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Citation

Hoekstra, Johanna and Diker Vanberg, Aysem. 2019. The proposed directive for the supply of digital content: is it fit for purpose? *International Review of Law, Computers & Technology*, 33(1), pp. 100-117. ISSN 1360-0869 [Article]

Persistent URL

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A critical analysis of the Directive for the Supply of Digital Content: Fit for Purpose?

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Keywords: digital content, digital services, harmonisation of contract law, Digital Single Market Strategy, Consumer Acquis

Abstract

In December 2015, the European Commission proposed a new Directive for the Supply of Digital Content. This Directive was presented along with a second proposed Directive on Online and Distant Sale of Goods. These proposed Directives form part of the European Union Digital Single Market Strategy. This paper critically examines the Directive for the Supply of Digital Content to establish whether it fits the purposes for which it is drafted and whether it fits the goals of the Digital Single Market Strategy.

It is submitted that although the Directive is presented as part of the Digital Single Market Strategy and as an instrument to fill a gap in the Consumer Acquis, it is mainly concerned with harmonising contract law and it is driven by the Commission's previous failed attempts to harmonise Contract law. The paper also highlights that in its current form due to some of its requirements on businesses the proposed Directive may lead to negative consequences for consumers. The paper argues that the Directive and some of its provisions needs to be revisited.

Part 1 Introduction

1.1 Introductory Remarks

In December 2015, the European Commission proposed a new Directive for the Supply of Digital Content (COM (2015)634 final 2015/0287). This Directive was presented along with a second proposed Directive on Online and Distant Sale of Goods (OSD).¹ These proposed Directives form part of the European Union Digital Single Market Strategy (DSMS). They are meant to encourage consumers to engage in cross-border transactions and to enhance consumer protection in the EU. In the proposal the European Commission (EC) states that the absence of harmonised legislation is a barrier to cross-border trade for both consumers and for merchants, especially for Small and Medium Enterprises (SMEs) (EC 2015b). The general purpose of the Directive for the Supply of Digital Content (DCD) is: 'to contribute to faster growth of the Digital Single Market, to the benefit of both consumers and businesses' (EC 2015b, 2).

1.2 Purpose of paper, hypothesis, and outline

This paper critically examines the Digital Content Directive.² The main question it seeks to answer is whether the DCD fits the purposes for which it is drafted. The paper argues that although the DCD is presented as part of the DSMS and is part of the consumer protection framework, its primary goal is to contribute to the further harmonisation of contract law in the EU. This harmonisation is one of the ambitions of the European Commission and European Parliament but success in this area has been limited, mainly for political reasons (Lehmann 2016). Despite this ambition the Directive might not lead to further harmonisation because of its narrow scope and because it diffuses the European contract law landscape further. The paper also finds that the Directive might lead to some disadvantageous consequences for consumers contrary to its purpose as part of the consumer Acquis.

This introductory part of the paper gives an overview of the DCD and its development. The second part of the paper explores the DSMS and whether the Directive fits into this. The

¹ An amended proposal from the EC in October 2017 means that the Online Sales Directive would be applicable to all sales, including offline sales.

² This article was written before the future relationship between the European Union and the United Kingdom received any clarity. It can be assumed that the proposed Directives will not be transposed as the UK will have no obligation to do so by the time the legislation passes. However, for now no real assumptions can be made on this subject.

third part analyses the harmonisation of contract law in the EU and the role the DCD plays in this. The final part concludes on how well the Directive fulfils these purposes and whether it requires any revisions.

1.3 Directive – Content and Background

The premise of the EC is that the existence of different national laws deters consumers and SMEs from trading abroad because they lack clarity and certainty in understanding which rules would be applicable to the contract (Rafel 2016). The Directive should help eliminate this uncertainty for the supply of digital content. 39 % of businesses that sell online but do not sell cross-border mention diverging contract laws as one of the obstacles preventing them from doing so and the one-off costs of divergence in contract law for traders is estimated at EURO 4 billion (EU Commission 2015a, 2).

Four current EU Directives are concerned with consumer digital content contracts: The Consumer Sales Directive, the Consumer Rights Directive, the Unfair Terms in Consumer Contracts Directive, and the E-commerce Directive. None of these instruments were designed specifically to cover digital content. Most member states do not have any specific legislation on the sale of digital content (Rafel 2016). The Consumer Rights Directive 2011/83/EU does contain some rules that are applicable to digital content such as the need to provide pre-contractual information regarding the specifics of the content. There is thus a perceived legal gap. In that sense the Directive has been welcomed by Member States, far more than the OSD on which subject there is already extensive national legislation (Beale 2016).

