivas propuestas por la Comisión Europea, una sobre suministro de contenidos digitales a los consumidores y la otra sobre la compraventa de artículos en línea a los consumidores, plantean dos objetivos: ofrecer una protección más completa a los consumidores que adquieren contenidos digitales (en muchos de los Estados miembros, los derechos de los consumidores distan mucho de quedar claros) o que adquieren artículos en línea, y fomentar que más empresas suministren productos a los consumidores de otros Estados miembros. A la Comisión sigue preocupándole que, debido a que si una empresa trata con un consumidor en el país de residencia habitual de ese consumidor o dirige sus actividades hacia ese país, el consumidor está protegido por las leyes de su país, a las empresas las disuade el hecho de encontrar diferencias entre las legislaciones de los distintos Estados miembro. La idea inicial de la Comisión era sustituir las actuales directivas de armonización mínima por una directiva amplia de armonización total. Al encontrarse con la oposición de los Estados miembros, la Comisión optó por el método del "instrumento opcional", la propuesta de normativa común de compraventa europea. Tras el fracaso también de esta medida, la Comisión pretende ahora conseguir la plena armonización en una serie limitada de cuestiones. Las dos propuestas incluyen nuevas y útiles disposiciones, pero adolecen de algunas carencias graves. Según parece, tanto los Comités del Parlamento Europeo como el Grupo de Trabajo del Consejo acogen favorablemente la propuesta sobre contenidos digitales siempre que se corrijan algunas de esas carencias. La propuesta de la compraventa en línea resulta más controvertida y todavía no ha sido valorada en profundidad por el Consejo. El documento termina preguntándose si una armonización completa pero limitada que solo incluya los contratos de empresa a consumidor es la mejor forma de abordar los problemas que provocan las diferencias en las legislaciones.

**Palabras clave**

contenidos digitales, compraventa de productos en línea, consumidores, armonización completa, contratos empresa-consumidor, armonización mínima, normativa común de compraventa europea

**Tema**

derecho contractual europeo

## Introduction

In recent years there has been an enormous growth in online sales but, according to figures used by the European Commission, the growth in online sales between a trader in one state and a consumer in another - "cross-border" sales - has been much lower.<sup>1</sup> Something needs to be done to encourage traders and consumers to shop online across borders.

In addition, even within domestic markets the law on the supply of digital content needs clarification. Few Member States have specific legislation on contracts for digital contents, and often the legal position is quite unclear - are these contracts to be treated as analogous to sales, even though nothing tangible is supplied and the consumer does not acquire ownership of anything? Or are they to be treated like services contracts? Or are they entirely *sui generis*?<sup>2</sup> As a result, in many Member States it is very hard for consumers and traders to know exactly what the law is.

## The European Commission's strategy

The European Commission has been pursuing a policy that has two strands: increasing consumer confidence and encouraging traders to offer to supply goods and digital content across borders. We will see that sometimes there is a tension between the two, and that there is some disagreement about the best means of achieving them.

### Increasing consumer confidence

The European Commission began with "active" consumers. It took the view that if consumers knew that wherever or

from whoever in Europe they bought goods, they would have certain guaranteed minimum rights, that would give them confidence to make purchases when they were abroad and also to search out traders in other countries who might sell to them. Thus we had the Directives on doorstep<sup>3</sup> and distance sales;<sup>4</sup> we have the Directive on Unfair Contract Terms<sup>5</sup> and we have the Consumer Sales Directive.<sup>6</sup> These directives have been minimum harmonisation directives: in other words, Member States may give their consumers additional rights.

### Reducing the costs of cross-border sales to traders

The second strand or aim has been to encourage the internal market by reducing the costs that traders face in selling across borders. There is a widespread belief that differences between the laws of contract in the various Member States, while not preventing trade between those states, at least add to the costs of cross-border contracting. In 2001 the European Commission published a communication on contract law<sup>7</sup> which asked for evidence of these costs. I do not find the responses they received<sup>8</sup> to be very convincing as many of the examples did not relate to general contract law, but it is intuitive that differences between the laws do add additional cost to international trade. If they do not, instruments like the 1980 Vienna Convention on the International Sale of Goods and the UNIDROIT *Principles of International Commercial Contracts*<sup>9</sup> would be a waste of time.

At first, the costs to traders do not seem to have worried the European Commission, but from about 2003 there was a change of approach towards reducing the costs for traders (and as we shall see later, covering also business-to-business contracts).

1. "Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically": COM(2015) 634 final, p 2.
2. For a UK study of the problem, see R. Bradgate (2010).
3. Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.
4. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.
5. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
6. Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
7. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final.
8. See Communication from the Commission to the European Parliament and the Council, A more Coherent European Contract Law, An Action Plan [2003] OJ C63/1.
9. UNIDROIT, Rome, 2010. A revised version is expected shortly.

