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Universitat Oberta de Catalunya
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Milà Rafel, Rosa

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The Directive Proposals on Online Sales and Supply of Digital Content (Part I): will the new rules attain their objective of reducing legal complexity?*

Rosa Milà Rafel

Juan de la Cierva-Incorporación Researcher

Centro de Estudios de Consumo, Universidad de Castilla-La Mancha

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Abstract

This article aims to critically analyse the two proposals for Directives that the European Commission launched on 9 December 2015: the Online Sales Directive and the Digital Content Directive. Both proposals are part of the Digital Single Market Strategy for Europe. Their main objective is to eliminate one of the barriers to cross-border trade: differences in contract law between Member States. This article is structured in two parts, which will be published separately. The first part of the article aims at answering the question of whether the new rules will attain their objective of reducing the complexity of the legal framework applicable to consumer protection in e-commerce. Section 2 briefly introduces the purpose of the Directives and their precedents. Sections 3 and 4 discuss, with regard to each Directive, what kind of contracts are covered by the Directives, how these contracts are currently regulated in Europe and what the implications are of the new rules, if adopted, for the contract law of Member States. It can be argued that whereas the Online Sales Directive will contribute to increasing the fragmentation of the regulation on consumer sales, the Digital Content Directive will address the existing legal lacunae at the EU level concerning certain aspects of contracts for the supply of digital content.

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Keywords

Digital Single Market, full harmonisation, consumer protection, online sales, supply of digital content, remedies for lack of conformity

Topic

Consumer protection in online sales and supply of digital content

Las propuestas de directiva sobre compraventa en línea y sobre suministro de contenidos digitales (Parte I): ¿lograrán las nuevas reglas el objetivo de reducir la actual complejidad legal?

Resumen

El presente artículo tiene como objeto el análisis crítico de las dos propuestas de directiva que la Comisión Europea presentó el 9 de diciembre de 2015: la Directiva sobre compraventa en línea y la Directiva sobre contenidos digitales. Ambas propuestas forman parte de la Estrategia para un Mercado Único Digital para Europa. Su principal objetivo es eliminar una de las barreras del comercio transfronterizo: las diferencias entre el derecho contractual de los Estados miembros. El artículo se estructura en dos partes que se publicarán de forma separada. En la primera parte del artículo se pretende responder a la pregunta de si las nuevas reglas lograrán el objetivo de reducir la complejidad del marco legal aplicable a la protección de los consumidores en el comercio electrónico. En el apartado 2 se presenta brevemente el propósito de las directivas y sus precedentes. En los apartados 3 y 4 se trata, respecto a cada directiva, los tipos de contrato que cubren, cuál es la regulación actual de dichos contratos en Europa y cuáles son las repercusiones que, de adoptarse, tendrían esas nuevas reglas dentro del derecho contractual de los Estados miembros. Puede sostenerse que, mientras que la Directiva de compraventa en línea contribuirá a aumentar la fragmentación de la regulación de las ventas de consumo, la Directiva de contenidos digitales servirá para abordar algunas de las lagunas legales existentes, en el ámbito de la Unión Europea, respecto a ciertos aspectos de los contratos para el suministro de contenidos digitales.

Palabras clave

Mercado Único Digital, armonización plena, protección del consumidor, compraventa en línea, suministro de contenidos digitales, remedios por faltas de conformidad

Tema

Protección del consumidor en la compraventa en línea y en el suministro de contenidos digitales

1. Introduction

This paper aims to critically analyse the two proposed Directives that the European Commission launched on 9 December 2015, namely the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content¹ (the “Digital Content Directive” or “DCD”)² and the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods³ (the “Online Sales Directive” or “OSD”)⁴. Both proposals are part of the Digital Single Market Strategy for Europe, adopted by the European Commission in May 2015. This strategy aims to transform the current 28 national digital markets into an EU digital single market by tackling all major obstacles to the development of cross-border e-commerce in Europe.⁵ The Commission estimates that dismantling these barriers would increase European GDP by €4 billion per year.⁶

This article is structured in two parts, which will be published separately.

- Part I, entitled “Will the new rules attain their objective of reducing legal complexity?” and published in this issue of the journal, aims at answering the question of whether the new rules will attain their objective of reducing the legal complexity of online sales and supply of digital content in Europe. Firstly, it briefly introduces the purpose of the Directives and their precedents. And, secondly, with regard to each Directive, it discusses what kind of contracts are covered by the Directives, how these contracts are currently regulated in Europe and what the implications of the new Directives are, if adopted, for the contract law of Member States.
- Part II, entitled “Conformity and remedies for lack of conformity”, will be published in the following issue of this journal. It highlights the most significant rules governing conformity and the remedies for lack of such

conformity with regard to each proposed Directive. It also raises questions as to the justification of their particular format. These will include suggestions that I consider need to be clarified or revised.