The Directive is applicable to both domestic and international contracts where the consumer resides in one of the EU Member States. It is only applicable to Business to Consumer contracts (B2C). The DCD applies to online and offline contracts. Digital content is defined as: computer programs and mobile applications, and cultural and entertainment goods in digital form. Digital services including, cloud computing services or social media platforms could also be covered but the exact limitations are not yet clear (Manko 2018). Content is therefore defined in a broad manner and would cut across different types of contracts (goods, services, lease). The content can be provided in digital form (like streaming) but also on physical means (like a DVD). It is however the content which is covered by the Directive and not the physical object itself. Furthermore, contracts where

'the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer' are excluded (article 1(3) of the proposal.) This type of sale is covered by the proposed Online Sales Directive, national law, and the existing Consumer Sales Directive 1999/44/EC. Contracts that do not involve human agency are excluded. An example of this would be a fridge that orders groceries if it is empty. In defining digital content, the EC tries to be as extensive as possible to ensure that the Directive remains relevant in light of likely future technological developments (Weber 2017, 1782). The DCD does not apply to 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' (Recital 11). An example of this is satellite navigation. Gambling, health service, and financial service contracts are excluded on public policy grounds (Article 3(5)d). Given that the Directive is only a proposal so far it is likely that there will be some changes as to the specific content that falls under the DCD.

The consumer should provide consideration for the contract. This can be a monetary compensation or can be in the form of the provision of personal data (article 3 (1)). The Directive is not applicable to contracts where the consumer provides no consideration at all. The EC thus recognises that personal data can be a valuable commodity. Exempted from this are contracts where the data is not actively provided by the consumer (but instead mined through the use of cookies for instance), data that the consumer needs to provide to access the content or that is legally required, and data that is needed to improve the service. This could include name, email, IP address etc. This distinction leads to less protection for the consumer who passively provided data, as he will not fall under the DCD (Rafel 2016). It is interesting to note that the proposal thus requires that consideration is always provided in a contract. In that it follows the common law tradition rather than the civil law tradition where consideration is not necessarily required for a contract to be enforceable. It also means that most social media platforms will not be covered by the DCD because they only request data needed to access the service and not in exchange for the service.

The Commission received 189 responses during the public consultation it held with regards to the DCD (Manko 2018). Points raised included the need for equal or better consumer protection than in contracts for tangible goods, general contract law already covering the supply of digital content and therefore the Directive not being necessary, the DCD offering

less protection than some national legislations, and the Directive not being properly coordinated with the accompanying proposed Online Sales Directive (Manko 2018).

The Council adopted its position and issued a general approach in June 2017. In November 2017 the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection issued a report on the DCD. Both of these reports suggested several amendments. These include: the DCD should cover not just digital content but also digital services (which includes cloud storage, file sharing etc.) and specific performance should be the primary remedy for both non-conformity and non-delivery. The Council proposes in its position that the DCD should apply to all contracts where personal data is provided, whether that is passively or actively to avoid a distinction in consumer protection.

Trilogue meetings began in December 2017. Several meetings were held throughout early 2018. In June 2018 a communication was emitted that meetings were ongoing, but some stumbling blocks remain (The Council of the European Union 2018). The main issue is that of embedded digital content: the European Parliament favours the application of the DCD to embedded digital content whilst the Council wants the OSD to be applicable. This is compounded by the difficulties in negotiations on the OSD which have not advanced substantially. Once an agreed text is reached the proposal will be submitted to the plenary for approval.

Part 2 Digital Single Market Strategy and the Proposed Directive

2.1 DSM Strategy – overview and purposes

Initially, the aim of the European Union was to encourage trade between Member States by removing barriers to cross-border trade and by encouraging free movement of goods, services, people, and capital. According to the EU, one area where barriers to trade continue to exist is the online sphere, in which consumers and businesses are missing out on the benefits of the digital economy due to these perceived barriers. (EU Commission 2015a, 3). To resolve this, the EU decided to complete the Digital Single Market. The Digital Single market is a market in which the free movement of persons, services, and capital is ensured and where the individuals can access and engage in online activities under conditions of fair competition as well as enjoy a high level of personal data protection (EU Commission 2017). The DSM is part of the Digital Agenda for Europe 2020 proposed strategy. This covers several areas including digital marketing, e-commerce, and telecommunications. The DSMS

is crucial in making the EU a successful player in the emerging Data Economy. The EU has been rather slow to take advantage of the opportunities presented by the data economy, as only some 4 per cent of global data is stored in the EU (European Commission 2018, 2). According to the Commission, the value of the European data economy has the potential to top EUR 700 billion by 2020, which is 4 per cent of the EU Economy (European Commission 2018, 2). Removing the DSM barriers within the EU could contribute an additional EUR 415 billion to European Gross Domestic Product (EU Commission 2015a,3). In order to tackle the perceived barriers to trade in online environments, on 6 May 2015, the DSM Strategy was introduced (EU Commission 2015a).

The three pillars of the DSMS comprise enhancing access to online products and services for consumers and businesses, creating the necessary environment for digital network and services to grow and to support the growth of the European digital economy (European Commission 2015a). Amongst others the DSM strategy includes reforming European copyright law, harmonising contract law provisions pertaining to e-commerce, reviewing rules for audio visual media, geo blocking, cross-border sales and online platforms, reforming EU telecoms rules, digital services, handling of personal data and building a secure data driven economy. To achieve the objectives of the DSM Strategy the Commission has presented a set of legislative proposals including the DCD. As noted above, the DCD is currently being discussed by the co-legislator, the European Parliament and the Council, whilst the proposals on mobile roaming and portability of online content services have already been adopted in early 2018 (EU Commission 2017, 3). The General Data Protection Regulation which is also a crucial part of the DSMS became directly applicable to all member states on 25 May 2018.

