Towards new rules on sales and digital content

Analysis of the key issues

IN-DEPTH ANALYSIS

EPRS | European Parliamentary Research Service
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March 2017 — PE 599.359
In December 2015, the Commission presented two proposals for maximum harmonisation directives – one on online sale of goods to consumers, and another one on supply of digital content to consumers. The rules of both proposals cover a broadly similar array of topics with regard to tangible and digital goods respectively. At the same time, the Commission is working on a regulatory fitness check (REFIT) of the 1999 Consumer Sales Directive. The similarity of the topics covered by the two proposals and the existing Consumer Sales Directive mean that the regulatory coherence of the legal provisions is of the utmost importance. This paper provides an overview of the key issues common to all three texts, namely criteria for assessing conformity with the contract, duration of the trader’s liability for non-conformity, consumer remedies, maximum versus minimum harmonisation, and mandatory versus default rules.
EXECUTIVE SUMMARY

In 2015, the Commission presented two proposals for directives: on the online sale of goods to consumers, and on the supply of digital content to consumers. The legal basis for the proposals is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which empowers the European Union (EU) legislature to harmonise legal rules applicable in the internal market.

A crucial element of both proposals is the definition of the criteria of conformity with the contract or, in other words, criteria for assessing if the goods sold or digital content are free of defects. Essentially, two approaches are possible: objective, whereby normal expectations as to quality prevail, and subjective, whereby the contract prevails. Whereas the online sales proposal proposes a cumulation of the two, the digital content proposal gives clear priority to the contract.

Once a defect appears, the question is whether the seller is still liable for the quality of the goods or digital content. Currently, under the Consumer Sales Directive the seller’s liability expires after two years, but some Member States have provided for longer periods. The proposal on tangible goods seeks to retain the two-year period. The digital content proposal does not set a deadline for enforcing consumers' claims, thereby leaving the issue to national rules on the limitation of claims.

If the defect appears within the period of the seller’s liability, the consumer may seek certain remedies vis-à-vis the seller. These include rescinding (cancelling) the contract and claiming a refund of the price; keeping the faulty goods or digital content and claiming a partial refund (price reduction); claiming a repair of the goods or digital content; and claiming a replacement of the goods or digital content. Traditionally, continental legal systems gave the buyer a free choice between the first two remedies, but the Consumer Rights Directive, following more recent legal developments in many countries, gave priority to repair and replacement. This implies a 'hierarchy of remedies' whereby the consumer is no longer free to choose between repair, replacement, or total or partial refund, but must first allow the seller to either repair or replace (at the seller’s choice). Both proposals retain the hierarchy of remedies.

A key issue when it comes to the implementation of a directive under national law is the choice between maximum and minimum harmonisation. The current Consumer Sales Directive is a minimum harmonisation instrument, and therefore some Member States, such as Finland, the Netherlands, Portugal and the UK could enact more consumer-friendly rules. Both proposals are maximum harmonisation instruments, however, which means that some Member States will have to lower their current consumer protection standards so as not to exceed the maximum level prescribed by the directives.

One final important issue is the relationship between the national rules implementing the directive and the actual text of the contract between the consumer (buyer) and the business (seller). If rules under national law are mandatory, the contract must follow them, and in cases of discrepancy the legal rules will have priority over the contractual terms. Conversely, if the rules under national law are merely a default, they can be modified by the contract and will apply only as a fall-back option. Implementation of the rules on seller's liability prescribed by the Consumer Sales Directive are mandatory; this pattern is followed by the tangible goods proposal but not by the digital content proposal. This means that in certain cases, rules less favourable to consumers of digital content may prevail over the national rules implementing that directive.
# TABLE OF CONTENTS

1. Introduction ........................................................................................................................................ 3

2. Legal basis and existing EU legislation ............................................................................................ 4
   2.1. The legal basis for EU regulation of consumer sales ................................................................. 4
   2.2. Existing legislation on consumer sales and its on-going review ................................................. 6

3. Criteria for assessing the conformity of goods or digital content with the contract .................. 8
   3.1. The issue: objective versus subjective criteria ............................................................................ 8
   3.2. Approach taken by the Consumer Sales Directive .................................................................... 10
   3.3. Approach taken by the proposed Online Sales Directive ......................................................... 11
   3.4. Approach taken by the proposed Digital Content Directive .................................................... 12
   3.5. Analysis .................................................................................................................................... 14

4. Duration of a trader's liability for non-conformity and burden of proof .................................... 15
   4.1. The issue: how long should traders be liable for the goods or digital content? ...................... 15
   4.2. Approach taken by the Consumer Sales Directive .................................................................... 17
   4.3. Approach taken by the proposed Online Sales Directive ......................................................... 18
   4.4. Approach taken by the proposed Digital Content Directive .................................................... 20
   4.5. Analysis .................................................................................................................................... 20

5. Consumer remedies in cases of non-conformity ........................................................................... 21
   5.1. The issue: should consumers be free to choose between remedies? ........................................ 21
   5.2. Approach taken by the Consumer Sales Directive .................................................................... 23
   5.3. Approach taken by the proposed Online Sales Directive ......................................................... 24
   5.4. Approach taken by the proposed Digital Content Directive .................................................... 25
   5.5. Analysis .................................................................................................................................... 25

6. Maximum versus minimum harmonisation and other options .................................................... 26
   6.1. The issue: two levels of harmonisation ....................................................................................... 26
   6.2. Approach taken by the Consumer Sales Directive .................................................................... 29
   6.3. Approach taken by the proposed Online Sales Directive ......................................................... 29
   6.4. Approach taken by the proposed Digital Content Directive .................................................... 30
   6.5. Analysis .................................................................................................................................... 30

7. Mandatory versus default rules ...................................................................................................... 31
   7.1. The issue: freedom of contract versus consumer protection ..................................................... 31
   7.2. Approach taken by the Consumer Sales Directive .................................................................... 31
   7.3. Approach taken by proposed Online Sales Directive ............................................................... 32
   7.4. Approach taken by the proposed Digital Content Directive .................................................... 32
   7.5. Analysis .................................................................................................................................... 32

8. Outlook .............................................................................................................................................. 33

9. Main references ................................................................................................................................ 34
1. Introduction

The contract of sale is the principal legal form used in a market economy; it enables the exchange of goods for money. Rules on sale are therefore of paramount importance for the functioning of the EU internal market. The first EU instrument partly harmonising the law of sales was the Consumer Sales Directive enacted in 1999.\footnote{Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, p. 12.} It applies to the sale of tangible goods to consumers, but does not apply to commercial sales (between two businesses). These are covered, in cross-border transactions, by the optional instrument of public international law – the Vienna Convention on the International Sale of Goods.\footnote{United Nations Convention on Contracts for the International Sale of Goods (CISG).} Commercial parties may apply it to their transactions, but are not obliged to do so.