2. Purpose of the proposed Directives

2.1. Purpose of the proposed Directives: to eliminate differences in contract law between Member States that give rise to additional transaction costs

The purpose of the proposed Directives is to eliminate one of the barriers that are currently hindering cross-border trade: namely, the respective differences in contract law regulation between Member States. According to the European Commission, differences in contract law between Member States generate additional transaction costs when concluding cross-border transactions that deter both consumers and businesses alike from engaging in such transactions.

First and foremost, the existence of different national rules governing the contractual rights of consumers generates uncertainty among the latter as to the extent of their essential contractual rights when purchasing from another EU jurisdiction. In effect, the lack of legal certainty deters consumers from making cross-border purchases and this is especially true online. Consequently, consumers do not exploit the potential of having access to a wider choice of goods and digital content at more competitive prices.

In tandem with this, the reality of such legal diversity also dissuades businesses, especially small or medium-sized enterprises (SMEs), from selling goods online or supplying

1. Visit: < <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0634&from=EN>>.

2. Brussels, 9.12.2015, COM (2015) 634 final.

3. Visit: < <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0635&rid=1>>.

4. Brussels, 9.12.2015, COM (2015) 635 final.

5. European Commission (2014, p. 3). According to this communication, fragmentation and barriers in the European digital market prevent Europe from making the most of its capabilities to lead the global digital economy. A Digital Single Market is “one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence”.

6. Explanatory Memorandum OSD, p. 12.

digital content beyond their domestic markets. The reason being that they have to meet the cost of adapting their contracts to particular domestic markets.

Pursuant to Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations⁷ (the "Rome I Regulation") governing cross-border transactions between businesses and consumers, in such instances consumers are entitled to the mandatory protection of the domestic contract law rules applicable in their country of habitual residence if the trader has directed its activity to consumers in that Member State. These rules also need to be respected "in cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection".⁸ This scenario could arise in the case of a trader that sells its products online via a website across Europe.⁹ Therefore, many businesses may prefer to trade exclusively in their own domestic market or only export to one or just a few Member States, which entails losing opportunities for trade expansion and economies of scale.¹⁰

The proposed Directives establish a fully harmonised set of contract law rules governing consumer rights in online sales and the supply of digital content in Europe. The goal is to promote cross-border e-commerce by reducing the complexity of the legal framework governing this area that in turn would both reduce the costs faced by businesses and increase consumer trust.¹¹

Some empirical studies show that substantial legislative differences among EU Member States, along with other disparities, are a source of transaction costs in cross-border trade.¹² However, this viewpoint is not without its critics. Some authors claim that the harmonisation of European contract law is unnecessary because the legal divergence between Member States is not significant enough to generate transaction costs that might affect cross-border trade. These authors add that the existence of costs arising from differing contract rules in Member States can be effectively overcome by operators by selecting the law applicable to the contract based on the rules governing international private law.¹³ However, as Prof. Fernando Gómez has noted, even "the most intelligently designed rules on choice of law" are not able to remove all transaction costs arising from legal diversity.¹⁴ Additionally, the abovementioned Article 6 of the Rome I Regulation strictly restricts the choice of law in business-to-consumer contracts.

However, it would be naïve to argue that the harmonisation of contract law will in effect provide the magical solution to eliminating all barriers to cross-border trade,¹⁵ given that many other factors influence these exchanges which must be taken into account.¹⁶ In this vein, it should be borne in mind that the European Commission has announced other measures as part of the first pillar of the Single Market Strategy, namely putting forward new regulation to address unjustified geo-blocking;¹⁷ decreasing the costs and inefficiency of cross-border parcel delivery services; reducing the differences between national copyright

7. Visit: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008R0593&qid=1472299087322&from=EN>>.

8. Explanatory Memorandum of the CESL, Context of the Proposal.

9. H. Beale (2016, p. 8).

10. Recital 6 OSD.

11. The economic grounds of the proposals are based on an impact assessment, which concluded that "if the barriers related to contract law were lifted 122,000 more business would be selling online across borders. Increased online retail competition will lead to retail prices going down in all Member States, averaging -0.25% at the EU level. As a result of this price decrease and increased consumer trust stemming from uniform EU rights, there will be additional consumer demand. Household consumption [...] would rise in every Member State with an EU average of +0.23% [...] This increase in supply and demand will have direct effects on the main macroeconomic variables in each Member State and in the EU as a whole. Overall real EU GDP is expected to gain about €4 billion per year" (Explanatory Memorandum OSD and DCD).