On 10 May 2017, the European Commission published a mid-review of the Digital Single Market Strategy, which evaluated the progress and the implementation of the Digital Single Market Strategy so far (EU Commission 2017). In this document the Commission outlined three key areas where further action is needed, namely data economy, cyber security, and online platforms.

2.2 Key Provisions of the Directive and potential negative consequences

As discussed in part 3, the proposed directive is in line with the efforts of the Commission to harmonise contract law in the EU. However, the Directive is part of the consumer protection

framework. Substantively, the proposed Directive might have some unintended negative consequences for consumers.

Some of the key provisions of the proposed Directive include remedies available to consumers, reversal of burden of proof, and right to end a contract. Below, these provisions of the DCD and possible adverse consequences for the consumers and businesses will be examined further.

2.2.1 Remedies available to consumers

Article 12 of the DCD consists of the remedies available to consumers in case of any failure to supply or lack of conformity of the digital content. If the product supplied does not conform to the contract, the supplier³ has to bring the digital content in line with the contractual requirements. This can be done by the supplier providing an update of the content, or by asking the consumer to access/download a new copy of the digital content. The primary remedy is thus specific performance.

The initial proposal by the Commission suggested that there will not be a time limit to the supplier's liability for such defects, because, unlike tangible goods, digital content is not subject to 'wear and tear.' Nevertheless, in November 2017, the European Parliament proposed that, time limits should be introduced regarding supplier's liability for defects. At first glance the lack of a time limit to supplier's liability seems very advantageous for consumers. However, this relatively burdensome requirement for the trader could increase the cost of doing business for suppliers of digital content. In other words, contrary to the initial intention, the proposed directive could reduce the consumer's access to digital content as the suppliers will account for the risk of potential litigation by increasing the price for the supply of digital content. Arguably the introduction of time limits is a sensible development for maintaining competitiveness for businesses and it must be ensured that any time limits introduced in the final version are reasonable to avoid a strong adverse impact on the pricing of digital content.

2.2.2 Reversal of burden of proof

Article 9 of the DCD states that, if the digital content is defective, it will be the supplier's responsibility to prove that the defect did not exist at the time of supply. This is important

³ Throughout this article the term "supplier" has been used interchangeably with the terms 'provider' and 'trader' to refer to providers of digital content and services.

because the technical nature of digital content means that it can be difficult for consumers to prove the cause of a problem. Yet, the reverse is true as well. Software companies have criticised this approach on the basis that it will be almost impossible for them to prove that their products were not defective (McLean and Ehle 2016, 3). The functioning of software depends on the hardware, operating system and other software used on the consumer's systems; each of the interfaces to those systems or the incorrect use of the software may be responsible for an issue. In other words, with some digital content it might be very difficult to find the party responsible for the defect. Whilst this provision would indeed be beneficial for consumers, as already has been put forward by software companies, this might put providers operating in Europe at significant disadvantage.

2.2.3 Right to end a contract

Pursuant to Article 16 of the DCD, if the supplier makes major changes to terms and conditions of the contract, consumers have the right to terminate long-term contracts. These are contracts concluded for an indeterminate duration or for a duration longer than 12 months. This can also lead to unintended consequences such as increased cost of digital content and services, as the providers might want to account for the cost of losing customers prematurely. It should be made clearer in the Directive what constitutes major changes. This would give additional certainty to both consumers and suppliers.

2.3 Does the Directive fit in with the DSMS?

As noted above the DSMS aims to achieve three goals, namely to enhance access to online products and services for consumers and businesses, create the necessary environment for digital network and services to grow, and to support the growth of the European digital economy (European Commission, 2015a).

In this respect arguably, the main contribution of the proposed Directive will be in relation to enhancing access to online products and services, particularly for consumers. On one hand it can be argued that the proposed Directive fits well with the DMS Strategy by enhancing the access of consumers to digital content and digital services and by improving conditions for consumers. However, the DCD may not be well suited to meeting the latter goals, namely creating the necessary environment for digital network and services to grow and supporting the growth of European digital economy. As discussed, the burdensome nature of the above-mentioned provisions of the DCD might discourage businesses from

creating new digital content and services for the European market and this in return might adversely affect the growth of the European digital economy.

As noted above, the DCD is part of the DSMS. It mainly seeks to enhance access to online products and services for consumers. Nevertheless, as it currently stands, it can create an undue burden on providers and the wide and ambiguous scope of the DCD could stifle innovation, reduce the number of traders and as a result potentially harm the European digital economy in the long run. This concern has been already put forward by several associations representing traders such as EDiMA, the European association representing European and global online platforms and innovative technology companies operating in the EU (Edima, 2017).

