Contracts for the supply of digital content and for the online and other distance sales of goods


Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission’s Impact Assessment (IA) accompanying the above two Commission proposals (the proposals), submitted on 9 December 2015 and referred to Parliament’s Committee on Internal Market and Consumer Protection.


In its Work Programme for 2015, the Commission stated that it would be modifying the CESL proposal and the two proposals under examination are the result of that process. The 2015 Work Programme had announced that the Commission was preparing a strategy to identify and tackle the major challenges towards a digital single market, undertaking, amongst other things, to simplify the rules for consumers making online and digital purchases and to facilitate e-commerce.

The resulting strategy was published in May 2015 in a Communication entitled ‘A Digital Single Market Strategy for Europe’. One of the three pillars of the strategy is ‘better access for consumers and businesses to online goods and services across Europe’, which entails the removal of barriers to cross-border online trade. Such barriers include, amongst others, differences in contract law.

The present proposals adopt a completely different approach to that of the CESL proposal. The idea of an optional instrument existing in parallel with Member States’ laws has been abandoned, as has the intent to address comprehensively all contract law issues in cross-border contracts of sale.

The two proposals seek to eliminate the contractual law barriers that undermine consumer confidence and hinder businesses in the supply of digital content and in the online or other distance sales of tangible goods.

1 COM(2011)635.
They form part of a bigger package of initiatives under the Digital Market Strategy covering, inter alia, such issues as copyright, portability of online content, geo-blocking, parcel delivery and VAT. These initiatives are intended by the Commission to act in synergy towards the goal of a truly integrated digital market.

**Problem definition**

The IA establishes early on that the main problem that needs tackling is essentially the unexploited potential of e-commerce within the EU, with the consequent repercussions on growth. To demonstrate this, the IA compares statistics on e-commerce in the US and the EU and compares also cross-border e-commerce within the EU with domestic e-commerce in Member States.

The IA goes on to delve in considerable depth into the detailed definition of the problem, the exploration of the problem drivers and the identification of those affected. In this investigation the IA draws on data from an extensive stakeholder consultation process conducted in preparation of the proposals and on a number of Eurobarometer surveys.

The IA analyses the existing legal framework that currently regulates e-commerce in the EU. It dwells on the main differences between Member States’ domestic consumer mandatory contract law rules and on the trends in Member State regulation in areas not yet covered by EU legislation.

In this process the IA chooses to break up the problem according to who is affected by it, viz. traders and consumers. Thus, what is presented as 'Problem 1' is in fact the grouping of difficulties faced by traders, especially SMEs, due to the legal fragmentation in the area of consumer contract law. Although there exists some level of harmonisation of certain aspects of consumer contract law under EU law, there are still divergent mandatory national rules that online and distance traders have to puzzle out and adapt to at considerable cost. Moreover, contracts of sale of digital content products are still not specifically regulated on an EU level, the result being a hodgepodge of national regimes that creates uncertainty for traders of digital content. These barriers to cross-border trade prevent traders from reaping the benefits of economies of scale.

What is presented as 'Problem 2' is the group of difficulties faced by consumers. Consumers are not confident in buying digital content and goods from another Member State. Such low consumer confidence is due to a lack of knowledge of one’s rights when buying online from another Member State and a fear of a lower standard of consumer protection. Furthermore, consumers suffer financial and non-financial detriment because of an absence of a clear contractual framework for digital content.

**Objectives of the legislative proposals**

The objectives of the proposals have to be seen within the ambit of the objectives of the Digital Single Market Strategy. The IA highlights that the objectives of the proposals are intended to complement and add value to other measures planned within the framework of the Strategy, such as measures for the simplification of VAT rules, for improving cross-border delivery services, for tackling geo-blocking and for the modernisation of copyright law, amongst others.

The general objective of the proposals is to contribute to faster growth of the digital single market, for the benefit of both consumers and businesses. This translates, following logically from the problem definition, into four specific objectives:

- reduce business costs resulting from differences in contract law;
- reduce the uncertainty faced by businesses due to the complex legal framework;
- contribute to building consumer trust in online cross-border shopping in the EU;

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4 IA, p. 22.
reduce the detriment caused to consumers with respect to non-conforming digital content or certain unbalanced contract terms.