12. F. Gómez Pomar (2012, p. 235), who refers, among others, to the empirical contribution of S. Vogenauer and S. Weatherill (2006, pp. 105-148).

13. F. Gómez Pomar (2012, pp. 233-234).

14. F. Gómez Pomar (2012, p. 234).

15. F. Gómez Pomar (2012, p. 236).

16. In this vein, see European Economic and Social Committee (2016, conclusion and recommendation no. 3.1.2 and 1.2).

17. On 25 May 2016, the European Commission launched the Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (<<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0289&from=EN>>) (EC) No 2006/2004 and Directive 2009/22/EC, Brussels, 25.5.2016, COM (2016) 289 final.

regimes and allowing for wider online access to works by users across the EU;¹⁸ and reducing the administrative burden on businesses arising from different VAT regimes.

2.2. The Common European Sales Law and the new approach taken in the proposed Online Sales and Digital Content Directives

2.2.1. The Common European Sales Law

This is not the first time that the European Commission has set forth a proposal to achieve the abovementioned objectives. In 2011, the Commission published the Proposal COM 2011 (635) for a Regulation on a Common European Sales Law¹⁹ (the "CESL"), in accordance with the notion that: "disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships".²⁰

Regarding the legal instrument chosen, the CESL was an optional contract law regime in the form of a Regulation. This would in effect create a second contractual law regime within each Member State's national law, which could co-exist alongside the pre-existing domestic rules governing the law of contract. The CESL was an "opt-in" instrument for cross-border contracts, in other words it was only applicable "on a voluntary basis, upon an express agreement of the parties".²¹

With regard to the scope of the CESL, it governed cross-border sales of goods; the supply of digital content; and the provision of related services, most notably repair,

maintenance or installation of the goods or digital content. As for its personal scope, the CESL not only covered business-to-consumer (B2C) transactions but also business-to-business (B2B) transactions, in the event that at least one of the parties was an SME (Art. 7 CESL). The content of the CESL consisted of a comprehensive set of rules covering the entire life cycle of the contract and could be found in Annex I of the Regulation.²²

On 26 February 2014, the European Parliament approved an amended version of the CESL.²³ However, it was never endorsed by the Council, who were opposed to it.²⁴ In late 2014, the Commission announced the withdrawal of the CESL²⁵ to concentrate on the proposals for the Online Sales Directive and the Digital Content Directive, both of which drew heavily for their inspiration on the experience acquired during the CESL negotiations. In point of fact, in the new proposals the Commission had taken into account the amendments made by the European Parliament to the CESL.

2.2.2. The new approach taken in the proposed Online Sales and Digital Content Directives

In the Online Sales Directive and in the Digital Content Directive the European Commission has abandoned the approach previously adopted in the CESL. The new proposals differ from the CESL in "form, scope and content".²⁶

With regard to the legal instrument chosen, the new proposals comprise two full harmonisation Directives. Therefore, they will in effect create a single set of rules providing the same level of consumer protection across the European Union.²⁷

18. On 9 December 2015, the European Commission presented the Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market (<<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0627&qid=1472147519695&from=ES>>), Brussels, 9.12.2015, COM (2015) 627 final; on 14 September 2016, the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, (<<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2016:593:FIN&qid=1474729047876&from=ES>>), Brussels, 14.9.2016, COM (2016), 593 final and the Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (<<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0594&qid=1474729139314&from=ES>>), Brussels, 14.9.2016, COM (2016), 594 final.

19. Visit: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011PC0635&qid=1472149340367&from=EN>>.

20. Recital 13 CESL.

21. Recital 9 CESL.

22. See F. Gómez Pomar and M. Gili Saldaña (2012) for an analysis of some of the rules.

23. European Parliament (2014).

24. H. Beale (2016, p. 9) and R. Manko (2016, p. 2).

25. European Commission (2014, p. 12).

26. H. Beale (2016, p. 6) and European Law Institute (2016, p. 8).

27. Explanatory Memorandum OSD.

Member States shall not be permitted to adopt or maintain provisions with a different level of consumer protection from the ones laid down in the provisions of the Directives, including more or less stringent ones.²⁸ Additionally, the proposals do not follow the approach of an optional regime as the consumer contract law rules applicable under the Directives are mandatory for the contracts coming under their scope of application.²⁹

With respect to the scope of the proposals, they are intended to be applicable to domestic as well as cross-border contracts that come under the provisions of the Directives.³⁰ In particular, the personal scope of the Directives is much narrower than that of the CESL, because their provisions are only applicable to B2C transactions. Unlike the CESL, the Directives' provisions will not apply to B2B transactions.