Hence, the DCD needs to be amended to ensure that it does not create an undue burden on providers, which can create unintended adverse consequences for consumers in the long run and negatively affect the environment for digital content providers and the growth of the digital economy.

Part 3 the Directive and the Harmonisation of Contract Law

3.1 Attempting to Harmonise Contract Law

With the proposed Directives on Digital Content and Online Sales of Goods the EU infringes further on contract law than it has before (Lehmann 2016). There is an undercurrent within both the EU Parliament and the EC that is seeking to harmonise contract law further because it is seen as necessary to complete the Single Market, but not much progress has been made due to lack of political will from Member States (Collins 2008). However, through consumer protection mechanisms the EU has influenced and shaped consumer contract law. With the DCD the EU continues operating within the framework of consumer protection whilst pushing further towards a contract law-oriented approach.

General contract law is regulated by the Member States. Apart from the aforementioned Directives on consumer protection which regulate some parts of consumer contracts there is no substantive legislation at EU level. The harmonisation of contract law is seen as beneficial for the Single Market as it would encourage cross-border trade and therefore further economic growth (Elod Cserep 2017).

The main developments in the harmonisation of contract law in Europe have taken place outside the context of the EU institutions. In the 1980s the Principles of European Contract Law (PECL) were developed by the Commission on European Contract Law (commonly referred to as the Lando Commission after its president Professor Ole Lando) with the aim to enunciate the rules of contract law which are common to European states. This Commission was a private initiative. The work was done independently of the EU institutions although the EC showed interest during the project, especially in the initial stages (Lando 1998, 819). The PECL were published between 1995 and 2003.⁴ The aim of the PECL is to enunciate common contract law principles across the EU and to create rules that could someday replace contract law in the Member States (Oser 2008, 3).

They are a restatement of law, like the UNIDROIT Principles of International Commercial Contracts. The PECL have five functions according to their pre-ample. First of all, they can be used as the choice of law in a contract, secondly, they can be used by the courts to interpret contracts, thirdly they can be used as a basis for the harmonisation of European contract law, fourthly they represent a modern formulation of the *lex mercatoria*, and finally they are a foundation for European legislation (Smits 2007, 233). It is especially in this last function that the PECL are used. The practical applicability of the PECL has been limited for several reasons. The Lando Commission no longer exists which means that there is no structural framework to update the PECL, although an independent working group has published some revisions.⁵ Another is that the PECL have become a basis for further projects in European legal harmonisation and have been absorbed by these in a way (Bonell 2008, 11/12).

In 2001 the EC issued a communication on European contract law (Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final). The goal of this communication was to understand whether the piecemeal approach that the EU has taken towards contract law issues was sufficient or whether more comprehensive legislation is needed to facilitate economic growth. It proposed the following ideas: (1) leaving the solution to the market, (2) the development of nonbinding rules, (3) the review and improvement of existing legislation in contract law, (4) or the

⁴ Part I, dealing with performance, non-performance and remedies, was published in 1995. A revised version of Part I alongside Part II was published in 1998. Part III deals with issues of assignment, assumption, statutes of limitation, procedural issues, capitalisation of interest and the effects of illegality and was published in 2003. Part III is published separately whereas Part I and II are integrated into one document.

⁵ *Principes Contractuels Communs – Projet de Cadre Commun de Référence* (Association Henri Capitant des Amis de la Culture Juridique Française & Société de Législation Comparé, 2008).

adoption of a new instrument at EU level. The Commission received over 181 responses to this consultation and none of these indicated that the sectoral piecemeal approach was problematic. Nonetheless the majority of the responses favoured further cohesion of European contract law, although in majoritarian not through the creation of a new instrument (EC 2003, 4).

Following from this consultation the EC published an action plan entitled 'a more coherent contract law' in 2003. The Action Plan suggested the following: increasing the coherence of the Acquis in the area of contract law, promoting the elaboration of a EU wide contract terminology, and a further examination of whether there is a need for non-sector specific contract law solutions, which could take the form of an optional instrument. One of the ideas that came from this Action Plan was the creation of a Common Frame of Reference (CFR). In 2004 the EC published a follow-up communication entitled '*the Way Forward*' on the CFR. The CFR has the following goals: first, to provide for best solutions in terms of common terminology, rules; and definitions, with contractual freedom being the guiding principle; second, to achieve a higher degree of convergence between the contract laws of EU Member States and third-party countries; and third, to help the Commission judge whether non-sector-specific measures such as an optional instrument would be needed (EC 2004).

The Research Group on EC Private Law (Acquis Group) researched and published the Principles of Existing EC Contract Law (Acquis Principles) as a preliminary to the Draft Common Frame of Reference (DCFR).⁶ The Study Group on a European Civil Code and the Acquis Group developed the DCFR on this basis and published this in 2009. Like the Lando Commission, these are private groups consisting of individuals who were neither appointed by their governments nor by the EU institutions. The DCFR lays the groundwork for the CFR. It consists of rules and principles common to the Member States.