Following the failure of the revision of the consumer acquis project, the Commission embarked on a new initiative – the optional Common European Sales Law (CESL).\footnote{Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 11.10.2011, COM(2011) 635 final, 2011/0284 (COD). Cfr. R. Schulze (ed.), Common European Sales Law: A Commentary (Beck 2012); A. Petrucci, European Digital Single Market in the Perspective of European Legal Tradition (2016) 3 Jus Civile 55.} The CESL was intended to be an EU regulation (i.e. an instrument directly applicable across the EU), but optional for the contracting parties. In other words, the CESL would not apply automatically to a sales transaction, but only if the parties agreed to it. It was intended to apply not only to consumer sales, but also to commercial sales between SMEs and big businesses. Many scholars argued that the CESL would be less invasive vis-à-vis national laws than a minimum harmonisation directive precisely because of its optional nature. This is because the Member States would not need to change anything in their domestic civil codes or other sources of contract law, but would simply have to...
agree to the application of the CESL in parallel to their domestic legal rules on sales. While the Parliament supported the CESL, the Council remained sceptical and the proposal remained stalled. Eventually the Juncker Commission officially announced its withdrawal in December 2014.

In the meantime, the Juncker Commission also launched the regulatory fitness check (REFIT), encompassing various areas of the acquis, including consumer law and – importantly – the Consumer Sales Directive (section 2.4.4). At the time of writing, the REFIT exercise was still on-going with regard to the latter instrument.

In place of the withdrawn CESL, the Juncker Commission proposed, in December 2015, two maximum harmonisation directives: one on online and other distance sales of goods and another on the supply of digital content. They are closely interconnected, since in the digital age, the barrier between digital and non-digital goods is becoming increasingly invisible, as witnessed by such phenomena as embedded digital content (digital elements of tangible goods) and the internet of things (tangible goods interconnected via digital means). While the Member States in the Council would rather speed up work on the Digital Content Directive, leaving the Online Sale of Goods for later on, the Commission has stressed the need to coordinate the two. A similar approach has been taken in practice by the Parliament, with the rapporteurs for both proposals making efforts to coordinate their amendments. All parties have also underlined the need to coordinate the two proposals with the 1999 Consumer Sales Directive, which is still subject to the on-going REFIT exercise.

As work on both proposals is on-going, the present paper focuses on the key legal issues common to both proposals and to the existing Consumer Sales Directive, namely: a brief overview of the existing EU legislation and a discussion of the legal basis for EU regulation on consumer sales in the internal market (Section 2); the criteria for assessing the conformity of goods or digital content with the contract (Section 3); the duration of the seller’s liability (Section 4); the remedies available to consumers in cases of non-conformity (Section 5); the question as to whether harmonisation should be maximum or minimum (Section 6); and whether rules on consumer sales should be mandatory or default (Section 7).

2. Legal basis and existing EU legislation

2.1. The legal basis for EU regulation of consumer sales

2.1.1. Article 114 TFEU
EU competence to legislate in a given area is subject to three principles: the principle of conferral (which means that the relevant competence must be positively attributed in the Treaties); the principle of subsidiarity (applicable in the case of shared

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11 For an overview of the legislative pathway for both proposals, see the two recently updated EPRS ‘Legislation in Progress’ briefings: R. Marko, Contracts for online and other distance sale of goods, PE 599.286 (2nd ed., February 2017) and idem, Contracts for supply of digital content to consumers, PE 599.310 (2nd ed., March 2017).
competences); and the principle of proportionality (which concerns the way in which the EU should legislate). Contract law, and sales law in particular, provides the legal framework for economic transactions in the internal market, and therefore is (implicitly) included within the EU competence to regulate the internal market (Article 114 TFEU). Furthermore, since the Maastricht Treaty, the EU has enjoyed an independent mandate to protect consumers (Article 169 TFEU), and this protection takes place, inter alia, through the harmonisation of laws affecting the internal market (Article 169(2)(a) in conjunction with Article 114(1) and (3) TFEU). Importantly, Article 169 TFEU does not constitute an independent basis for enacting EU legislation, as it refers directly to Article 114 TFEU.

However, as the Court of Justice has ruled on several occasions, the mandate to harmonise laws in order to ensure the proper functioning of the internal market does not give the EU legislature carte blanche to harmonise any laws it wishes. The Union does not enjoy a general competence to legislate in the internal market, and mere disparities between national legal systems are not enough, per se, to justify harmonisation measures. Such legal differences must constitute a real or potential obstacle that the EU legal measure must genuinely aim to remove. Therefore, in order to harmonise private law on the basis of Article 114 TFEU, the EU legislature must show not only that there is divergence between domestic laws, but also that this divergence is hampering the smooth functioning of cross-border economic exchanges and that harmonising the rules would be effective in helping such exchanges to take place.

2.1.2. A shared competence and the principle of subsidiarity

Furthermore, EU competence to harmonise national laws affecting the internal market belongs to the category of 'shared competences', and is therefore shared between the Member States and the Union (Article 4 TFEU). Unlike exclusive competences, shared competences are exercised at both EU and domestic levels. However, to the extent that the EU has exercised its competence, the Member States are precluded from issuing their own legislation in that specific area (Article 2(2) TFEU), unless national rules implementing an EU directive are concerned. Conversely, should the EU abrogate its legislation, the power of the Member States to legislate freely in that area will be revived (Article 2(2) TFEU, third sentence).

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14 For an overview of EU consumer policy see e.g. J. Valant, Consumer protection in the EU: Policy overview, EPRS in-depth analysis, PE 565.904 (2015).
15 R. Mańko, ‘Kompetencje Unii Europejskiej w dziedzinie prawa prywatnego w ujęciu systemowym’ [EU competences in the field of private law in a systemic perspective], Kwartalnik Prawa Prywatnego 25.1 (2016): 37-79, p. 44. See also the EESC opinion of 27.4.2016, points 1.6 and 3.2.
16 Case C-376/98 Germany v Parliament and Council (Tobacco Advertising I), ECLI:EU:C:2000:544, para. 84; Case C-380/03 Germany v Parliament and Council (Tobacco Advertising II), ECLI:EU:C:2006:772, para. 41, 80.
17 Protocol (No 25) on the exercise of shared competence attached to the Treaties.
The exercise of competences that the EU shares with its Member States – and contract law belongs to this group – is subject to the principle of subsidiarity. The EU may legislate in a given area only if it is demonstrated that Member States are not able to deal with it efficiently on their own, and that the EU is in a better position to do so. The principle of subsidiarity (Article 5(3) TEU) creates a presumption in favour of a narrow interpretation of EU competence in cases of doubt.