In particular the Commission sought to overcome a problem for consumer contracts posed by Article 6 of the Rome I Regulation.<sup>10</sup> Under Article 6, the parties to a consumer contract, like the parties to any other contract, may choose what law is to govern it. However, if a consumer contracts with a business in the consumer's country of habitual residence, or if the business has directed its activity towards the consumer in the consumer's country of habitual residence, the consumer is entitled to the protection of the mandatory rules of the law of the country of residence. The Court of Justice is quite ready to find that a trader has directed its activities towards consumers in another Member State: for example, in *Mühlleitner C-190/11* (2012) a website in German and giving an international dialling code was held to be directed towards consumers in Austria.<sup>11</sup>

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 at least 28 different jurisdictions. (I say "at least 28" because, as readers in Catalonia will be well aware, some Member States have more than one system of contract or consumer law; for example, Catalonia and also Scotland, which has a separate legal system from that of the rest of the UK).

## Full harmonisation

The way in which the European Commission first proposed to reduce the differences between the laws in the different Member states was by a move from minimum harmonisation to full harmonisation. It proposed to revise eight directives,<sup>12</sup> and while consumer protection would to some extent be improved, the big change was that consumers' rights would be fully harmonised<sup>13</sup> so that, within the fields covered by

the directives, the substance of the law would be the same in each Member State.

This approach met with some success - for example, the early Product Liability Directive,<sup>14</sup> and more recently the Unfair Commercial Practices Directive.<sup>15</sup> This was also the approach taken in the proposal for a Consumer Rights Directive made in 2008.<sup>16</sup> The new directive would have replaced four major directives: those on doorstep selling, on distance selling, on unfair terms and on consumer sales. There would have been some increase in the degree of consumer protection but that would have been slight. The important change was towards full harmonisation. The result would have been that Member States which had given consumers more protection than was required by the Directives (or which had stronger protection before the relevant directive was adopted and had left it in place) would have had to remove the extra protection. Not surprisingly, this approach was a political failure. Member States that gave their consumers more protection than the minimum were very reluctant to see it reduced, particularly as the reduction would apply to all consumer transactions, not just to cross-border transactions. The only way the European Commission could get the legislation through was to narrow down the scope of the directive and its full harmonisation provisions. That is what happened. The Commission opted for a new version of the Consumer Rights Directive<sup>17</sup> that for the most part applies only to distance and off-premises contracts and governs only pre-contractual information and withdrawal rights.<sup>18</sup> In effect the Commission decided to cut its losses on the CRD, because by then it had a new approach.

## The Common European Sales Law

The new approach was a proposal for an instrument that would apply only to cross-border contracts and would be optional. In 2011 the European Commission introduced a

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

11. The case was actually under the Brussels I Regulation, Regulation (EC) 44/2001, which has similar wording. For a critical examination of this and other cases, see C. Bisping (2014).

12. Communication to the European Parliament and the Council. European Contract Law and the Revision of the *acquis*: The Way Forward, COM(2004) 651 final, p. 3. The Directives to be reviewed were 85/577 (Door-step Selling), 90/314 (Package Travel), 93/13 (Unfair Terms), 94/47 (Timeshare), 97/7 (Distance selling), 98/6 (Unit prices); 98/27 (Injunctions) and 99/44 (Consumer sales).

13. *The Way Forward*, p 4. See also para 4.2.2 of the *Action Plan*.

14. Directive 85/93 of 25 July 1985.

15. Directive 2005/29/EC of 11 May 2005.

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

17. Directive 2011/83/EU of 25 October 2011 on consumer rights.

18. Articles 18-20 of Directive 2011/83/EU deal with delivery of goods and passing of the risk.

proposal for a Regulation on a Common European Sales Law for sales of goods and of digital content ("the CESL").<sup>19</sup> The Regulation would have inserted into each Member State's law a separate set of rules which the parties could choose to use for cross-border contracts instead of the "pre-existing" or "domestic" rules. If the parties had chosen the CESL, its rules would have applied to any issues that fell within the scope of the CESL in place of the rules of the "domestic" law. Most importantly, the CESL included rules that, if the CESL were chosen, would be mandatory. So the CESL contained its own set of mandatory rules for consumer contracts and, within the scope of its application, it would have been these that would have applied, not the mandatory rules of the "pre-existing" domestic law. The CESL's mandatory rules provided a high level of consumer protection, and for a consumer contract, Article 8(3) of the Regulation provides that the CESL could only be adopted in its entirety. This meant that the trader would not be able to "cherry-pick" just those rules of the CESL that were more favourable to it than the rules that would otherwise apply.

So the CESL would not have replaced "pre-existing" or "domestic" contract law: that law would remain in force for domestic contracts and also for cross-border contracts for which the parties did not choose to use the CESL. But if the parties chose to use the CESL, its rules would have displaced the domestic rules that would otherwise have applied. Thus for most purposes a trader who could persuade a consumer to buy goods using the CESL to govern the contract needed worry only about one set of rules - the rules of the CESL. The neatness of the solution was that Article 6 of the Rome I Regulation ceased to be a problem. Suppose an English internet seller directed its website towards consumers in Spain, but asked the consumers to agree to use the CESL. A consumer habitually resident in Spain who agreed to buy goods on these terms would still be entitled to the protection of the law of the

mandatory rules of Spanish law but, because he or she has agreed to use the CESL, it is the mandatory rules of the CESL which will apply<sup>20</sup> and these rules would be the same in both Spanish and English law.