The scope of the DCFR is much wider than merely regulating contract law as it is meant as a basis for an eventual European civil code, something that the EU Parliament has contemplated on several occasions.⁷ If a European Civil Code is not feasible the DCFR is a guide for legislators and courts and could serve as a basis for (optional) contract law instruments (Howell 2011, 176).

⁶ <http://www.acquis-group.org/>

⁷ For instance in 1994 (see: O.J. C 205 February 4, 1994, at 518 (Resolution A3-0329/94 on the harmonization of certain sectors of the private law of Member States))

In 2010, the EC published another communication, *Europe 2020 - A Strategy for Smart, Sustainable and Inclusive Growth*, which discussed that the current lack of contract law harmonisation harms the growth of cross-border trade and thus the Single Market. Especially SMEs are reluctant to engage in cross-border trade because of legal uncertainty. This was followed by the publication of the Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses (2010). This Paper advocated creating an optional contract law instrument. This would satisfy the subsidiarity and proportionality principles of EU law and contribute to furthering legal certainty. The EC also set up an expert group to conduct a feasibility study on whether the CFR should be drafted (EC 2011).

The CFR was not taken forward and this study accumulated in the proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (CESL) in 2011. CESL was meant for B2C contracts and for Business to Business (B2B) contracts if at least one of the contracting parties is a SME. It was to be an opt-in instrument and would both protect the consumer and offer legal certainty to the trader. CESL would counter mandatory laws of the applicable law if it is included in the contract. It would fall under the jurisdiction of the European Court of Justice and would therefore be interpreted uniformly. The CESL had strong support from the European Parliament, but the backing from the business community, consumer organisations, and national parliaments was weaker.⁸

In 2014, the EC presented its Work Programme for 2015 and withdrew the proposal for the CESL. The Commission stated that the reason for withdrawal is the modification of the proposal in a new instrument on e-commerce. However, the less than enthusiastic responses from national governments and business interest groups and the lack of approval from the European Council played an important part (Van Schagen 2012, Norris 2016). This decision should not cause too much regret. The project would have diffused the international commercial law landscape further by adding another instrument.

⁸ For some news articles on this issue see:

Common European Sales Law faces rocky reception

<http://www.euractiv.com/sections/innovation-enterprise/common-european-sales-law-faces-rocky-reception-301090>

The Common European Sales Law – advantage or trap for consumers?

<http://www.consumatoridirittimercato.it/diritti-e-giustizia/the-common-european-sales-law-advantage-or-trap-for-consumers/>

EU sales law is against the interest of consumers and online traders

<http://www.euractiv.com/health/meps-opportunity-opt-optional-co-analysis-533757>

ICC Position on the EC Proposal for Common European Sales Law: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Position-on-the-EC-proposal-for-a-Common-European-Sales-Law/>

Furthermore, CESL would only be applicable to a small number of contracts. The opt-in character of the instrument likely would have meant that it would not be used frequently. Therefore, the project would not have provided substantial additional legal certainty for traders and consumers. The EU already has an almost harmonised law for B2B international sale of goods in the form of the Convention for the International Sale of Goods (CISG). The CISG has been ratified by 25 of the EU Member States (the UK, Portugal, and Malta being the exceptions). Furthermore, the CISG is often excluded by the parties because of a preference for the known quantity of national law (Schwenzer and Hachem 2009, 463). If this is already the case for an opt-out instrument, chances are that an opt-in instrument would have been largely ignored by the business world. If the EU wants to support an opt-in instrument it could promote the UNIDROIT Principles of International Commercial Contracts. Not only is this a global instrument (and thus contributes further to global legal harmonisation), but it also applies to all contracts and not just international sale contracts. The UNIDROIT Principles were designed for commercial contracts but could be promoted in conjunction with the PECL which are applicable to B2C contracts as well as B2B contracts.

In June 2015 the European Commission began a public consultation for the development of this new electronic commerce instrument which cumulated into a proposal for two new directives on ecommerce in December 2015.⁹ These are the proposed Digital Content Directive and the proposed Directive on the Online Sale of Goods. The subjects of these Directives were also at the core of the CESL.

Thus, what started out as a more ambitious project on the harmonisation of contract law is finding its first concrete outcome in two Directives covering some aspects of consumer contracts in relation to ecommerce. This is a continuation of the piecemeal approach to harmonising consumer contract law the EU has followed so far. From the above it is clear that the EC and the EU Parliament would wish to develop a more comprehensive framework, but due to the lack of political will among the Member States and other stakeholders this is not (yet) feasible. Nevertheless, with these Directives the EU furthers its presence in the area of contract law.

3.2 Substantive Harmonisation and the DCD

⁹ 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

If the goal is to further the harmonisation of contract law, it should be asked whether the DCD leads to this. The existing Directives that regulate consumer law are not fully harmonised substantively, both in terms of principles and concrete rules (European Commission 2001). This is partly because these are minimum harmonisation Directives. Member States can introduce more extensive legislation as long as it meets the minimum criteria laid out by the Directive.