2.1.3. Principle of proportionality
When exercising its competences, whether shared or exclusive, the EU must always abide by the principle of proportionality (Article 5(4) TEU). This means that no measure the EU resorts to must exceed the ends that it purports to pursue. A less invasive legislative measure is to be preferred if it can attain the goal pursued; otherwise a more intrusive form of EU legal act may have to be deployed.

The principle of proportionality governs the choice of legal instrument, unless a specific type of instrument is prescribed by the competence norm itself (Article 296 TFEU). This means, inter alia, that non-binding instruments should be preferred over binding ones. Within the remit of Article 114 TFEU, both directives and regulations may be issued. Among binding instruments, preference must be given to those that are less intrusive, i.e., in principle, to minimum harmonisation directives (which set a minimum common standard) before total harmonisation directives (which do not leave Member States any choice), and, in principle, to directives before regulations. The difference between maximum and minimum harmonisation is analysed in more detail in Section 6 below.

2.2. Existing legislation on consumer sales and its on-going review
2.2.1. The Consumer Sales Directive
The Consumer Sales Directive dates back to 1999 and is based on a proposal submitted by the Commission in 1996, long before the development of digital consumer sales. The directive applies (indistinctly) to all consumer sales transactions, regardless of how they

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20 Hesselink, M.W., Rutgers J.W & de Booys, T.O. The legal basis for an optional instrument on European contract law, Policy Department C short study, PE 393.280 (2008), p. 24. See also Article 296 TFEU.
21 The Protocol on the application of the principles of subsidiarity and proportionality in the version attached to the Amsterdam Treaty provides explicitly that 'Other things being equal, directives should be preferred to regulations and framework directives to detailed measures' (para. 7), and that 'Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the treaty.' These very explicit passages disappeared from the protocol in its Lisbon version, replaced by the broader formulation of Article 296 TFEU.
are concluded. Therefore, online sales are also covered by its scope. The Directive is a minimum harmonisation instrument (Article 8). Its rules will be analysed in detail in Sections 3 to 7 and compared with the two recent proposals.

2.2.2. The Consumer Rights Directive

The Consumer Rights Directive was enacted in times when online consumer sales were already growing – the proposal dates from 2009 and the Directive was adopted in 2011. Member States had until the end of 2014 to implement the Directive. It is a maximum harmonisation directive (Article 4), and it replaces two minimum harmonisation directives – the Distance Selling Directive and the Doorstep Selling Directive.

It applies to any contract concluded between a trader and consumer, regardless of the way in which it was concluded, i.e. whether it was concluded face to face, on or off the trader's premises, online or offline (Article 3(1)). It even covers utilities contracts for water, gas, electricity or heating (Article 3(1)). However, some contracts are excluded from the directive on account of their subject matter. This is either because they are governed by other directives (e.g. package holidays, financial services and timeshare) or on account of their specific features (e.g. contracts for social services, such as social housing or social childcare, healthcare contracts or construction contracts).

The directive lays down a set of detailed information traders are obliged to provide (Articles 5-6), as well as formal requirements regarding the contract document (Articles 7-8). Consumers enjoy an at-will right of withdrawal (Articles 9-15) for contracts concluded at a distance and off-premises, which applies (indistinctly) to all digital contracts. The Consumer Rights Directive also contains rules specifically designed for the digital environment. In principle, consumers cannot withdraw from a contract for the provision of digital content if they have already used the content, i.e. unpacked a CD-ROM or downloaded the content from the internet.

Furthermore, the directive provides for a number of additional rights for consumers, besides those relating to information and termination-at-will rights. For instance, consumers have a (default) right to the timely delivery of goods, and in any event delivery must take no longer than 30 days (Article 18). In cases of later delivery, a consumer may cancel the contract. Fees for using a given means of payment (e.g. a credit card) must be limited to the actual cost borne by the trader (Article 19). The risk of damage to the goods passes to consumers, in principle, only once the goods are actually delivered to them (Article 20). Calling a trader's hotline may be subject to a basic fee only (Article 21). The consumer must have explicitly consented to any extra fees charged in addition to the price, and these may not be imposed by means of default options (prohibition of pre-ticked boxes) (Article 22).

2.2.3. On-going REFIT exercise

The idea of fitness checks was introduced in the Commission communication on ‘smart regulation’ in 2010. They are intended to be ‘comprehensive policy evaluations assessing whether the regulatory framework for an entire policy sector is fit for purpose’. Currently, a fitness check of EU consumer law is ongoing, and covers within

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23 The only exceptions are the supply of goods to be manufactured (emptio rei speratae) (Article 1(4)) and the optional exclusion of sales of second-hand goods at an offline auction (in-person attendance) (Article 1(3)).

24 Some contracts are excluded on account of the way in which they were concluded (Article 3(3)(j), (l) and (m)).

its scope the following EU consumer law directives: the Unfair Commercial Practices Directive, the Consumer Sales Directive, the Unfair Terms Directive, the Price Indication Directive, the Misleading and Comparative Advertising Directive, and the Injunctions Directive. As to the Consumer Rights Directive, the Commission intends to subject it to a review in accordance with its Article 30, and – as the Commission indicates, the 'outcome of this separate evaluation of the Consumer Rights Directive will feed into the conclusions of the Fitness Check'.

The Commission expects the final results of the REFIT of EU consumer law to be available in the second quarter of 2017. Presumably, the legislative work in the Parliament and Council on the two proposals submitted in December 2015 (on Online Sales and Digital Content) will still be on-going at that time, although it seems probable that the parliamentary committee reports may have been adopted by then.

3. Criteria for assessing the conformity of goods or digital content with the contract

3.1. The issue: objective versus subjective criteria

As Jan Smits points out, the concept of 'conformity with the contract' is actually the 'key criterion for the seller's liability'. The issue of selecting criteria for assessing conformity with the contract essentially boils down to when it can be said to be clear that the goods or services delivered to the consumer are defective ('not in conformity') so that the consumer can resort to a legal remedy (e.g. demand repair, replacement or a partial or total refund). At first glance, the whole issue might seem to be a tautology – the goods or service are in conformity with the contract when... they are in conformity with the terms of contract, i.e. fit the description of quality, quantity, etc. as contained in the text of the contract. However, the issue is not that simple. First of all, the actual text of the contract might not list all the details of the goods or services in question. The consumer might have certain expectations that are normal with regard to the goods, but on which the contract is silent. Should the consumer be allowed to enforce their claim on the basis of those expectations? Secondly, the actual text of the contract might be biased in favour of the trader (seller or service provider). The 'fine print' terms of the contract, which the consumer barely ever reads (especially in the digital context), might stipulate, for instance, that the business is not liable for any defects in the goods, digital content or digital services it is supposed to provide. If a very strict approach to the 'freedom of contract' is adopted, such a term (excluding any liability of the business) is conclusive: the consumer agreed (by signing or clicking, or simply tacitly) and so does not have a remedy; the consumer should have read the contract

27 Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers.
30 Evaluation and fitness check (FC) roadmap, p. 2.
carefully. However, it is common knowledge that contracts, especially those proposed online, can have hundreds of pages drafted in legal jargon that most consumers cannot possibly read (it would take far too long) or understand (the structure of the text and its terminology are often complicated). Should the consumer be, nonetheless, allowed to pursue a remedy against the business, even if the contract stipulated otherwise?