A second major shift in emphasis was that the proposed CESL was not aimed only at consumer contracts. It could be used also for contracts between traders at least if one party was an SME. Member States were given the option of allowing traders of any size to use the CESL.<sup>21</sup>

### The fate of the proposed Common European Sales Law

The European Commission's proposal was quite well received in the European Parliament. The Legal Affairs Committee ("JURI") supported the proposal subject to a number of (mainly very helpful) amendments and its report was adopted by the European Parliament by a substantial majority.<sup>22</sup> However, in the European Council the proposal was much less well received. A great deal of time was spent discussing the optional instrument approach; I understand that the Member States' Representatives had doubts over both its necessity and how it would work. At the same time there was great scepticism among consumer organisations, which feared that in order to get the proposal through, at the last moment substantial reductions in consumer protection would be introduced. I have to say that there was also some fear that this proposal for an optional instrument was just "the thin end of the wedge" and that the Commission intended some day to introduce a fully uniform contract law for the whole of Europe, or even a European Civil Code. In any event, in December 2014 the Commission announced that the proposal would be withdrawn and that the Commission would make "a modified proposal in order to fully unleash the potential of ecommerce in the Digital Single Market".<sup>23</sup>

19. Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final.

20. It is true that some commentators questioned whether the consumer's agreement to use the CESL provisions of the applicable law (in the example given, the seller is likely to have stipulated for English law) means that the consumer has also agreed to accept the CESL provisions of the law of the consumer's habitual residence (in the example, Spanish law): see, e.g., The Law Society (2012), p 3). Even if there is any real doubt on this, it seemed simple enough to amend the proposed Regulation to make this effect clear.

21. CESL Reg Art 13(b).

22. 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)) (<<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0159&language=EN&ring=A7-2013-0301>>).

23. European Commission (2015a, p. 12). See also the European Commission (2015b, pp. 4-5) and the questionnaire, *Public consultation on contract rules for online purchases of digital content and tangible goods* (<[http://ec.europa.eu/justice/newsroom/contract/opinion/150609\\_en.htm](http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm)>).

## The DSM proposals

So now we are considering the replacement proposals:

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")<sup>24</sup> and

A Directive on certain aspects concerning contracts for the online and other distance sales of goods ("Online Sales Directive" or "OSD")<sup>25</sup>

These proposals are very different from the CESL. They apply only to consumer contracts and they are "targeted", in the sense that they cover only a very limited range of issues.

## The DCD

The principal issues covered by the DCD are:

The time in which digital content must be supplied and remedies for delay;<sup>26</sup>

Conformity and remedies;<sup>27</sup>

The trader's right to modify digital content that is to be supplied over a period of time, and the consumer's right to terminate the contract if the consumer is unhappy with the modification;<sup>28</sup> and

The consumer's rights after the contract has been terminated in relation to data supplied by the consumer and data that the trader holds for the consumer.<sup>29</sup>

On the other hand, the proposed directive will apply to both domestic and cross-border contracts and it will be a full harmonisation directive.<sup>30</sup> The Commission's explanatory memorandum says that it has learned from the experience of the CESL.<sup>31</sup> Insofar as the Commission is once again seeking

full harmonisation measures, it seems to have forgotten its experience with the Consumer Rights Directive.

In fact it seems that the proposal for a directive on digital content is quite likely to be adopted even though it requires full harmonisation. The lack of opposition seems to be due to two facts. The first is that few Member States have any legislation on contracts for digital contents and therefore, as I said earlier, often the legal position is quite unclear to both consumers and traders. The second fact is that in the two Member States that do have modern legislation (the Netherlands and the United Kingdom, which has new legislation on digital content in its Consumer Rights Act 2015) the proposed DCD would not reduce consumer's right by much, if at all - in the UK, the DCD would give consumers even greater rights than they have under the Consumer Rights Act 2015. So Member States have little to lose by agreeing to full harmonisation of the relevant aspects of the law on digital content.

## Scope of application of the DCD

This will become evident if we look at the provisions of the DCD. The DCD has a broad scope of application. First, Article 2 provides:

'digital content' means

- (a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software;
- (b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer; and
- (c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.

So it applies both to one-off downloads and to the supply of digital content over a period of time.

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

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

26. DCD Arts 5 and 11.

27. DCD Arts 6-13.

28. DCD Art 15.

29. DCD Arts 13 and 16.

30. DCD Art 4.

31. COM(2015) 634 final, p 2.

Secondly, the DCD applies not only when the consumer pays cash but also when the digital content is supplied in exchange for personal data, as is now frequently the case. Article 3 provides:

(1) 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.