The DCD aims for maximum harmonisation (Manko 2018,2). Maximum harmonisation creates a level-playing field between businesses, but it also prevents states from introducing measures that offer additional protection to consumers. The Revised Consumer Rights Directive (2008) was intended as a maximum harmonisation instrument, but as there was no political will among the Member States for this the EC decided to significantly reduce the scope (Beale 2016,6). The Consumer Sales Directive is also a minimum harmonisation instrument. This has allowed the UK to retain the right of consumers to reject non-conforming goods despite the preference of the Consumer Sales Directive for specific performance as a primary remedy.

The EC now opts for maximum harmonisation because it ensures legal certainty for cross-border businesses (European Commission 2013, Par. 4.2.2). The French Senate objected and stated that European law should not prevent national law offering a higher degree of protection and that maximum harmonisation thus does not conform to the subsidiarity requirement of European law (Sénat 2016). Although from a consumer protection viewpoint maximum harmonisation might not be advantageous it does encourage legal coherence between Member States.

There is lack of agreement on whether digital content provision is a sale or a service contract (Beale 2016). These all fall under the DCD, but the DCD does not classify these contracts either. The DCD will be applied in conjunction with national contract law for those aspects that are not covered by the legislation. At that point the classification becomes important again because depending on how the contract is classified under national law different rules could be applied (Rafel 2016). If in one jurisdiction the contract is seen as a service contract and in another jurisdiction as a sale contract this would lead to divergence in how the dispute is resolved. It would be beneficial if the proposal did classify digital

contracts as the lack of a common classification can create further divergence, especially with regards to the applicable remedies (Weber 2017).

The DCD is only applicable to B2C contracts. On online sharing platforms the distinction between trader and consumer is not as clear-cut. The position of the parties can change per transaction: whereas a party is a consumer in one transaction he is a trader in the next. It could be that both parties are seen as traders. Whether or not transactions are covered by the DCD would thus depend on the interpretation of the position of the parties. This could lead to legal uncertainty. Furthermore, those trading on these platforms are often not professional traders and thus having a more protective regime applicable to these transactions would be beneficial (Weber 2017, 1790). By having a separate regime for B2C contracts the EU continues with a piecemeal approach to contract law. Whilst politically this is understandable to truly accomplish legal harmonisation the DCD should cover all contracts, especially as the distinction between consumer and trader is not always clear in the digital economy.

There can be a discrepancy in the content of the DCD compared to national law, leading to further fragmentation. The EC proposes that the consumer has the right to terminate a contract in case of non-delivery and should be reimbursed within 14 days (Article 11). If economic damage has been caused to the consumer's digital environment, he is also entitled to claim for further damages (Article 14).

In its reaction to the Commission proposal the European Council opted that specific performance should be the primary remedy in case of non-delivery (European Council 2017). The consumer should accord a period of grace to the trader to cure. After that period the consumer can terminate the contract. These are different approaches to remedies. The first reflects the position of English law where the consumer now has an immediate right to terminate the contract (see the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the Consumer Rights Act 2015). The second reflects a civil law approach. Thus, there will be a divergence with the national laws of the Member States. In general, this shift towards specific performance imposes an extra burden on the consumer and introduces a strong *favor contractus* principle. For non-conformity the Proposal from the EC already states that specific performance should be the primary remedy (Article 12) (as discussed in section 2.2.).

Some of the language in the Directive is vague and thus open to interpretation by the court. This would lead to a less harmonised application of the DCD. For instance, if the supplier does not cure non-conformity after a reasonable time the consumer can terminate the contract. If the cure would cause significant inconvenience the consumer can terminate the contract immediately. If the non-conformity does not impact the main functionality of the content the consumer does not have a right to cure. A reasonable time, the main functionality, and a significant inconvenience are not further defined in the Directive.

As noted earlier, the concept of embedded digital content is another problematic issue. The proposal excludes products with embedded digital content if its functions are subordinate to the main functionalities of the product (Recital 11). This is not only vague (as it is not clear what the main functionalities are) but also potentially confusing. When are functions subordinate to the main functionalities? For many of these products the digital content forms an intrinsic part of the content, without which the product loses at least some of its functionalities and purpose. Making the distinction between when a product is covered by the Directive and when not can be difficult, especially as the views of consumers on what the main uses of a product vary (Sein 2017, 98). The proposal leads to a distinction between separately purchased content and integrated content, even if the content is exactly the same. For instance, the purchase of a separate app for a smart watch would be covered by the Directive, yet if the app is integrated in the watch it would not be (Sein 2017, 99). Some products cannot function without a specific type of digital content, but not necessarily the content they were delivered with. For instance, if a Windows laptop is bought, Windows is not vital to the functioning of the laptop. The consumer could opt to install Linux. However, the consumer needs to install some type of operating software for the laptop to function. There are also barriers to installing a different operating software as it requires some technological knowledge. So, for the average consumer the Windows operating software is vital for the functioning of the laptop. But does that mean that a laptop would fall under the Directive or only the Windows software or neither because it is embedded and subservient to the main functions of the laptop? And how could the average consumer be able to distinguish between the malfunctioning of the hardware or the software and therefore know which law is applicable?