It is at this point that the difference between what are referred to as **objective and subjective criteria of conformity** come into play.³³ 'Subjective criteria' are those contained in the text of the actual contract. They are called 'subjective' because the subjects of the law (the consumer and trader) have, at least legally speaking, 'agreed' to them (the consumer clicked or signed). In consumer contracts in particular, the weaker party (the consumer) usually has no influence on the content of those 'subjective' criteria and often does not even know about them, as they are hidden among hundreds of other 'terms and conditions' of the contract. And even if the consumer knows about them, the chances that the supplier of a popular operating system, computer programme or mobile application would change them because of an individual consumer are in practical terms rather limited on account of the difference in bargaining power between the parties.

This led legislatures already many years ago to introduce what are referred to as 'objective' criteria of conformity. They are objective' in the sense that they are not derived from the actual text of the contract, but from 'objective' criteria, independent from the individual contracting parties. In other words, neither the individual business nor the individual consumer have any influence over these objective criteria, which are determined by other factors, such as the usages of trade, market conditions and the expectations of the average consumer, etc.

Therefore, ultimately, the choice between objective or subjective criteria and their role in creating the legal benchmark for conformity is, in practical terms, a question of the degree of consumer protection, on the assumption that preferring objective over subjective criteria is more favourable to the consumer, whilst preferring subjective over objective criteria is more favourable to the trader. However, the strength of the consumer protection offered by legislation will depend on the exact relationship between the objective and subjective criteria, and the possibility of deviating from objective to subjective criteria. In theory the following situations are possible:

- subjective criteria always prevail over objective criteria (in line with a strictly understood principle of the 'freedom of contract'; therefore, whatever the consumer agrees to in the contract is binding, even if it removes any liability for the quality of the goods or digital content from the business);
- objective criteria are applicable only to the extent that the text of the contract is unclear or silent, otherwise subjective criteria prevail (this is the position of the original text of the Digital Content Directive proposal, see Section 3.4.1.);
- objective criteria are applicable, unless the parties explicitly agree to deviate from them;
- objective criteria are applicable, unless the parties explicitly agree to deviate from them and the consumer's attention is clearly drawn to this fact (this is the position of the co-rapporteurs on the Digital Content Directive proposal, see Section3.4.2);
- objective criteria always prevail; the parties may agree on subjective criteria only to be more favourable to the consumer (this is the most consumer-friendly option,

³³ For the terminology ('objective' v 'subjective') see e.g. Spindler, op.cit., p. 196.
treat objective criteria as a semi-mandatory rule);

- only objective criteria are applicable, and cannot be deviated from in the contract at all, even to the consumer's benefit.

It follows that the relationship between objective and subjective criteria can be framed in six different ways, each of which sets the balance between the consumer's and the trader's interests in a different way. The most favourable situation for the consumer is where the objective criteria are binding as a matter of principle, but can be deviated from only to the consumer's benefit.

For instance, consumers will usually expect a washing machine to last for 10 years. However, one producer gives a 25-year guarantee on his washing machine. Or, consumers will usually expect a given computer programme to perform functions a, b and c, but a particular software developer also promises functions d and e, on top of the usual ones, for a given type of software.

### 3.2. Approach taken by the Consumer Sales Directive

The Consumer Sales Directive (CSD), in its Article 2, clearly sets out the relationship between objective and subjective criteria. The article first lists two subjective criteria, requiring that the goods, first of all, 'comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model' (Article 2(2)(a) CSD), and, secondly, that they 'are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted' (Article 2(2)(b) CSD). Immediately thereafter, the CSD adds two objective criteria, requiring that the goods:

- 'are fit for the purposes for which goods of the same type are normally used' (Article 2(2)(c) CSD)
- 'show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling' (Article 2(2)(d) CSD)

The last criterion is actually mixed, as it introduces the element of 'public statements' of the seller, producer or their representative to slightly modify the objective element. Nonetheless, given the fact that advertisements normally praise goods rather than warn about their shortcomings, the objective element is not compromised in practice.

Objective elements can be contracted out by the parties only if the consumer is made aware, when concluding the contract, of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer (Article 2(3) CSD). To sum up, therefore, the Consumer Sales Directive provides for a cumulative mix of objective and subjective criteria, with the possibility of contracting out of objective criteria only by making the consumer positively aware of non-conformity (in the objective sense) at the time of contracting.\(^{34}\)

Furthermore, liability based on public statements as mentioned in Article (2)(2)(d) CSD can be avoided by the seller if they show that they were not, and could not reasonably been unaware, at the time the contract was concluded.

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\(^{34}\) H. Beale, *Scope of application and general approach of the new rules for contracts in the digital environment*, Policy Dept C in-depth analysis, PE 536.493 (2016), p. 16: 'Under the [Consumer Sales Directive], the consumer cannot complain of non-conformity in respect of a matter of which the consumer was aware, or could not reasonably been unaware, at the time the contract was concluded.'
have been, aware of the statement in question, or if they show that by the time of conclusion of the contract the statement had been corrected, or if they show that the consumer's decision to buy the goods could not have been influenced by the statement in question (Article 2(4) CSD).

As Jan Smits concludes, the Consumer Sales Directive provides for subjective criteria as the 'main standard of conformity'. 35 However, he believes that this approach may be out of tune with distance sales contracts, where:

'The consumer ... usually has very little to negotiate with the trader. This is an argument to prefer the objective standard over the subjective party-agreement: goods must simply meet the requirement of being fit for use and function in line with an average consumer's reasonable expectations. Too much emphasis on the party agreement could lead to difficult discussions about what the parties have "actually" agreed upon.'36

3.3. Approach taken by the proposed Online Sales Directive

3.3.1. Original Commission proposal

In principle, the proposed Online Sales Directive (OSD) follows the same regulatory approach to non-conformity as the existing Consumer Sales Directive. It provides for a mix of objective and subjective criteria, and clearly stipulates that 'Any agreement excluding, derogating from or varying the [rules regarding conformity] to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract' (Article 4(3) OSD). It can therefore be said that in both the Consumer Sales Directive and the proposed Online Sales Directive 'both the subjective and the objective criteria must be met: they are cumulative.'37

However, as Hugh Beale points out, the formulation of the Online Sales Directive is more favourable to consumers, because for sellers to avoid liability for defects they must not only prove that the consumer knew about the specific condition (defect) in the goods (which was sufficient under the Consumer Sales directive), but they must also show that the consumer expressly accepted that condition of the goods at when concluding the contract.38 This modification seems reasonable in an online environment, where consumers will not necessarily see all defects on a digital image of the goods published by the seller.