The content of the proposed Directives is also narrower.³¹ Unlike the CESL, both Directives focus on rules targeted to key consumer contractual rights needed to overcome contract-law-related barriers in cross-border transactions. In the main, the new proposals lay down rules on conformity of the goods and the digital content with the contract, as well as remedies in case of non-conformity and the modalities for the exercise of these remedies.

Regarding the Commission's new approach, some commentators have argued that the Directives' narrow scope of application - only B2C contracts, leaving out B2B transactions - and the limited number of issues covered - mainly, lack of conformity and remedies for lack of conformity, and no other relevant issues - is not the most effective way to remove legal uncertainty for both traders and consumers with the ultimate objective of fostering cross-border e-commerce.³²

3. Online Sales Directive: types of contracts covered, current legislation and the implications for the contract law of Member States

3.1. Contracts covered: distance sales of goods, including online sales

Regarding the kind of contracts covered by the proposed Directives, the Online Sales Directive applies to sales contracts for tangible movable goods that are concluded online or through any other means of distance communication, such as telephone or postal mail [Arts. 1 and 2.e) OSD]. However, it shall not apply if the tangible good is a "durable medium incorporating digital content where the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer", such as DVDs and CDs (Art. 1.3 OSD).

3.2. Current legislation on distance sales of goods

In relation to the abovementioned contracts, the Directive fully harmonises the rules on conformity, remedies for lack of conformity and modalities for the exercise of such remedies (Art. 1.1 OSD). These rules had already been harmonised by the existing 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 guarantees³³ (the "Consumer Sales Directive 1999/44/EC" or "CSD"), which the Online Sales Directive takes as its basis and currently applies to any consumer sales of goods, including online sales.

However, the Consumer Sales Directive 1999/44/EC is a minimum-harmonisation directive, since it only ensures a

28. Arts. 3 OSD and 4 DCD.

29. Recital 11 OSD and Arts. 18 OSD and 19 DCD.

30. These will be examined in sections 3 and 4 below.

31. European Law Institute (2016, p. 9). However, according to the ELI Statement, the proposals for the Directives on Online Sales and Digital Content "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".

32. Beale (2016, pp. 5 and 26), J. Smits (2016, pp. 6-7) and European Law Institute (2016, p. 9).

33. Official Journal L 171, 07/07/1999 P. 0012 - 0016. Visit: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999L0044&from=ENH>>.

uniform minimum level of consumer protection. Member States are allowed to improve the minimum standards by introducing provisions to ensure a higher level of consumer protection.³⁴ This has given rise to a situation where at present, national legislation transposing the Consumer Sales Directive 1999/44/EC effectively imposes different regulations on some essential elements of the consumer sales contract. For instance, national contract law may impose different regulations where:³⁵ a) there exists a hierarchy among the remedies available in the case of lack of conformity³⁶ or where the consumer has a free choice of remedies; b) where the trader is liable for the lack of conformity for the minimum period of 2 years or where this period is extended;³⁷ c) where the burden of proof is reversed during the first 6 months or where this period is extended; or d) where in order to benefit from his or her rights under the contract, the consumer must first inform the seller of the lack of conformity within a stipulated time period from the date on which he or she detected such lack of conformity.³⁸

3.3. Increases in the current level of consumer protection in most Member States, but with some reductions in others

In order to eliminate such differences, the Online Sales Directive fully harmonises certain rules for online and

other distance sales of goods. One advantage of full harmonisation is that the new Directive would establish a set of uniform rules imposing clear consumer rights applicable in all Member States, thereby creating a business-friendly environment.³⁹ From a consumer protection point of view, full harmonisation is to be welcomed since the new rules would either increase or maintain the current level of protection in most Member States.⁴⁰

However, this positive picture is not true for all Member States, particularly for those whose national law exceeds EU standards and imposes even higher levels of consumer protection. So if the Online Sales Directive is eventually approved in these Member States, the existing level of consumer protection will effectively be diminished.⁴¹ For instance, currently in the UK⁴² pursuant to domestic statute law consumers enjoy a period of six years from the date the goods are delivered within which the consumer may pursue remedies for lack of conformity.⁴³ Conversely, under the Online Sales Directive remedies for lack of conformity are only available for a period of two years. Therefore, the adoption of the Online Sales Directive would effectively mean a loss of rights for UK consumers.⁴⁴

34. Arts. 1.1 and 8.2 CSD and recital 5 OSD.

35. Recital 5 OSD.

36. According to the Explanatory Memorandum OSD, p. 6, "20 Member States have followed this approach (Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden), while other Member States have either offered the consumers a free choice of remedies, or have taken over the hierarchy of remedies but have also provided for another remedy".