The DCD applies both when the digital content is downloaded and when it is supplied on a physical carrier like a DVD.<sup>32</sup>

### Conformity of the digital content

As to conformity, the digital content must comply with the express requirements of the contract<sup>33</sup> and also meet any particular purpose for which the consumer requires the digital content and which the trader has accepted.<sup>34</sup> The digital content must meet certain minimum standards<sup>35</sup> and it must be the latest version.<sup>36</sup> When the digital content is to be supplied over a period of time it must conform to the contract throughout the period.<sup>37</sup>

### Remedies for non-conformity

If the digital content does not meet the conformity requirements, a “hierarchy of remedies” applies. The trader must bring the digital content into conformity unless that would be impossible, unlawful or disproportionate.<sup>38</sup> If the

digital content cannot be brought into conformity, or if the trader fails to do so within a reasonable time or without undue inconvenience to the consumer,<sup>39</sup> the consumer may claim a reduction in price (if a price was paid) or terminate the contract.<sup>40</sup> However the right to terminate exists only if the nonconformity impairs the functionality, interoperability or the main performance features.<sup>41</sup> If the trader fails to supply the digital content on time (and unless otherwise agreed, it must be supplied immediately after the contract is concluded),<sup>42</sup> the consumer may terminate the contract immediately.<sup>43</sup>

### The consumer's data after termination

Article 13 usefully sets out rules on termination for non-conformity or failure to supply and what is to happen to the consumer's data after the contract is terminated. The consumer may terminate by giving notice to the trader,<sup>44</sup> who must then refund any price paid within 14 days<sup>45</sup> and must take all reasonable steps to prevent the use of any personal data supplied by the consumer, except for content which has been generated jointly by the consumer and others who continue to make use of the content.<sup>46</sup> The trader must allow the consumer to retrieve any content supplied by the consumer or generated by the consumer using the digital content in a commonly used format.<sup>47</sup> The consumer must not make further use of the digital content; it should be deleted or rendered unintelligible, and, if it was supplied on a physical medium, the consumer should return the medium if the supplier so requests.<sup>48</sup> The consumer need not pay anything for use of the digital content before the contract was terminated.<sup>49</sup>

32. DCD Art 3(3).

33. See DCD Art 6(1)(a), (c) and (d).

34. DCD Art 6(1)(b).

35. DCD Art 6(2).

36. DCD Art 6(4).

37. DCD Art 6(3).

38. DCD Art 12(1).

39. See DCD Art 12(2).

40. DCD Art 12(3).

41. DCD Art 12(5).

42. DCD Art 5(2).

43. DCD Art 11.

44. DCD Art 13(1).

45. DCD Art 13(2)(a).

46. DCD Art 13(2)(b).

47. DCD Art 13(2)(c).

48. DCD Art 13(2)(d) and (e).

49. DCD Art 13(4).

## The trader's right to modify digital content

Article 15 deals with the trader's right to modify digital content that is to be supplied over a period of time stipulated in the contract. The supplier may alter its functionality, interoperability and other main performance features in such a way as to adversely affect access to or use of the digital content by the consumer only if the right was provided in the contract; the consumer is notified in advance; the consumer is allowed to terminate the contract free of charge within not less than 30 days from the receipt of the notice; and the consumer is allowed to retrieve any digital content, as under Article 13.<sup>50</sup>

## The consumer's right to terminate a long-term contract

Article 16 gives the consumer the right to terminate a contract for the supply of the digital content for an indeterminate period, or for a fixed period if either the initial contract or that plus any renewal period has exceeded 12 months. The consumer may terminate by giving 14 days' notice to the supplier, and the Article sets out the consequences of termination.<sup>51</sup>

## Public enforcement

Article 18 provides for "public enforcement" of the consumer's rights. It provides:

### Enforcement

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

- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting.

Such measures for "public enforcement" are important. The similar provision in the Directive on Unfair Terms in Consumer Contracts<sup>52</sup> has had a very significant impact, at least in the UK. When the Directive was implemented, the task of enforcement was given to the Director-General of Fair Trading.<sup>53</sup> The Director-General (and after 2002, the Office of Fair Trading<sup>54</sup>) was very active and achieved a great deal in terms of encouraging traders, and on occasions sectors of industry such as mobile phone providers, to improve the terms that they offer to consumers.<sup>55</sup> The OFT's role has now been taken over by the Competition and Markets Authority,<sup>56</sup> which also publishes some very useful guidance to traders.<sup>57</sup>

I believe that Article 18 of the DCD could have an equally significant impact, particularly if the relevant public bodies or consumer associations use big data to monitor complaints and employ a non-confrontational approach to their dealings with traders.<sup>58</sup>

50. DCD Art 15(1). Art 15(2) deals with reimbursement of a proportionate part of the price and with further use of the consumer's data by the supplier.

51. DCD Art 16(2)-(5).

52. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Art 7.