Example: John bought a new bicycle from Cycling & Co. He saw that there were some defects in the paintwork and that the tyres needed to be replaced owing to a manufacturing defect. However, neither John nor the shopkeeper at Cycling & Co. mentioned that fact. John was happy about the price and the shopkeeper was happy that the sale had taken place. Under the existing Consumer Sales Directive, John would not have a claim for non-conformity if the seller was able to prove that he had seen the defects (e.g. they were easily visible to anyone). However, if it is supposed that the transaction took place online, and the Online Sales Directive was applicable, even if John saw the defects on a picture, he could bring a claim for non-conformity unless he expressly accepted (e.g. in an email) that he was aware of those defects.

38 Beale, 'Scope', p. 16.
3.3.2. Modifications suggested by the rapporteur

In his draft report, Pascal Arimont proposes to exclude the seller’s liability for non-conformity if the consumer 'was aware, or could not reasonably have been unaware' of the non-conformity (proposed modification of Article 9(5)). This is because, in the rapporteur's view, 'positive knowledge of the lack of conformity must be interpreted as [its] acceptance'. This would tilt the balance slightly in favour of sellers, because in order to escape liability for non-conformity they would not have to produce evidence of the consumer express agreement to the defects, but would be able to argue that the consumer 'could not reasonably have been unaware' of such defects. This modification would, however, make the consumer's legal situation less favourable than under the existing Consumer Sales Directive where, in order to escape liability for defects, the seller must show that the consumer actually knew of the defects (positive knowledge), and not merely that the consumer 'could not reasonably have been unaware' of them.

3.4. Approach taken by the proposed Digital Content Directive

3.4.1. Original Commission proposal

The proposal for a Digital Content Directive takes a different approach from the Consumer Sales Directive and the Online Sales Directive proposal and reverses the order of subjective and objective criteria. Under this proposal, the contract – i.e. subjective criteria – is the central and primary source of standards for the conformity of the digital content. This follows from Article 6(1)(a), which indicates that the content must be of the quantity, quality, duration, version, functionality and interoperability, and display other performance features (accessibility, continuity, security), as required by the contract. Therefore, it is correct to say when it comes to defining standards of conformity, that 'contractual agreements (...) prevail over objective expectations'. As a result, as Hugh Beale points out, the protection afforded to consumers by the Digital Content Directive is 'substantially weaker' than that provided by the Online Sales Directive.

Alongside the actual text of the contract document, items of pre-contractual information, which under the law are considered binding (i.e. an 'integral part' of the contract), are also primary points of reference for determining the conformity standard. The proposal itself does not indicate what items of pre-contractual information exactly are an integral part of the contract. Under EU law, Article 6(5) CRD states that the obligatory pre-contractual information given to the consumer in line with information duties for distance and off-premises contracts (under Article 6(1) CRD) automatically becomes an integral part of the contract. Indeed, with a view to the phenomenon of 'information overload' in which, upon receiving all the required information from the trader, the consumer 'often ends up being more confused than

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40 Impact Assessment, p. 123; Explanatory Memorandum, p. 12.


42 Beale, 'Scope', p. 20.
In addition to the description of the 'goods' provided in the contract and in any binding pre-contractual information, the proposed directive also includes the requirement of **fitness for purpose** (Article 6(1)(b)). This criterion is operational only if the consumer actually made known such a purpose to the supplier and the supplier accepted that requirement.

The contract between the trader and the consumer is the primary source of criteria for ascertaining conformity of the digital content (primacy of subjective criteria). Therefore, **recourse to objective criteria is permissible only to the extent that the contract is insufficient or unclear with regard to the requirements of the digital content** (Article 6(2); Recital 25). As Gerald Spindler notes, this is the first time in EU law that a requirement of transparency of individually negotiated contracts is formulated, as until now this was required only of standard terms of contract.

The primary objective criterion for ascertaining conformity is fitness 'for the purposes for which digital content of the same description would normally be used, including its functionality, interoperability and other performance features, such as accessibility, continuity and functionality' (Article 6(2) in medio). The criterion refers therefore not to the use a particular consumer would like the digital content for, but what the typical consumer of such content would 'normally' use it for. It is therefore an objective fitness for purpose. In order to evaluate such objective fitness for purpose, the proposal also requires four factors to be taken into account alongside the 'normal' use of the digital content in question, namely:

- the **nature of the consumer's counter-performance**, namely whether the consumer paid a price for the digital content or merely supplied data in exchange for the content (Article 6(2)(a)) – presumably on the assumption that consumers paying money can expect more, while consumers 'merely' giving away their data should expect less;
- where relevant, **any existing international technical standards** (Article 6(2)(b) in principio);
- in the absence of existing technical standards – applicable **industry codes of conduct and good practice** (Article 6(2)(b) in fine);
- **public statements** made by suppliers, on behalf of suppliers, or by other persons earlier in the chain of transactions, unless suppliers can show that those statements cannot be imputed to them (Article 6(2)(c)).

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44 R. Milà Rafel, 'Intercambios digitales en Europa: las propuestas de directiva sobre compraventa en línea y suministro de contenidos digitales', *Publicaciones Jurídicas – Centro de estudios de consumo* (18 March 2016), p. 27.

In order to avoid being bound by the public statements in question, suppliers need to prove that: (i) they were not aware of them or could not reasonably have been aware; or (ii) that the statement was corrected prior to the conclusion of the contract; or (iii) that the consumer's purchasing decision was not influenced by that statement (Article 6(2)(c)(i)-(iii)). Reference to 'existing international technical standards' is presumably, above all, a reference to standards laid down by the International Organization for Standardization (ISO).  

As Gerald Spindler notes, the priority given to subjective over objective criteria means that it will be possible for traders to exclude any rights of the consumer to updates or patches, 'even if the content is prone to be malfunctioning'.  

Furthermore, he points out that 'it is troubling that the Commission does not set up any requirements whatsoever with respect to standard-setting institutions or process, entirely leaving out any kind of mandatory consumer representation or consideration of consumer interest'.