After the analysis of impacts, the IA compares the options in terms of their level of attainment of each of the specific objectives. It produces a summary table\(^5\) which conveniently provides a succinct and simple overview of how these objectives are achieved.

The operational objectives established by the IA (viz. (i) the provision of a set of uniform, targeted rules for sales of digital content and (ii) the elimination of contract law-related barriers to cross-border online trade in tangible goods, address the identified problem drivers. These operational objectives are covered, respectively, by each of the two proposals, which lay down the relevant provisions for the achievement of the operational objectives. The IA details how the Commission intends to measure their attainment\(^6\).

**Range of options considered**

The IA chooses not to consider one set of options for each of the proposals separately, and instead considers the options for the two proposals together. Therefore, each of Options 1 to 5, as presented in the IA, is a combination of one option for the proposal on the supply of digital content and one option for the proposal on online and other distance sales of goods. The IA justifies this approach by referring to the view that emerged during the consultation process that rules on digital content should be based on the rules on sales of goods and differ only to the extent necessary to take account of the specificity of digital content, and that hence both sets of rules should be discussed in parallel.

The following table is a summary of the options, presented in a manner to allow the reader to visualise, not only each option as a package as presented in the IA, but also the options for each proposal individually:

<table>
<thead>
<tr>
<th>Option</th>
<th>Supply of digital content</th>
<th>Online and other distance sale of goods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>Targeted, fully harmonised rules</td>
<td>Targeted, fully harmonised rules</td>
</tr>
<tr>
<td>Option 2</td>
<td>Targeted, fully harmonised rules</td>
<td>Application of the law of the trader’s Member State combined with existing harmonised rules</td>
</tr>
<tr>
<td>Option 3</td>
<td>Targeted, fully harmonised rules</td>
<td>No policy change</td>
</tr>
<tr>
<td>Option 4</td>
<td>Minimum harmonisation rules</td>
<td>No policy change</td>
</tr>
<tr>
<td>Option 5</td>
<td>Voluntary European model contract and EU trust mark</td>
<td>Voluntary European model contract and EU trust mark</td>
</tr>
</tbody>
</table>

Option 5 is a *non-regulatory* option, suggesting a voluntary European model contract combined with an EU trust mark. However, it is debatable whether this could be considered as a viable alternative. The fact that it would be voluntary makes it susceptible to at least some of the criticisms levelled at the original CESL proposal. In looking back at the lessons learnt from that proposal, the IA states that its optional character was one of the main reasons for its failure to muster the required majority in Council. In fact, the choice of an optional instrument is listed among the options that were discarded *a priori*. The IA is at pains to emphasise the experience drawn from the debate on previous initiatives in the area of contract law rules. It therefore seems strange that one of

\(^5\) IA, p. 44.

\(^6\) See below under *Monitoring and Evaluation.*
the options considered (option 5) is precisely an optional instrument, presented in the form of a voluntary European model contract with an EU trust mark.

As to the exclusion of offline sale of goods from the scope of the proposals, the IA acknowledges that rules on the online and offline sale of goods should be aligned. The decision to limit the scope to online sales was based, on the one hand, on the urgency to take immediate action on the subject matter of the proposals and, on the other hand, on the fact that the offline sale of goods is subject to a Fitness Check analysis that will be completed in the second half of 2016. The IA suggests that the results of the Fitness Check, once completed, could feed into the already ongoing debate on the proposals within the ordinary legislative procedure, and thus ‘the discussions on offline sales of goods will not have to start at zero and repeat issues that have already been discussed and agreed for the online sales of goods’.

It is also true, however, that any new elements emerging from the Fitness Check would necessarily have to be factored in to the ongoing discussion if the rules on online and offline sales are to be aligned. Furthermore, the IA suggests that the dates of the entry into force of rules on online and offline sales could be approximated or even aligned by the co-legislators to avoid the risk of concurrent different regimes for online and offline sales. Despite the IA’s efforts, it is therefore still unclear why the decision was taken to launch proposals for online and offline sales at different times if such proposals (i) have to be aligned in their substance, (ii) both depend on the outcome of the same Fitness Check, and (iii) are intended to enter into force at more or less the same time in order to avoid having two different regimes operating concurrently.