53. See Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 8.

54. The office of DGFT was abolished by the Enterprise Act 2002.

55. See S, Bright (2000, p. 331).

56. The legislation that now implements the Directive as a whole is the Consumer Rights Act 2015, Part 2 and, as regards Art 7, Sch 3. On public enforcement generally see H. Beale (2015), paras 38-323 ff., under the 1999 Regulations; and paras 38-387 ff, under the 2015 Act. (S Whittaker).

57. E.g. CMA37, *Unfair contract terms guidance*, available at <<https://www.gov.uk/government/publications/unfair-contract-terms-cma37>>.

58. See H Beale (forthcoming).

## Reservations

As I have said, the DCD proposal seems to be welcomed by the Council working groups, but both the Council<sup>59</sup> and the Parliament<sup>60</sup> seem to have a number of reservations, and quite rightly so. While in general terms I welcome the provisions of the proposed DCD, there are a number of issues that need to be “fixed” if the proposal is to be acceptable. Some points may only need clarifying, while others will require revisions. I will explain an example of each.

## Clarifications

An example of a clarification that is needed is in Article 14. This provides that the consumer will have the right to damages for any harm caused by the digital content to the consumer's digital environment, that is, the consumer's data or hardware. Because this is a full harmonisation directive, the implication is that consumers may not have any right to damages for other kinds of loss. The Explanatory Memorandum appears to confirm that Member States may not permit compensation for other kinds of loss caused by non-conformity or failure to supply. It states:

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.<sup>61</sup>

If it is really intended to remove 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 - that would be very 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 Common European Sales Law's definition of “loss”,<sup>62</sup> 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 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 latter 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).<sup>63</sup> 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 Directive on Unfair Terms, 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. I am glad to be able to report that informally Commission officials have said that it did not intend to exclude consumers being given compensation for these kinds of loss. If that is correct it is very welcome, but the Directive must be clarified.

## Revisions

An example of the revisions that are needed is that the minimum standard which digital content must meet is not sufficiently demanding. Many Member States have applied their sale of goods law to digital content at least when it was supplied on a tangible medium, and this means that, in accordance with the Consumer Sales Directive, the digital content must be fit for all the purposes for which goods of the same type would ordinarily be used.<sup>64</sup> However Article 6(2) of the DCD introduces an additional qualification: the normal requirement applies only “to the extent that the contract does not stipulate, where relevant, in a clear and

59. See Note from the Presidency to the Council, Brussels 2 June 2016, <<http://data.consilium.europa.eu/doc/document/ST-9768-2016-INIT/en/pdf>>.

60. See Committee on the Internal Market and Consumer Protection Committee on Legal Affairs, Working Document of 23 June 2016, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-585.510+01+DOC+PDF+VO//EN&language=ES>>

61. COM(2015) 634 final, p 13.

62. CESL Reg Article 2(c).

63. See S Whittaker (1989); K Alheit, (2001, pp. 188-209) and further references cited there.

64. CSD Art 2(2)(c).

comprehensive manner". This is again unnecessary - in the past, digital content has been treated in the same way as goods without a problem - and it is very risky for the consumer. In effect the trader would be able to use the terms of the contract to set its own minimum standards. Very few consumers will ever read the terms of the contract before they agree to it. The trader should ensure that the general description of the digital content makes it clear to the consumer what the digital content will or will not do.

### Other examples of revisions needed

Other revisions that are needed include:<sup>65</sup>

- extending Article 3 so that the DCD applies if the trader collects the consumer's personal data, rather than only if the consumer provides it actively;
- extending the scope of application of the DCD to embedded software, which is currently excluded<sup>66</sup> but which, with the developing Internet of Things, might well need to meet similar requirements of "interoperability", etc. as other digital content;
- the minimum conformity requirements should include privacy by design and by default;
- digital content should be supported (including by the continued provision of "digital services") for as long as the consumer will reasonably expect, even if no time period is stated in the contract;<sup>67</sup>
- where digital content is to be supplied over a period of time, but the supply fails, the suggested remedy of "partial termination"<sup>68</sup> should be replaced by price reduction and the right to terminate if the interruption (or cumulative interruptions) are sufficiently serious;
- there should be the right to withhold performance when the supply of digital services is interrupted;
- there should be provision for the termination of linked contracts; and
- there should be a minimum period of prescription.<sup>69</sup>

## The Online Sales Directive

The OSD may be summarised as "CSD +", in that it covers the topics covered by the Consumer Sales Directive - conformity obligations, the consumer's remedies for non-conformity and commercial guarantees - and adds some new provisions.

### New provisions

Examples of new provisions include:

- the consumer will have the right to terminate even for minor non-conformity;<sup>70</sup>
- termination may be exercised by the consumer giving notice to the trader;<sup>71</sup>
- when goods do not conform to the contract, the period of the presumption that the goods were non-conforming from the outset is extended from six months to two years;<sup>72</sup>
- the consequences of termination are spelled out,<sup>73</sup> including a requirement that the trader reimburse the price paid within a maximum of 14 days from the date of the notice of termination<sup>74</sup> and a provision that the trader may make a deduction for any decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use;<sup>75</sup>

65. The European Law Institute has published a *Statement on the European Commission's proposed Directive on the supply of digital content to consumers* (<[http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Statement\\_on\\_DCD.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf)>). This contains a large number of proposed amendments.