37. According to the Explanatory Memorandum OSD, p. 6, "while 23 Member States have implemented this 2-year period, in 1 Member State (Sweden) that period is longer and in 2 Member States (Finland and the Netherlands) it is unlimited. In 2 other Member States (Ireland and the United Kingdom) there is no specific legal guarantee period, but the consumer rights are limited" by time limits within which rights can be invoked in court.

38. According to the Explanatory Memorandum OSD, p. 6, "while in 11 Member States consumers do not have such an obligation, in 12 Member States (Belgium, Croatia, Cyprus, Estonia, Finland, Italy, Latvia, Malta, Portugal, Romania, Slovenia and Spain) the consumer has to notify the defect within 2 months and in 5 Member States (Denmark, Sweden, the Netherlands, Hungary and Slovakia) the consumer has to do so within a different period of time".

39. Explanatory Memorandum OSD.

40. The new elements and clarifications set to be introduced under the Online Sales Directive will be analysed in the second part of this article which will be published in the next issue of this journal.

41. European Law Institute (2016, p. 18-19) and J. Smits (2016, p. 3).

42. At the closing date of this paper the UK is still a Member State of the European Union, despite the result of the referendum held on 23 June 2016 in favour of leaving the European Union.

43. See the explanatory notes (<<http://www.legislation.gov.uk/ukpga/2015/15/notes>>) of the Consumer Rights Act 2015 (<http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf>) and Section 5 of the Limitation Act 1980 (<<http://www.legislation.gov.uk/ukpga/1980/58>>).

44. H. Beale (2016, pp. 19-20).

3.4. Further fragmentation of contractual remedies available in consumer sales

Moreover, it can be argued that if the Online Sales Directive comes into force, it will fail to achieve its objective of decreasing the complexity of the legal framework applicable to cross-border consumer sale of goods contracts. On the contrary, the Online Sales Directive will effectively contribute to increasing the degree of fragmentation in the regulation of consumer sales across Europe. The reason is that face-to-face sales of goods are not governed by the Directive, which only covers online and other distance sales of goods (Art. 1.1. OSD).

As a consequence, full harmonisation of the rules governing online sales may run the risk of having binding online sales rules which differ from the rules regulating face-to-face sales.⁴⁵ If the proposal is finally approved, consumers would end up having different rights depending on whether they purchased goods online or offline. Whereas the contractual remedies for online and other distance sales would be regulated under the Online Sales Directive, remedies for face-to-face sales would be governed under the current Consumer Sales Directive 1999/44/EC.⁴⁶ It goes without saying that having different rules for consumer protection depending on whether the consumer has purchased the goods online or offline lacks credible justification.⁴⁷ This is all the more pertinent given the "increasing importance of the omni-channel distribution model", in other words, "selling at the same time via multiple channels".⁴⁸

The European Parliament has warned the European Commission about the risk of having different rules for online sales of goods and face-to-face sales and is of the view that:

"online and offline sales should be dealt with coherently and treated equally on the basis of the existing high level of consumer protection, as different legal standards might be perceived by consumers as a denial of their rights".⁴⁹ The European Economic and Social Committee shares this opinion.⁵⁰

3.5. The uncertain future of the proposal

The Online Sales Directive faces an uncertain future. The reductions in the current level of consumer protection in some Member States and its controversial scope of application have given rise to increasing reservations about the proposal in many Member States and among stakeholders.⁵¹ The European Parliament have called "on the Commission ... to consider whether the Commission's planned proposal for tangible goods ought not to be launched at the same time as the REFIT"⁵² of the whole consumers *acquis*.⁵³ Furthermore, the Council has given priority to the consideration of the Digital Content Directive over the Online Sales Directive.⁵⁴

4. Digital Content Directive: types of contracts covered, current legislation and the implications for the contract law of Member States

By contrast, the Digital Content Directive has been well received. Many European consumers experience problems when the digital content they have bought, such as games,

45. The Explanatory Memorandum of the OSD adds that the Commission will take steps to avoid the risk of increasing the current legal fragmentation and "ensure that consumers and traders will indeed be able to rely on a coherent legal framework which is simple to apply everywhere in the EU".