3.4.2. Modifications suggested by the co-rapporteurs

The co-rapporteurs propose to modify the relationship between objective and subjective criteria, in order to bring the Digital Content Directive more into line with the Online Sales Directive proposal. They would make the objective criteria of conformity applicable to all contracts (proposed Article 6a), and make it possible to exclude them 'only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the digital content or digital service and the consumer expressly accepted that (...)' (proposed Article 6(1a)).

This modification undoubtedly strengthens the extent of consumer protection, bringing it into line with what is provided for in the existing Consumer Sales Directive and in the original proposal for an Online Sales Directive. For, as Hugh Beale underlines, the requirement of transparency of the contract (formulated in the original proposal) does not equal a requirement of prominence, meaning that a clear but hidden exclusion of the supplier's liability would pass the test of the original text proposed by the Commission. The co-rapporteurs' suggestion to require 'express acceptance' of defects of the digital content by the consumer goes even beyond the requirement of prominence.

Incidentally, it should be noted that there is a difference between the modifications suggested by the co-rapporteurs of the Digital Content Proposal and what Pascal Arimont proposes for the Online Sales Directive: it boils down to the question of treating situations in which the consumer did not expressly agree to the non-conformity, but 'could not have reasonable been unaware' of it (section 3.3.2).

3.5. Analysis

The question of balance between objective and subjective criteria of conformity is, in the last instance, a question of protecting consumer interests versus the interests of traders. The greater the preference for objective criteria, the better for consumers, and the greater the emphasis on subjective criteria – the better for businesses. According to Gerald Spindler:

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46 Recital 28 is, however, broader and also includes national and European standards.
47 Spindler, *Contracts for the supply of digital content*, p. 198.
48 Spindler, *Contracts for the supply of digital content*, p. 199.
Towards new rules on sales and digital content

'it is not very likely that [the Digital Content Directive] will actually improve the level of consumer protection for digital content. Article 6(1) [of the proposal] leaves the contract's content almost entirely to the parties' individual stipulations (which in practice usually means to the supplier’s pre-designed terms and conditions), while the proposal's high level of abstraction makes it harder to counterbalance those stipulations with considerations for the common requirements of comparable types of contracts.'\(^50\)

Hugh Beale, in turn, draws attention to the parallels between sale of consumer goods and supply of digital content, arguing that

'Of course, the trader must be free to define what is being supplied and any "objective" standards imposed should not require the trader to deliver digital content that will perform functions, or perform to higher standards, that was reasonable for the consumer to expect in the light of what the consumer was told. But exactly the same is true for goods; and the problem is dealt with by providing that the goods must "be fit for all the purposes for which goods of the same description would ordinarily be used."'\(^51\)

Whilst the exact setting of this balance involves deciding on technical details, such as those regarding consumers who were unaware, but reasonably should have noticed the defects, the ultimate outcome will always depend on litigation in concrete court cases. For this reason, the issue of burden of proof of non-conformity is crucial – the more consumers need to prove in court, the more difficult their position.

4. Duration of a trader's liability for non-conformity and burden of proof

4.1. The issue: how long should traders be liable for the goods or digital content?

4.1.1. Extinction v limitation of claims

The question as to how long the seller should be liable for any defects in the tangible goods or digital content is a crucial one, not only for the consumer but also for the producer (who may face up-stream claims from the seller). Producers determine their technology and pricing depending on the expected lifetime of the goods. Digital content, although not subject to ‘wear and tear’ in the same way as tangible objects, also needs updating to maintain the same standards of security and stability (cf. the 'critical updates', 'security patches', etc. regularly provided for instance by producers of operating systems).

<table>
<thead>
<tr>
<th>Extinction v time-barring (limitation) of claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>From a legal standpoint, there are two techniques for limiting the seller's liability in time. One is the extinction of the buyer's claim (whereby the claim legally no longer exists), and the other is the limitation (time-barring) of the buyer's claim (whereby the claim continues to exist, but the seller can block its enforcement by the consumer).</td>
</tr>
<tr>
<td>While the judge must ex officio take into account the extinction of a claim, limitation usually operates on the initiative of the parties, i.e. seller can block the enforcement of the buyer's claim by raising a time-barring objection (^52) However, since a time-barred claim still exists, it can</td>
</tr>
</tbody>
</table>

\(^{50}\) Spindler, Contracts for the supply of digital content, p. 199.

\(^{51}\) Beale, 'Scope' p. 21. First emphasis added, second emphasis in the original.

\(^{52}\) See Article 2938 Italian Civil Code; Article 117 § 2 Polish Civil Code.
– in contrast to an extinguished claim – be satisfied by the seller (voluntarily) or be subject to set-off.\(^{53}\) Furthermore, the law regulates issues such as the commencement, suspension and recommencement of the limitation period,\(^{54}\) but those rules do not apply to the period leading to the extinction of a claim.

Furthermore, in some countries rules on limitation of claims are mandatory (and may not be modified by the parties),\(^{55}\) while the time limit on the seller's liability may be modified by the parties (and in consumer sales – extended, but in the case of second-hand goods, also shortened, to 1 year in most Member States). Finally, periods of limitation are usually longer than two years (e.g. in Poland 10 years, and three years for commercial claims, in Italy 10 years and shorter periods for specific types of claims\(^{56}\), in Germany three years).

The body of law regulating the time-barring of claims is referred to as 'statute of limitations' in the common law tradition, where it belongs to the field of civil procedure. In contrast, for the civil law tradition the limitation of claims\(^{57}\) is part of substantive private law and is treated either as a topic of the general part of civil law (Germany, Poland) or as a matter of acquiring property (France), or as part of the civil law regulating the protection of rights (Italy). In any event, leaving aside the question of whether the EU has competence to provide a sweeping harmonisation of prescription periods (presumably, on the basis of Article 114 TFEU), it must be underlined that there is no EU legal instrument to this effect. What the existing Consumer Sales Directive and the proposed Online Sales Directive affect is only the extinction of the buyer's claim, and not its limitation, and this is clearly stated in the text of both instruments.\(^{58}\)

4.1.2. Historical evolution and current national law on extinction of buyer's remedies

In the civil law tradition, the claims granted to sellers in case of defective goods (see below, 5.1.2) used to become extinct very quickly, i.e. after 6 or 12 months. Later on, this period was prolonged to two years, and this period was taken over by the 1980 Vienna Convention on the International Sale of Goods (CISG). In contrast, the periods for limitation of claims were introduced only in later Roman law and were very long (30 years). This period was taken over by many civil law systems, including the original text of the French, German and Austrian civil codes. This meant that buyer's claims against the seller became extinct before they could become time-barred (compare two years and 30 years).

The position under common law and in Nordic countries has traditionally been different. A buyer's claims against a seller regarding defective goods are not treated as a special legal category and are subject only to limitation periods. Currently, these are five years in England, and six in Scotland. There are no rules on extinction of buyer's claims, however.