66. DCD Recital 11 states "[...] this Directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods".

67. Compare DCD Art 6(3), which applies only if the contract stipulates that the digital content is to be supplied over a period of time.

68. DCD Art 13(5).

69. Cf DCD Recital 43, which leaves prescription to Member States' law.

70. OSD Recital 29; and see the Explanatory Memorandum, p 15; compare CSD Art 3(4).

71. OSD Art 13(1). In some Member States termination (or its functional equivalent) 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.

72. OSD Art 8(3); cf CSD Art 5(3).

73. OSD Art 13(3).

74. OSD Art 13(3)(a).

75. OSD Art 13(3)(d).

- Member States may no longer require the consumer to notify the trader of any non-conformity within two months of detecting the non-conformity;<sup>76</sup> and
- there is a provision for “public enforcement”<sup>77</sup> similar to Article 18 of the DCD, which was discussed above.

## Clarifications

There are also some useful clarifications of points on which the CSD was unclear, or where the new legislation could usefully incorporate interpretations of the CSD by the Court of Justice. For example, under the OSD:

- conformity includes conforming to the express terms of the contract,<sup>78</sup> so that the remedies for non-conformity also apply;
- the consumer may withhold payment of any outstanding part of the price until the seller has brought the goods into conformity with the contract;<sup>79</sup>
- where the seller replaces non-conforming goods, the original goods must be taken back by the seller at its own expense;<sup>80</sup>
- that includes removing any goods that have been installed before the lack of conformity became apparent, and the installation of replacement goods, or bearing the costs of having this done;<sup>81</sup>
- the consumer need not pay for any use made of the goods before the replacement;<sup>82</sup> and
- a formula is provided for calculating price reduction.<sup>83</sup>

## Revisions needed

There are a number of points at which the OSD needs to be improved. For example, where goods rely on embedded software, the requirements of the DCD as to both

interoperability and continuing supply or support should apply,<sup>84</sup> and there should be a provision for termination of the whole contract when only some of the goods are not in conformity with the contract but this renders the goods as a whole useless or much less valuable - for example, if half the plates in a dinner service arrive broken and it is not possible to replace them because plates of the relevant pattern are no longer made.<sup>85</sup>

## Effects of full harmonisation

However, the principal problem with the OSD is that it also would require full harmonisation, and that will result in a loss of consumer protection in some Member States. The principal losses for consumers in the UK would be two.

First, the UK's Consumer Rights Act 2015 provides that 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.<sup>86</sup> 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, were very unclear. Empirical research by the Law Commission 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.<sup>87</sup> The immediate right to terminate 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. (If the

76. OSD Recital (25); cf CSD Art 5(2).

77. OSD Art 17.

78. OSD Art 4; cf CSD Art 2(1), which might be read as applying only to the requirements of the remainder of Art 2.

79. OSD Art 9(4). This is only likely to be useful when the goods are to be supplied in instalments over a period of time; with other online sales, the consumer is normally required to pay immediately or at least before delivery.

80. OSD Art 10(1).

81. OSD Art 10(2), which reflects the decision of the CJEU in C-65/09 *Weber* and C-87/09 *Putz* [2011] ECR I-5257.

82. This reflects the decision in the ECJ case C-404/6 *Quelle*, [2008] ECR I-2685-2730.

83. OSD Art 12.

84. See above.

85. Cf OSD Art 13(2), which only permits termination in respect of the broken plates.

86. Consumer Rights Act 2015, ss 19 and 20.

87. 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.

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.) 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.

Secondly, 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. Even though damages are not otherwise regulated by the OSD, in the light of Recital 32, which refers to "the period during which the seller is held liable [...]", it seems that this would prevent Member States from allowing consumers 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.<sup>88</sup> 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 under the Product Liability Directive,<sup>89</sup> 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.

I suspect that consumers in many Member States would also lose consumer protection in one respect or another were the OSD to be adopted. So it comes as no surprise that the proposal for the OSD seems to be meeting opposition in the

European Council. Moreover, it is asked why it is necessary to have separate regimes for online sales and other sales, which would be the result in many Member States. As a result, at least during the Dutch Presidency<sup>90</sup> the Council has deferred consideration of the online sales directive.<sup>91</sup>

## Issues still to be tackled

Even were both Directives to be adopted with the amendments suggested above, there would still be important issues left for the European legislator to tackle.

One would be to ensure that consumers who buy digital content obtain certain minimum rights, such as to install the digital content on more than one machine or to resell digital content, either on its own or with the machine on which it is installed, if the consumer no longer wants to use the digital content. These rights would not have to be mandatory, but I think there is a case for providing that they apply by default, so that the trader would have to indicate when the consumer will get only more restricted rights<sup>92</sup> and the relevant term of the contract would be subject to the provisions of the Directive on Unfair Terms. That would mean that the term would either have to meet the requirements for a "core term" under Article 4(2) of the Directive, which means it must be in plain and intelligible language, or it would have to meet the test of fairness under Article 3(1).