It should not be surprising that this has become one of the main issues in the Triilogue negotiations (Council of the European Union 2018). Unless the definition in the Directive is

very clear this likely will lead to diverging interpretations by courts. Courts would interpret the Directive with regards to the European principles underlying it and according to EU precedents whereas it will interpret domestic contract law according to the principles of the forum. Therefore, in one contract courts might have to resort to different interpretation methods if the contract covers both digital content and other objects (Lehmann 2016, 765).

The different rules for digital content and other type contracts would also lead to a more complex and fragmented contract law. There would be a difference between a contract where the content was offered digitally or by other means, even if the content is the same (for instance, an ebook v a paperback). Confusion over the applicability of the Directive seems likely. Not only is there the previously discussed issue with regards to embedded content, but there could be other issues as well. For instance, the Directive excludes content that is sold exclusively via durable media like a DVD and CD. However, if the durable medium is part of a larger package (for instance, through the DVD it is possible to access further online content) the Directive would be applicable. But, what if the package consists of multiple items, including books and digital content. Would the Directive then be applicable to part of the package but not to the other items? And would a different law govern different aspects of the contract? (Lehmann 2016, 766). If the law becomes more complex legal costs will rise and thus transaction costs will rise too. This leads to further divergence as for the same product sold by the same trader different laws would be applicable depending on how the product is sold. This also runs counter to the omnichannel approach that businesses favour in their approach to sales (Weber 2017).

The Directive does not cover all aspects of contracts for the supply of digital content. The DCD is at least partly framed as a consumer protection mechanism and that is only one issue in contract law and the digital economy (Weber 2017). The contract will still be governed partly by national law provisions. The interpretation of Directives also leads to divergence, especially because of the interaction with the national legislative framework (European Commission 2001). The above shows that the DCD is likely to lead to further harmonisation of contract law because of the current absence of specific national legislation and because it is a maximum harmonisation Directive. However, the interaction with national law, lack of consensus on what a digital supply contract is, and vague language will hinder substantial legal harmonisation.

3.3 The Need of Consumers for Legal Harmonisation in Digital Content Contracts

The EU Institutions hold that consumers are deterred from ordering goods from other Member States because of the legal uncertainty that comes from national laws being different (Rafel 2016,3). Whether this is truly the case is a contentious issue as there is a lack of quantitative evidence to support this widely-carried premises. Furthermore, there are already mechanisms that protect EU consumers from legal uncertainty.

The EU offers low entry access to justice through their consumer dispute resolution mechanisms.¹⁰ The Online Dispute Resolution Mechanism offers an accessible complaints procedure for any goods purchased online (in any Member State).¹¹ For consumers it is thus not be difficult to launch a complaint if there is an issue.

Through European private international law, the consumer has a high degree of legal certainty as to the applicable law and jurisdiction. Article 6 of the Rome I Regulation states that B2C contracts shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

The parties can choose another law, but this cannot deprive the consumer of the protection of the mandatory laws of his habitual residence. The Rome I Regulation states that: 'Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country' (preamble 25).

¹⁰ Resolve your Consumer Complaint

https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint_en

¹¹ Online Dispute Resolution

<https://ec.europa.eu/consumers/odr/main/?event=main.home.show>

Professor Beale suggests that a maximum harmonisation Directive would be beneficial for traders as Article 6 of the Rome Regulation ensures certainty for the consumer, but decreases legal certainty for the trader (2016,6). The trader has to deal with the mandatory laws from all the Member States where he has customers. This could discourage SMEs from trading abroad.

The Consumer can only be sued in his own forum and he can bring proceedings in either his own forum or that of the supplier. Consumers should be protected by the jurisdiction that is the most favourable for them (Preamble 18). Article 18 of the Brussels I Regulation (recast) states that: 'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled' and 'Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.' Article 18 is not triggered by the mere fact that a website is accessible for the consumer although if a website encourages long-distance contracts this should be taken into account as a sign that the website targets foreign consumers. Therefore, the consumer is already accorded protection against the application of a foreign law or having to appear in another forum than his own. This makes the need for harmonisation less pertinent for the consumer.

Article 18 of the DCD allows for competent institutions to seek compliance with the Directive, in the same way as under the Unfair Contract Terms Directive (93/13/EEC). These include public institutions, relevant professional organisations, and consumer interest groups. This enhances consumer protection. A consumer does face barriers when bringing proceedings, in terms of energy, time, and often money. He can therefore be easily dissuaded from pressing charges if the trader proposes an acceptable compensation. Whilst this solves the problem for the individual consumer it also means that the courts do not address systematic issues and failure to comply with the legislation. By allowing for public enforcement this adds an additional layer of monitoring compliance to the DCD.

The individual consumer thus might not profit substantially from the harmonisation offered by the DCD. He is already protected through European private international law, has access to dispute resolution mechanisms, and the DCD prevents national legislations from introducing more protective measures than the Directive. However, the DCD will offer an

advantage to traders as the mandatory laws of the forum will not interfere with the Directive. This could lower transaction costs which would be advantageous for the consumer. Furthermore, for consumers as a group article 18 of the DCD could ensure that traders overall are more likely to comply with the legislation.