4.1.3. Burden of proof

The notion of 'burden of proof' (onus probandi) in civil law refers to the duty of one of the parties to provide evidence for a given fact. Normally, the burden of proof rests

\(^{53}\) See Article 117 § 2 Polish Civil Code; § 214 German Civil Code.

\(^{54}\) See Article 120-125 Polish Civil Code; § 199-213 German Civil Code; Article 2941-2945 Italian Civil Code.

\(^{55}\) See Article 119 Polish Civil Code; Article 2936 Italian Civil Code.

\(^{56}\) Article 2955 of the Italian Civil Code provides for a one-year time-limit for businesses.

\(^{57}\) E.g. Latin: praescriptio, German Verjährung, French préscription, Italian prescrizione, Polish przedawnienie.

\(^{58}\) See Article 5(1) CSD which clearly distinguishes the two notions.
upon the person who derives legal consequences from a given fact. In the case of sales, this would mean that the burden of proving that the object sold is defective normally rests upon the buyer. However, in order to raise the level of consumer protection, it is possible to provide for a \textit{reversal of burden of proof}, meaning that the consumer needs simply to indicate that the object is defective, while it is for the seller to bring evidence that it was not defective at the time of delivery, but became defective only later (in particular owing to the buyer’s mishandling, lack of care, etc.).

4.2. Approach taken by the Consumer Sales Directive

4.2.1. Extinction of the consumer's claim against the seller and limitation periods

The liability of the seller under the Consumer Sales Directive (CSD) is expressly limited to \textbf{two years only} from the day of delivery of the goods (Article 5(1) CSD).\textsuperscript{60} This rule overrides any national statute of limitations, meaning that a shorter limitation period will not apply (Article 5(2) CSD). However, unless the Member States decide to extend the period of liability, the latter expires within two years of delivery, leaving the consumer without any remedy in the event of defects in durable goods, such as motor vehicles, long-term home equipment (washing machines or dish washers) or high-precision consumer goods (photo cameras, computers, etc.) that consumers may reasonably expect to last for longer than just two years from the day of delivery.

Owing to the fact that the Consumer Sales Directive is a minimum harmonisation instrument, five EU Member States have opted for a longer period of seller’s liability.\textsuperscript{61}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Period of seller’s liability for non-conformity</th>
<th>Limitation period for claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>Three years</td>
<td>10 years\textsuperscript{63} (not relevant)</td>
</tr>
<tr>
<td>Finland</td>
<td>No time limit</td>
<td>Three years from discovery of non-conformity by buyer; otherwise 10 years from appearance of non-conformity</td>
</tr>
<tr>
<td>Netherlands</td>
<td>No specific time limit, but the consumer must notify the seller within two months of discovery\textsuperscript{64}. However, an informal list of expected durability of specific goods is taken into account by judges.\textsuperscript{65}</td>
<td>Two years from discovery of non-conformity by consumer</td>
</tr>
</tbody>
</table>

\textsuperscript{59} See Article 6 Polish Civil Code: 'The burden of proving a fact shall be incumbent upon the person who derives legal consequences from that fact.'


\textsuperscript{61} K. Tonner and R. Malcolm, \textit{How an EU lifespan guarantee...}, p. 21-23.


\textsuperscript{63} § 2 \textit{Preskriptionslag} (1981:130).


Towards new rules on sales and digital content

<table>
<thead>
<tr>
<th>UK</th>
<th>No time limit&lt;sup&gt;66&lt;/sup&gt;</th>
<th>Six years (England &amp; Wales), five years (Scotland) from the time when the claim accrued&lt;sup&gt;67&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>No time limit&lt;sup&gt;68&lt;/sup&gt;</td>
<td>6 years from the time when the claim accrued&lt;sup&gt;69&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

However, it must be emphasised that in those countries where claims based on non-conformity could in theory be pursued many years after delivery of the goods, courts will refuse such claims in the case of **perishable goods** (e.g. food, flowers) or **cheap goods** that are not intended to be durable.<sup>70</sup>

### 4.2.2. Reversal of burden of proof in the consumer’s favour

As regards the reversal of the burden of proof, the Consumer Sales Directive provides that any non-conformity appearing within the first 6 months from delivery is deemed to have been in the object sold at the moment of delivery. Hence, it is for the seller to provide evidence to the contrary, which in practical terms could be difficult. However, once the six-month period lapses, the consumer must prove that the defect existed at the time of delivery and is not for instance the result of normal wear and tear (for instance of a garment or motor vehicle). Furthermore, the presumption in favour of the consumer does not apply if it would be ‘incompatible with the nature of the goods or the nature of the lack of conformity.’

Of all the Member States only **Portugal** opted to prolong the period of inversion of the burden of proof (in favour of the buyer), providing for two years in cases of movables and five years in case of immovables.<sup>71</sup>

### 4.3. Approach taken by the proposed Online Sales Directive

#### 4.3.1. Two-year extinction period

Under the proposed Online Sales Directive the seller would be liable to the consumer if the non-conformity appeared within two years of delivery. National law may not impose a shorter prescription period than two years from delivery. These two rules are the same as in the Consumer Sales Directive. What would change, however, is that the Member States would no longer be allowed to provide for an exception for second-hand goods (shorter period of liability). Furthermore, the period of liability of the seller would be identical to the timeframe for presumption of non-conformity. The CSD currently in place provides that the relevant time for ascertaining non-conformity is the delivery of the goods. The new proposal provides for a more elaborate set of rules, depending on whether the goods were installed (e.g. in the consumer’s house) by the seller or under their responsibility, and who delivered the goods (whether the carrier was chosen by the seller or by the consumer).

Furthermore, the switch from minimum to maximum harmonisation has met with criticism from Jan Smits, who points that it

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<sup>66</sup> Consumer Rights Act 2015: Explanatory Notes, para. 105.


<sup>69</sup> s11 Statute of Limitations, 1957.

<sup>70</sup> K. Tonner and R. Malcolm, How an EU lifespan guarantee..., p. 20.

<sup>71</sup> Article 3(2) DL n.º 67/2003, de 8 de Abril – Venda de bens de consumo e das garantias a ela relativas. See also K. Tonner and R. Malcolm, How an EU lifespan guarantee..., p. 25.
Towards new rules on sales and digital content

'will provide a major change to the national laws of those Member States that take the conformity standard seriously. If the criterion is whether the goods are fit for ordinary use and possess the qualities that the consumer may expect ..., durable consumer goods may have to last for much longer than two years. The buyer of a washing machine, refrigerator or a piece of consumer electronics may well be confronted with a defect that manifests itself after more than two years, while the reasonable consumer expectation is that the goods must remain in conformity for three or four years'.