A second topic is that of language. To impose any general requirement that contracts be written, or information be given, in any particular language seems to be too politically sensitive to be tackled: it was certainly considered "off limits" to the Expert Group that helped to draft the CESL. But something more modest could be achieved. Consumers who are contracting online should at least have the right to insist that all exchanges relating to a transaction are in the language of the website that the consumer used in the first place.<sup>93</sup>

88. Limitation Act 1980, s 5.

89. 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.

90. January - June 2016.

91. See Note from the Presidency to the Council, Brussels 2 June 2016 <<http://data.consilium.europa.eu/doc/document/ST-9768-2016-INIT/en/pdf>>.

92. See 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, pp 23-24.

93. See *ibid*, pp 11-12.

## More general legislation?

More broadly, however, I think there is reason to doubt how much the European Commission's current approach will solve the problems of cross-border trade. I think more general legislation is needed. By that I mean two things. First, the legislation on B2C contracts should tackle issues of general contract law. Secondly, the legislation should extend to B2B contracts.

### Reducing legal differences in B2C contracts<sup>94</sup>

The European Commission's current proposals, like the CESL before them, 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 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. We need to consider the extent to which the new proposals meet the apparent aims of the exercise.

Both the proposed directives are quite limited in their scope of coverage. They are targeted at the topics which the Commission thinks are most likely to give rise to disputes. In this respect there is a major difference between the 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, it is true that 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", if only because for the transactions with which the directives are dealing, 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 to 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 trader's 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.

Which is more likely to solve the problems faced by traders interested in selling to consumers across borders: 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.

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

94. This section of my paper draws heavily on a Briefing Paper on scope of application and general approach of the new rules for contracts in the digital environment, which I prepared for the Legal Affairs Committee of the European Parliament in February 2016.

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 reassurance 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.

## B2B contracts

Even more importantly, 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 B2B 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 vary enormously between Member States.

The main concern is for smaller businesses (SMEs), as it was with the CESL.<sup>95</sup> Larger businesses may actually not sell across borders: they may open a subsidiary in the buyers' country. Secondly, larger businesses are more likely to have the expertise to deal with foreign laws. Thirdly, they are likely to be entering larger transactions with higher values, when the cost of obtaining legal advice about foreign law will be relatively much lower than with a small transaction. SMEs are often not so sophisticated and they will not think the cost of taking expert advice can be justified. So if they were to make cross-border contracts they would have to take the legal risk. And that brings us to another difference. I strongly suspect that smaller businesses are generally more risk averse than larger ones. Putting it simply, they cannot afford to take the same risks. I suspect many are simply put off from trying cross-border selling. It is SMEs that we need to target.

Moreover, the problems faced by SMEs are not just ones of understanding foreign laws. They are also about the terms of the contract or, indeed, the way in which the contract is made or the way in which the other party might behave during the course of the contract. When a party is relatively inexperienced or unsophisticated in negotiating contracts

and cannot afford legal advice, there are serious dangers. An SME, for example, may not know what is in the standard contract terms supplied by the other party, or it may not understand the implications of the terms. During the course of negotiations, it may not think to ask for information which would affect its decision about whether or not to enter the contract - it may assume the other party will disclose such information. And it may not anticipate the other party behaving opportunistically during the course of performance, and so not seek to insert appropriate safeguards into the contract.

## Online B2B sales

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 to 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

95. See H. Beale (2013, p. 65).

E-Commerce Directive).<sup>96</sup> 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.

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.

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 buyer's 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 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 possibly 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 in no one's interest 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.

### More general B2B legislation

The CESL proposal contained substantial protection for SMEs (in particular, controls over unfair terms that were not individually negotiated). Of course, this made it appear more threatening to Member States that have few controls (even though their domestic law would have remain untouched).

96. Directive 2000/31/EC of 8 June 2000.

But I think there is still a case for providing a general optional instrument for cross-border contracts, at least when one party is an SME.

It is true that in many countries, parties to a cross-border sales contract can use the CISG. The CISG offers many of the same advantages as did the CESL. It provides a neutral, internationally-accepted law that is translated into many languages. But elements that are crucial for SMEs - validity and the control of unfair terms - are not covered by the CISG. They are to be determined by the otherwise-applicable law of the contract. And that brings us back to the problem of knowledge. Unless it is familiar with the otherwise-applicable law of the contract, an SME which is offered a contract to which the CISG will apply but which is on standard terms will not know whether it would be able to challenge one of those terms if it is unfair; it will not know whether the other party has a duty of disclosure; it will not know whether it might have a remedy if it finds that it has made a fundamental mistake; it may have enormous difficulty in knowing to what extent it will have protection if the other party behaves badly. All that will depend on what the law that governs these issues provides. And the position is made even more complex by the fact that in some laws, the protections that apply to domestic contracts do not apply to "international", i.e. cross-border, contracts.<sup>97</sup>

I believe that SMEs would benefit significantly from a uniform law for cross-border contracts that contains the kind of protective rules that SMEs want. Clearly any such law would have to be optional.