Also excluded from the scope of the proposals were business to business (B2B) contracts. The IA explains this on the basis that (i) B2B contracts are governed by the principle of contractual freedom (even though this principle did not stop the 'main SMEs association' from advocating the extension of rules on digital content to B2B transactions), (ii) there is inconclusive evidence that contract law-related issues hinder B2B cross-border trade, (iii) all stakeholders - with the notable exception of 'the main SMEs organisation' - argued that the current proposals should limit themselves to business to consumer transactions. The IA recognises the need of SMEs, in their capacity as clients in B2B transactions, to be protected to some extent, and leaves the door open for this issue to be regulated under other initiatives under the Digital Single Market Strategy.

Scope of the Impact Assessment

Options 1 to 4 are assessed quite comprehensively for their economic, social and environmental impact and for their impact on fundamental rights. In the case of Option 5, analysis of impacts could not be performed to the same level as the other four options due to the uncertainties regarding the level of take-up of the voluntary scheme among businesses, the level of consumer protection offered by the model contract and which areas of law it would cover.

The IA produces a table allowing easy visualisation of the conclusions of the analysis.

Subsidiarity / proportionality

In the section concerning subsidiarity, the IA reiterates the problem driver that underpins the proposals. It points out that the task of addressing the legal fragmentation, which is seen to be creating barriers to the digital single market as regards the supply of digital content and distance and online sales of goods, is, by its very nature, something to be undertaken at EU level. The Member States, acting individually, cannot achieve the harmonisation of domestic laws required to remedy the current state of affairs.

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7 IA, p. 6.
8 IA, p. 23.
9 IA, p. 44.
At the time of writing no national parliaments had issued a reasoned opinion. The deadline for submissions is 8 March 2016.

The choice of legal instrument is a key difference compared to the CESL proposal. The IA explains how the new proposals depart from the idea of a regulation, with a comprehensive set of rules regulating all relevant issues, and instead go for a directive with targeted rules allowing Member States more freedom to adapt the implementation to their respective national laws.

Proportionality is discussed in Section 6.2 'Preferred Policy Option" and in Annex 8 of the IA. Here the IA discusses which consumer contractual rights are to be targeted under the preferred policy option (e.g. conformity criteria, consumer remedies for non-conformity or non-supply, notification obligation of lack of conformity, burden of proof of non-conformity, legal guarantee period). It also discusses the measure of protection to be afforded within these areas of the law. It acknowledges that in a few Member States the level of consumer protection for the sale of goods will decrease on certain specific points. The IA produces a table that summarises the main differences in consumer protection between the domestic laws of the Member States and the proposal on online and other distance sales of goods. The IA claims that the decrease in consumer protection on some specific points in a few Member States will be offset by a very high level of consumer protection throughout the EU and by an increase in consumers' confidence in cross-border purchasing. The IA also argues that fully harmonised consumer rules would enable better cross-border enforcement of such rules.

Budgetary or public finance implications

The implications for the EU budget are not analysed in the IA itself, but the explanatory memoranda accompanying the proposals state briefly that they will not have any budgetary implications. Public finance implications for the Member States are analysed to some extent under the analyses of economic impacts.

SME test / Competitiveness

The IA sets out from the premise that SMEs constitute 99 per cent of European businesses and gives SMEs a central role throughout. It identifies SMEs as amongst the major beneficiaries of the proposals in that they would allow SMEs to overcome the barrier of limited resources in their quest for cross-border trade and this would in turn open up a much bigger market and the opportunity to exploit economies of scale. The position of SMEs is specifically examined in detail under the analysis of the impact of every option.