46. J. Smits (2016, pp. 7-8).

47. See also E. Arroyo Amayuelas (2016, p. 27).

48. Explanatory Memorandum OSD.

49. European Parliament (2016, comment 16).

50. European Economic and Social Committee (2016, comments 1.8 and 3.5).

51. European Law Institute (2016, pp. 8-9).

52. Regulatory Fitness and Performance Programme.

53. European Parliament (2016, comment 16).

54. See the document approved by the Council working group with the "basic principles and political guidelines for future work" [Council of the European Union (2016, p. 2)]. The European Economic and Social Committee also considers that "the rules on sales of digital content [are] the priority" [see European Economic and Social Committee (2016, conclusions and recommendations no. 1.10)].

applications, movies, music, cloud storage, software, etc., is faulty or because they find themselves unable to access it.⁵⁵ Protection of consumer rights against lack of conformity of digital content has not to date been regulated either at an EU level or in most Member States. Therefore, there is a pressing need to regulate this field so as to reduce the negative fallout suffered by many European consumers.

4.1. Contracts covered: the supply of digital content in exchange for a price or for personal data

The Digital Content Directive covers contracts for the supply of digital content in exchange for a price or for personal data or any other data actively provided by the consumer (Art. 3 DCD). Unlike the Online Sales Directive, the Digital Content Directive does not limit its scope of application to distance contracts. Its purpose, as set forth in the recitals, is to avoid legal fragmentation between different distribution channels.⁵⁶

4.1.1. What kind of digital content is included within the scope of the DCD?

The Directive introduces a broad definition of “digital content” that is wider in scope than the one employed under the prior Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights⁵⁷ (the “Consumer Rights Directive 2011/83/EU” or “CRD”). The purpose is to make the regulation technologically neutral and resistant to the passage of time, and ensure it effectively covers the rapid technological developments of the sector.⁵⁸

In particular, the Digital Content Directive applies to contracts in which the supplier agrees to provide the consumer with “data which is produced and supplied in digital form, for example video, audio, applications, digital

games and any other software” [Art. 2.1.a) DCD]. This is the case regardless of the medium used for its transmission, whether in durable form, for example DVDs and CDs, or by any other means, such as downloading the digital content by consumers on their devices, web-streaming, etc., and irrespective of the way the content has been developed, including digital content developed by the supplier according to the consumer’s specifications (Art. 3.2 DCD).⁵⁹

But it also applies when the supplier supplies “digital services” to the consumer.⁶⁰ In particular this includes services such as cloud computing that allow consumers “[...] the creation, processing or storage of data in digital form, where such data is provided by the consumer” [Art. 2.1.b) DCD]; and access to the use of social media platforms that allow consumers “[...] sharing of and any other interaction with data in digital form provided by other users of the service” [Art. 2.1.c) DCD].⁶¹

Contracts within the scope of the Digital Content Directive will be governed by its terms regardless of how the contract is classified under domestic law; thus a sale or licensing agreement, a rental and a service contract will be treated alike.⁶² Nevertheless, the classification of the contract under national law continues to be relevant to those aspects of the contractual relationship not harmonised by the Directive, “such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract”.

4.1.2. Consideration: in exchange for a price or for personal data

One of the main features of the Digital Content Directive is that its regulation does not only apply to contracts where the supplier supplies digital content in exchange for a price, but also to those agreements in which the counter-performance consists of personal data or any other data

55. Explanatory Memorandum DCD, p. 3. See also H. Beale (2016, p. 6).

56. Recital 12 DCD.

57. 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. Visit: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0083&qid=1472750441674&from=EN>>.

58. Recital 11 DCD.

59. For instance, “tailor-made software” or “the supply of visual modelling files required in the context of 3D printing”, although “the goods produced with the use of 3D printing technology” are not covered (recital 16 DCD).

60. H. Beale (2016, p. 11).

61. V. Mak (2016, p. 8).

62. Art. 3.9 DCD. In this vein, see M. E. Storme (2016, p. 5) and S. Cámara Lapuente (2016b, pp. 16-17).

(Art. 3.1 DCD).⁶³ By doing so, the Digital Content Directive takes into account that in the contemporary market, information about individuals has “a value comparable to money”.⁶⁴ However, the Directive does not apply if the data collected is “strictly necessary for the performance of the contract or for meeting legal requirements” (Art. 3.4 DCD).