Part 5. Conclusion

The DCD is the newest development in a series of Directives aimed at raising consumer protection in the EU. The Proposal itself explicitly states that it aims at filling in a gap in the Consumer Acquis (and not the Contract Acquis) (European Commission 2015b). At the same time, the DCD also ensures a foothold for the EU in the domain of contract law because of the issues it regulates. The DCD came about through the CESL which was drafted as a general sales contract law instrument. Hence, the DCD (and the ODS Directive) should be seen as a way for the European Commission to further its aim of the harmonisation of contract law rather than mainly as a mechanism to protect the consumer (Lehmann 2016, 773).

The focus is on the growth of the digital single market economy: 'the purpose of these proposals is to (...) make it easier for businesses, especially SMEs, to sell cross-border' (EU Commission 2015b, 2). However, it must be noted that the DCD also has the potential to create unintended negative consequences for consumers. For instance, the maximum harmonisation aspect of the DCD ensures that Member States cannot enact better protection mechanisms. This does not enhance consumer protection but does further legal harmonisation for traders. Traders are no longer confronted with the mandatory laws of all the Member States where they do business and they can compete on a level playing field across Europe.

Furthermore, it must be noted that some rigid provisions of the DCD particularly with regards to consumer remedies, reversal of burden of proof and the right to cancel long term contracts, might discourage suppliers from supplying digital goods and the costs associated with complying with the DCD might be passed on to consumers. From this it can be observed that the EC has preferred focussing on furthering legal harmonisation rather than practical implications.

This article analysed whether the DCD meets the purposes for which it is drafted and whether it is in line with the DSMS. There are three purposes to this Directive: to further

enhance consumer protection, to advance the DSMS, and to further the harmonisation of contract law. These purposes can be contradictory. The DSMS aims to achieve three goals namely to enhance access to online products and services for consumers and businesses, create the necessary environment for digital network and services to grow, and to support the growth of the European digital economy (European Commission, 2015a). The Directive aims to enhance consumer protection, however as discussed earlier the emphasis of the Directive on consumers may potentially create a hostile environment towards businesses. This in return may mean that the DCD might run contrary to the aims of the DSMS particularly with regards to the creation of the necessary environment where online businesses may flourish and grow. The DCD will not eliminate all barriers for traders such as VAT differences, copyright issues, and infrastructure (Rafel 2016, 4). These are all costly and require investment from traders. This means that the likely effect of the DCD on the growth of the digital economy will be rather limited.

The limited scope of the two proposed Directives is partly due to the EC deciding to continue with and adapt the current legislative framework focused on consumer protection rather than build up a new legal framework with a wider contractual aim (Weber 2017, 1795). The main reason why this was not done is because it was tried with the CESL and this attempt failed. There currently is no momentum among the Member States or trade associations to push this issue further forward. Whilst a wish for the Europeanisation of contract law is present in both the European Parliament and the European Commission, political reality means that the current sector specific approach is the most viable way forward. Furthermore, a wider question where further research is needed is into whether the EU needs to intervene in contract law to stimulate economic growth

It could thus be concluded that the DCD attempts to harmonise contract law, but as it does so from a consumer protection framework it is not entirely successful at either. It is doubtful whether the consumer will be protected in a more substantial way than he is now through existing (national and European) legislation. Furthermore, the piecemeal approach the EU follows has the effect of both harmonising contract law by bringing aspects of it in the European legal framework, but also diffusing it further by making legislation that is specific to a type of contract (consumers) and for a specific product (digital content). Ensuring the different European contract law instruments function seamlessly and coherently is already

difficult as the divergence between enacted consumer Directives shows. The interaction with national and transnational law hinders legal harmonisation and coherence as well.

The EU legal framework for consumer contracts will become more complex through enactment of the DCD. The Consumer Rights Directive will be fragmented with the addition of the DCD and the OSD. There will thus be three European contractual regulatory regimes which differ on several issues such as conformity and remedies (Smits 2016, 6). It can thus be concluded that the DCD is not the ideal mechanism for substantial harmonisation of contract law.

If the proposed Directive becomes law, there might be a need to revise several provisions. First, the existing differentiation between standalone and embedded digital content is a rather artificial distinction. Hence, the directive should apply to both stand-alone and embedded digital content as proposed by the European Council. Second, in its current form DCD is only applicable to B2C contracts. Due to the blurry distinction between traders and consumers in online sharing platforms, if the intention is to achieve full harmonisation the DCD should apply to all contracts and not be limited to B2C contracts. However, this would be politically very difficult to achieve. Thirdly, the concept of personal data as consideration should be refined further to ensure that consumers enjoy equal protection under the law. Finally, the ambiguity and the lack of clarity regarding the definitions in the DCD can have a negative impact upon consumer trust and fostering a business-friendly environment as intended by the DSMS. In this respect, there is a need to make the definitions clearer, more precise, and less ambiguous. This would benefit both traders and consumers.

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