SMEs feature prominently in the discussion on whether the proposals should have within their scope B2B transactions. SMEs are important stakeholders with regard to these proposals, not only as traders, but also as buyers of digital content or goods bought online or at a distance. This is why they advocated the extension of the scope of the proposals to B2B transactions. However, as explained above under 'Range of Options Considered', on the basis of the feedback received from all stakeholders, the Commission decided not to include B2B transactions within the scope of the proposals.

In the analysis of impact of every option the IA includes also sections on the competitiveness of businesses and the functioning of the internal market and competition.

Simplification and other regulatory implications

The impact analysis of every option includes a brief section on administrative burdens on businesses, concluding in every case - except for Option 5 - that no additional administrative burdens would result since there will be no additional information obligations on businesses.
Relations with third countries

Relations with third countries are relevant only insofar as the rules laid down will apply in the same manner to businesses from third countries as those in the EU. The IA does not investigate whether this would create barriers for EU consumers to buy digital content or goods from outside the EU.

Quality of data, research and analysis

The extensive data derived from the stakeholder consultation\(^{11}\) is used to estimate the impact that lack of sufficient harmonisation has on cross-border sales of digital content and tangible goods. At a second stage, this estimated impact is then applied to a macroeconomic model to predict the potential macroeconomic impact that policy measures to remove the identified barriers will have. This analysis was done by the Commission’s Joint Research Centre (JRC) and the macroeconomic model used is a version of the Global Trade Analysis Project (GTAP) model. A summary of this analytical work is given in Annex 4.

Annex 5 explains how contract law related costs for traders entering the market of another Member State are calculated. This calculation is based on data from the SME Panel Survey on the Impacts of European Contract Law\(^ {12}\). According to this calculation, a trader who wants to enter the market of another Member State must make between a low estimate of EUR 8 696 and a high estimate of EUR 9 565 in costs in order to be fully informed about the consumer protection provision in the Member State where he wishes to sell. These costs have to be multiplied by the number of Member States in which a trader wishes to sell.

The IA uses the above analysis and calculations, together with statistical evidence and stakeholder consultation, to make a convincing qualitative analysis of the impacts of the proposals. For its statistics and stakeholder views, the IA refers to data collected in-house and also to data from external sources. The IA gives the sources of its data and indicates when the data is estimated or based on regression analysis.

Stakeholder consultation

The IA clearly identifies the stakeholders and how they would be affected by the proposals. Extensive stakeholder consultation was conducted. Apart from the inception impact assessment\(^ {13}\) and the mandatory open 12 week web-based public consultation, the stakeholder consultation process included also:

- specific consultations targeting main stakeholders which comprised (i) the setting up of a stakeholder consultation group, (ii) workshops with Member States, (iii) bilateral meetings with some Member States, (iv) feedback from the Digital Single Market Sub-Group of the European Consumer Consultative Group, and (v) a specific business consultation which culminated in in-depth interviews with six businesses from five different Member States;

- consumers and business surveys conducted within the framework of the Digital Single Market Strategy or as part of an economic study on consumer digital content products.

The IA constantly refers to data from the stakeholder consultation and uses it in its argumentation. It expressly rules out B2B transactions from the scope of the proposals notwithstanding ‘the main SMEs organisation’ advocating their inclusion. The preferred policy option and the choices within are generally bolstered by substantial stakeholder support. Furthermore, in accordance with the new Better Regulation Guidelines, Annex 2 gives a separate summary of the stakeholder consultation, while Annex 3 gives a separate overview of who would be affected by the initiatives and how.

\(^{11}\) Discussed in more detail below under Stakeholder Consultation.
Monitoring and evaluation

The IA clearly identifies a number of apparently reliable indicators to measure the impact of the directives and presents them in a table\(^{14}\) which clearly links each indicator to the corresponding specific and operational objectives.

The IA mentions the statistical sources and targeted exercises the Commission intends to use in its monitoring and evaluation.