In particular, the Directive only applies where the personal data is actively provided by the consumer, such as his or her name, e-mail, address or photos when registering on the supplier's website. However, the Directive does not cover cases in which the supplier collects information about the consumer without him or her actively supplying it, for example by means of cookies.⁶⁵

This exclusion is a highly questionable omission. The European Law Institute Statement on the proposal has pointed out that the consumer should also enjoy protection under the Directive when “data are produced through active use of a digital product but transferred automatically and without any further action on the part of the consumer”; and “more importantly, [...] where the information is collected by means of a cookie”.⁶⁶

4.2. Current EU and national legislation on contracts for the supply of digital content

The Digital Content Directive will create a single fully harmonised set of rules providing the same level of

consumer protection across the European Union (Art. 4 DCD). In particular, it will fully harmonise the rules on the conformity of the digital content with the contract, the remedies available to consumers for lack of conformity and the modalities for the exercise of these remedies. Besides, the Directive will also regulate some aspects concerning the right to terminate long-term contracts, as well as modification of the digital content (Art. 1 DCD).⁶⁷

Currently, businesses and consumers alike suffer uncertainty about their contractual rights when they want to export to or buy in other Member States.⁶⁸ As I mentioned before, at the EU level there are no specific rules that protect consumers against the lack of conformity of digital content.⁶⁹ In 2011, the Consumer Rights Directive 2011/83/EU fully harmonised some rules regarding contracts for the supply of digital content, but those rules focused on other issues, in particular on providing some special rules regarding the pre-contractual information that the trader is obliged to provide the consumer and some particular details about the right of withdrawal.⁷⁰ Besides, even though the Consumer Sales Directive 1999/44/EC is currently applicable to the sale of digital content offered on a durable medium such as DVDs and CDs, this Directive does not provide specific rules for intangible digital content and does not include rules that take into consideration the specific features of digital content.⁷¹

To date, at the national level only two Member States, the UK⁷² and the Netherlands⁷³ have got around to adopting

63. In this point, the proposal incorporates the amendment adopted by the European Parliament in the first reading concerning the CESL.

64. Recital 14 DCD. It adds that “introducing differentiation depending on the nature of the counter-performance would discriminate between different business models; it would provide an unjustified incentive for business to move towards offering digital content against data”.

65. Recital 14 DCD.

66. European Law Institute (2016, pp. 15-16). In the same vein, V. Mak (2016, p. 9) and S. Cámara Lapuente (2016b, pp. 21-26).

67. The main issues raised by the Digital Content Directive rules on conformity and the remedies for lack of conformity will be analysed in the second part of this article, which will be published in the next issue of this journal.

68. Explanatory Memorandum DCD, p. 3. See also H. Beale (2016, p. 7).

69. R. Manko (2015, p. 11).

70. In particular, the Consumer Rights Directive 2011/83/EU contains special rules regarding the pre-contractual information that the trader shall provide to the consumer. He or she has the duty to inform the consumer about the functionality and the interoperability of the digital content with the hardware and software [Arts. 5.1.g) and h), 5.2, 6.1. r) and s) and 6.2) CRD]. On the other hand, when the contract for supply of digital content is a distance contract or an off-premises contract, the Directive recognises the consumer's right of withdrawal unless certain circumstances exist [Art. 16.m) CRD].

71. In order to avoid overlap with the Consumer Sales Directive 1999/44/EC, the Digital Content Directive will amend Art. 1.2.b) CSD by introducing a new exception into the concept of consumer goods: “a durable medium incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer [...]”.

72. Chapter 3 of the UK Consumer Rights Act 2015 (Sections 33 to 77) is especially devoted to contracts for the supply of digital content.

73. Regarding the Dutch regulation on the supply of digital content, see R. Manko (2016, pp. 1-3), according to which an “amendment to the Civil Code [was] enacted in March 2014 [that] made the rules on consumer sale (with exceptions) explicitly applicable to such contracts [...] As from June 2015, another amendment of the Civil Code excluded from the scope of consumer sales those contracts under which

specific legislation on digital content. In the other Member States there are as yet no specific rules on this matter. Many apply the same set of rules developed for other kinds of products and services. In particular, they usually apply sales of goods legislation to digital content supplied on a durable medium and rules on services if the digital content is downloaded from the internet or is web streamed.⁷⁴ Finally, in other Member States it is unclear which regulation applies to digital content.⁷⁵

4.3. The Digital Content Directive fills the current legal gap at the EU level

As a conclusion it is fair to say that the Digital Content Directive will fill the existing legal lacunae in the consumer *acquis* at the EU level concerning certain aspects of contracts for the supply of digital content.⁷⁶ If the Digital Content Directive is approved, both business and consumers will be able “to rely on fully harmonised rules for the supply of digital content setting out Union-wide contractual rights which are essential for this type of transactions”.⁷⁷ This in turn will increase both business certainty and consumer confidence when purchasing and selling digital content.

Moreover, the new legal regulation under the Directive looks likely to achieve its objective of reducing the legal fragmentation caused by the different national rules that currently apply to contracts for the supply of digital content. More importantly, it would also prevent further legal fragmentation in the future “that otherwise would arise from new national legislations regulating specifically digital content”.⁷⁸

4.4. The problem of embedded digital content: which rules should apply?

Nevertheless, a question arises that is not adequately addressed by the Digital Content Directive. Namely, which rules should apply to embedded digital content? The Directive does not apply to what are called “smart goods”, that is, smartphones, smart TVs, sat navs or connected cars, because in these cases the digital content 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” (recital 11 DCD). Instead, “smart goods” fall under the Online Sales Directive.