## The lessons of the CESL

I do not believe that the lesson to be learned from the failure of the proposal for a CESL is that future proposals must be narrow in scope. I think the main lessons to be learned are about the way a proposal of this type should be presented.

First, I think it is essential to get consensus on the general aims and approach before any draft is presented. Experience at the Law Commission in England has taught me that it is

important to set out and agree the policy, in detail, before starting to draft, because if there is no consensus on the policy, stakeholders may interpret the draft very differently according to what they think the policy is or should be.

Secondly, I think that the rules on application - for example, rules on the kind of contracts for which the instrument can be used and what steps must be taken by the parties in order for the instrument to be used - should be agreed at least in outline before all the details of the proposed law are set out, as the detail can be very distracting.

Thirdly, there needs to be much better presentation of the proposals - they should be more carefully drafted and more fully explained, for example by accompanying comments.

Fourthly and perhaps most importantly, we should not try to do too much too quickly. Good legislation takes time. This point is a difficult one. To get legislation through usually requires a political heavyweight to act as a champion for it. Within the EU institutions, the obvious political champion will be the Commissioner responsible. But Commissioners have limited tenure, and naturally they are most concerned to push through projects that can be completed while they are still in office so that they get the credit for it, rather than their successors. I think we have to find a way of persuading Commissioners to think beyond the lifetime of one commission.

But there is also important work to be done by academics, judges and practising lawyers. If we genuinely believe that an optional instrument is the right way forward, then we should do the groundwork even if there is no immediate prospect of the instrument being taken up by the political institutions. In other words, we need to make sure that the policy documents and preferably draft texts and comments are prepared now, so that they are ready when they are needed.

So I very much hope that the apparent failure of the proposal for a Common European Sales Law will not deter my colleagues either in Europe or elsewhere in the world from working on possible optional instruments on general contract law. I believe that they are the way forward.

97. E.g. the UK's Unfair Contract Terms Act 1977 does not apply to international supply contracts (s.26) nor to contracts to which English law applies only because the parties have chosen English law to govern the contract and which otherwise would be governed by some other law (s.27).

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## References

- ALHEIT, K. (2001). "The applicability of the EU Product Liability Directive to software". *Comparative and International Law Journal of Southern Africa*. Vol. 34, no. 2, pp. 188-209.
- BEALE, H. (2013). "A Common European Sales Law (CESL) for Business-to-Business Contracts". In: L. MOCCIA (ed.). *The Making of European Private Law: Why, How, What, Who*. Munich: Sellier.
- BEALE, H. (2015). *Chitty on Contracts 32<sup>nd</sup> ed. Volume II, Specific Contracts*. London: Sweet and Maxwell.
- BEALE, H. (forthcoming). "Conclusion and Execution of Contracts: Overview". In: S. LOHSSE, R. SCHULZE and D. STAUDENMAYER (eds.). *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*. Baden-Baden: Nomos.
- BISPING, C. (2014). "Mandatorily Protected: The Consumer in the European Conflict of Laws". *ERPL*, no. 22, pp. 513, 525.
- BRADGATE, R. (2010). Consumer Rights in Digital Products, a research report prepared for the UK Department for Business, Innovation and Skills. Sheffield, September, 2010. <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf)>
- BRIGHT, S. (2000). "Winning the Battle against Unfair Contract Terms". *Legal Studies*. Vol. 20, no. 3. p. 331. <<http://dx.doi.org/10.1111/j.1748-121X.2000.tb00147.x>>
- COMPETITION AND MARKETS AUTHORITY (2015), *Unfair contract terms guidance*. <<https://www.gov.uk/government/publications/unfair-contract-terms-cma37>>
- EUROPEAN COMMISSION (2015a). *Annex 2 to the Commission Work Programme, 2015 Com(2014) 910 final*, p. 12.
- EUROPEAN COMMISSION (2015b). *Commission staff working document. A Digital Single Market Strategy for Europe - Analysis and Evidence Communication from the Commission, 2015 COM(2015) 192 final*, pp. 4-5.
- THE EUROPEAN LAW INSTITUTE (2015). *Statement on the European Commission's proposed Directive on the supply of digital content to consumers*. <[http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Statement\\_on\\_DCD.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf)>
- THE LAW SOCIETY (2012). *European Brief*, November 2012, p 3.
- WHITTAKER, S. (1989). "European product liability and intellectual products". *Law Quarterly Review*, no. 105, p. 823.
-

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### About the author

Hugh Beale  
 hugh.beale@warwick.ac.uk  
 Professor at the School of Law  
 University of Warwick  
 <[http://www2.warwick.ac.uk/fac/soc/law/people/hugh\\_beale](http://www2.warwick.ac.uk/fac/soc/law/people/hugh_beale)>

School of Law  
 University of Warwick  
 Coventry CV4 7AL  
 United Kingdom