Commission Regulatory Scrutiny Board (RSB)

The Board’s first opinion\(^{15}\), issued on 16 October 2015, was negative, whilst a second opinion\(^{16}\) on 9 November 2015 was positive. Two points in particular are mentioned in both opinions:

- Different regimes for online and offline sales: the Board asks the Commission to justify the introduction of two different regimes for online and offline sales of tangible goods and assess the concrete implications of this choice, and explain the urgency of bringing forward the proposal on the sale of tangible goods before the fitness check on consumer law is completed. The IA in its final version deals with the matter to some extent laying down clearly that there might temporarily be different regimes in operation for online and offline sales of tangible goods and suggesting possible solutions. It explains that it was imperative that the sale of digital content and online and distance sales of tangible goods be addressed together but the launch of the digital content proposal was urgent and could not be delayed. In essence, the Commission was faced with a situation where three proposals had to be aligned with each other: (i) the supply of digital content, (ii) online and other distance sales of tangible goods and (iii) offline sales of tangible goods. On the one hand there was urgency in dealing with the issues, especially with the supply of digital content, and on the other hand there was the necessity to wait for the conclusion on the Fitness Check for consumer law. The Commission chose to launch two of these proposals immediately and wait for the completion of the Fitness Check before launching the third one. The logic behind this decision is still not entirely clear.

- The current proposals compared to earlier ones: The Board asks the Commission to explain why this attempt is likely to be more successful than previous ones, such as the Common European Sales Law and the Consumer Rights Directive. It seems that the IA addresses this point, outlining how the targeted approach (as against an all-encompassing piece of legislation), the binding character (as against an optional instrument) and the empowerment of Member States to adapt the new rules to their legal system, were lessons learnt from previous initiatives which give the proposals a better chance of success.

The Board highlights in its second opinion that, because of time constraints, the revised version of the IA (after the Board’s first opinion) was not subject to an inter-service meeting before resubmission to the Board.

Coherence between the Commission’s legislative proposals and IA

There are some discrepancies between the IA and the proposals in the provisions on review. The IA expresses the Commission’s intention to launch a monitoring and evaluation exercise to assess the effectiveness of ‘the two Directives\(^{17}\). However, while the proposal on the supply of digital content\(^{18}\) contains a review clause in Article 22, there is no corresponding clause in the proposal on the online and other distance sales of goods\(^{19}\).

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\(^{14}\) IA, p. 54.
\(^{17}\) (SWD (2015)274/2, p. 54.
\(^{18}\) COM(2015) 634.
\(^{19}\) COM(2015) 635.
Furthermore, whilst the IA states that the monitoring and evaluation exercise ‘will take place no sooner than 5 years after the entry into application of the Directives’\(^ {20}\), the aforementioned review clause in the proposal on the supply of digital content states that the review shall take place ‘not later than’ five years after the ‘entry into force’ of the Directive. The proposal does not specify a different date of application from the date of entry into force, so the two should be the same and the difference in terminology should not create any difficulties in that regard. What remains to be clarified is the ‘no sooner than’/‘not later than’ inconsistency, which is possibly down to a simple error in wording.

Apart from these slight inconsistencies, the legislative proposals appear to follow what has been identified in the IA as the preferred policy option (option 1).

**Conclusions**

The IA shows an awareness of the need to avoid the pitfalls that proved fatal for other legislative initiatives in the area, the CESL in particular. For this reason, it seems all the more strange that Option 5 was included in the final shortlist, given that it is akin in certain respects to the CESL proposal.

As to the timing of the proposals and to the separation of online and offline consumer rules, the IA makes a good case for the prompt submission of the two proposals under consideration. It struggles to explain convincingly, however, how this early submission will lead to any real benefits since (i) it is doubtful whether it will actually result in early adoption because the results of the Fitness Check on consumer rules (still to be completed) will have to feed into the debate about the proposals, and (ii) if the proposals are indeed adopted without taking into account the results of the Fitness Check there is the risk of non-corresponding rules for online and offline goods.

In general, the IA provides a well-argued qualitative analysis based on a wealth of data, whether in the form of statistics, stakeholder consultations or economic modelling and analysis. It logically links the problem with the objectives, with the options proposed and with the suggested preferred option and lays down appropriate indicators to evaluate the attainment of those objectives.

This IA is amongst the first produced according to the new Better Regulation Guidelines of the Commission, published in May 2015 as part of the Better Regulation Package.

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