Pursuant to the legislation drafted in the proposed Directives, the conformity of embedded digital content should be assessed under the rules governing tangible goods. For instance, if a consumer buys a sat nav which has road maps pre-installed, the conformity of these maps will not be assessed under the Digital Content Directive but rather by the Online Sales Directive.

It has been suggested that the solution offered by the proposal in relation to embedded digital content should be reconsidered because it does not take into account the fact that the latest smart goods effectively bring together not only features of tangible goods but also of digital content.⁷⁹ However, the conformity rules on sale of goods do not take into consideration the specific features of digital content. One solution proposed by the European Law Institute Statement on the Digital Content Directive is to apply the rules of the Online Sales Directive to hardware while the associated software comes under the Digital Content Directive.⁸⁰

the digital content is not individualised and controlled by the consumer. Effectively, therefore, contracts for the streaming of digital content are not treated as sales contracts, but are rather treated as contracts for the provision of services”. Regarding this last amendment, see the Dutch Act of June 4, 2015 amending Books 6 and 7 of the Dutch Civil Code (<<https://zoek.officielebekendmakingen.nl/stb-2015-220.html>>).

74. H. Beale (2016, p. 6).

75. R. Manko (2016, p. 2).

76. Explanatory Memorandum DCD. See also R. Manko (2015, p. 11). Regarding Spanish law, see S. Cámara Lapuente (2016a, pp. 211-269).

77. Recital 5 DCD.

78. Recital 6 DCD.

79. C. Wendehorst (2016, p. 7).

80. The European Law Institute (2016, pp. 11-12) proposal is “to apply both the OSD and the DCD to the sale of goods with embedded digital content, with the conformity criteria of the OSD applying to the hardware, and the conformity criteria of the DCD applying to the software, plus a clause clarifying that any non-conformity of the digital content automatically also means non-conformity of the goods. This is the solution adopted by Section 16 of the UK Consumer Rights Act 2015”. A similar point has been raised by the Council of the European Union (2016, p. 8).

5. Conclusions

The main findings of the first part of this article are the following:

- a) There are serious questions as to whether the new approach taken by the Commission in the proposed directives will effectively remove legal uncertainty for both traders and consumers. The reason is their narrow scope of application, dealing only with B2C contracts, and the limited number of issues covered.
- b) The Online Sales Directive introduces some improvements and clarifications into the Consumer Sales Directive that will either increase or maintain the current level of protection in most Member States. Nevertheless, in some Member States the Online Sales Directive will undoubtedly lead to a reduction in the existing level of protection. The new elements and clarifications set to be introduced under the Online Sales Directive will be analysed in the second part of this article, which will be published in the next issue of this journal.
- c) It can be argued that if the Online Sales Directive comes into force, it will fail to achieve its objective of reducing the legal complexity of consumer sales in Europe. On the contrary, it will contribute to increasing the degree of legal fragmentation. Consumers will end up having different rights depending on whether they buy goods online or offline. However, this differentiation lacks any justification and thus online and offline sales should be dealt with coherently and treated equally.
- d) The Digital Content Directive will address the existing legal lacunae at the EU level concerning the protection of consumer rights against lack of conformity of digital content. This in turn will increase both business certainty and consumer confidence when purchasing and selling digital content.
- e) Moreover, the Digital Content Directive would attain its objective to decrease the legal fragmentation caused by the different national rules that currently apply to contracts for the supply of digital content. The main issues raised by the Digital Content Directive rules on conformity and the remedies for lack of conformity will be analysed in the second part of this article, which will be published in the next issue of this journal.
- f) Nevertheless, there is a question that is not well settled in the Digital Content Directive. Namely, which rules should apply to embedded digital content? The solution offered by the proposal should be reconsidered, because it does not take into account the fact that the latest smart goods effectively bring together not only features of tangible goods but also of digital content. One solution could be to apply the rules of the Online Sales Directive to the hardware while the associated software comes under the Digital Content Directive.

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About the author

Rosa Milà Rafel
 rosa.mila@uclm.es

Juan de la Cierva-Incorporación Researcher
 Civil Law and Private International Law Department
 Universidad de Castilla-La Mancha

Facultad de Ciencias Jurídicas y Sociales de Toledo
 Cobertizo de San Pedro Mártir, s/n
 45071 Toledo