4.3.2. Prolonged burden of proof

The proposed Online Sales Directive significantly raises the level of consumer protection by extending the deadline during which the presumption of non-conformity operates. Under the CSD, only if the non-conformity appears within six months of delivery is it presumed that it was already present at delivery. The proposal would extend this period to two years.

According to Jan Smits: 'The benefit of this presumption of non-conformity is that the consumer only needs to prove that a lack of conformity exists and that this lack has manifested itself within two years, not how it came about or that it is the seller's fault. ... If the seller sheds enough doubt that the non-conformity did not exist at the time of delivery, the buyer must still provide the necessary proof that it did. Having said this, the provision does greatly strengthen the position of the consumer.'

4.3.3. Modifications suggested by the rapporteur

While the original proposal provided that any lack of conformity that appeared within two years of delivery was deemed to have existed from the outset (Article 8(3)), the rapporteur suggests reducing that time frame to six months, 'unless this is incompatible with the nature of the goods or with the nature of the lack of conformity' (proposed Article 8a, which mirrors the CSD). In essence, therefore, the legal situation would return to what the Consumer Sales Directive currently provides, with one exception: the maximum harmonisation clause (see section 6) means that Member States will not be able to prolong the reversed burden of proof on their own.

As K. Tonner and R. Malcolm point out,

'This would mean that in the event that a product fails to function after six months, the consumer will have to prove that this is due to a failure in the design or in the manufacturing process. ... This task of providing evidence will be difficult for the consumer to fulfil, and as a result, the legislator’s decision for maintaining the six month rule of the present [Consumer Sales Directive] would not tend to create liability of the seller for the lifespan of the product'.

K. Tonner and R. Malcolm recommend prolonging the period of legal warranty (seller's liability for non-conformity) from two to three years (with an option for the Member States to extend that up to five years), and to oblige producers either to give a commercial guarantee for the product's lifespan or to clearly indicate that no such guarantee is given. Also, the EESC has put forward the need to incorporate the durability criterion into the very definition of conformity, thereby influencing the period of the seller's liability.

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72 Smits, 'The new proposal', p. 11-12.
76 EESC Opinion of 27.4.2016, para 4.2.5.4.
4.4. Approach taken by the proposed Digital Content Directive

4.4.1. No period of extinction for consumer’s claims

In contrast with the Consumer Sales Directive and the proposed Online Sales Directive, there would be no EU-wide time-limit for bringing a claim of non-conformity by the consumer under the Digital Content Directive (DCD). The Commission justifies this solution by pointing to the fact that 'digital content is not subject to wear and tear'. While claims based on non-conformity of digital content will not be extinguished for two years from delivery of the digital content (as in the case of sale of goods), they may still be subject to general rules on limitation (time-barring) of civil claims under national law. This is because the directive does not harmonise this area, and there is no EU legal act harmonising prescription under national private laws. Needless to say, regimes for limitation of claims vary from country to country, not least in terms of the time limits after which prescription operates and (exceptional) possibilities for pursuing prescribed claims in court.

The draft report tabled by co-rapporteurs E. Gebhardt and E. Voss does not seek to introduce a time-limit for the consumer’s claim based on non-conformity.

4.4.2. Timeless inversion of burden of proof

According to Article 9 DCD, the burden of proof that any defects were present already at the time of delivery of the digital content is reversed, and this without a time limit. However, the trader can 'unreverse' the burden of proof by proving that the digital environment of the consumer was not compatible with the digital content (Article 9(2) DCD).

4.5. Analysis

There is currently growing concern that producers manufacture goods that are deliberately short-lived in order to sell more (planned obsolescence). Enabling consumers to bring claims on non-conformity of goods for a period longer than two years could be one way to address this issue by resorting to private-law instruments.

An overview of existing legislation in the Member States and of the proposed Digital Content Directive clearly shows that the short two-year period during which a buyer can bring a claim on defects in the goods sold can be abandoned altogether. In such cases the claims in question become subject to general limitation periods, which are usually longer than two years. Furthermore, limitation periods run from the moment a claim is incurred (i.e. from the moment when the defect appears), rather than from the moment of sale. As Gerald Spindler points out, however, the approach in the Digital Content Directive, whereby no period of extinction is provided for but Member States

77 Impact Assessment, p. 126.
78 Explanatory Memorandum, p. 12.
79 Spindler, 'Contracts', p. 213.
80 For instance, under Polish law, the debtor’s reliance on the statute of limitation (i.e. the defence of prescription) may be regarded by the court as an abuse of rights, and therefore rejected by the court (e.g. judgment of the Polish S.Ct. of 20.10.2011, Case IV CSK 16/11, LEX no. 1111006). However, whilst this applies to prescription (statute of limitations), it does not apply to the extinction of claims (which no longer exist).
81 PE 592.444, 7.11.2016.
82 Spindler, 'Contracts', p. 203.
83 Jana Valant, Planned obsolescence: exploring the issue, EPRS Briefing, PE 581.999 (2016).
may apply their own periods of limitation, may ultimately create ‘a diverse landscape of national rules ... which is quite the opposite of a European harmonisation’.

5. Consumer remedies in cases of non-conformity

5.1. The issue: should consumers be free to choose between remedies?

5.1.1. General aspects

With regard to the freedom of choice of remedy versus a cascade system of remedies the issue at stake is whether the buyer (here the consumer) should have the freedom to choose between remedies, or if this choice should be predetermined by the law, or left to the seller. There are four possible (basic) remedies in the event of goods being defective:

- **rescission** (termination) of the contract and full refund (the buyer gives back the faulty goods and gets the money back);
- **partial refund** (the buyer keeps the faulty goods, but gets a price reduction);
- **repair** (the seller repairs the goods); or
- **replacement** (the seller exchanges the defective goods for new ones, free of defects).

5.1.2. Historical evolution of remedies in civil law systems

In civil law countries, the historical roots of the buyer’s remedies against the seller in cases of hidden defects (lack of conformity) go back directly to ancient Roman law. Initially only for the sale of slaves and cattle in market places, Roman law allowed the buyer to make a choice between two remedies: a claim for rescission and full refund (actio redhibitoria) and a claim for partial refund (actio quanti minoris). The choice between the remedies was left to the discretion of the buyer. Liability for latent defects was completely strict and objective, i.e. there was no need to prove any fault or breach of good faith by the seller. The deadlines for bringing remedies were short: six months to rescind and claim a total refund, 12 months to claim a partial refund. The seller was liable not only for hidden defects (that had not been disclosed to the buyer) but also for anything that had promised about the goods that was not true (regardless of whether it was a deliberate lie or simply a mistake).

By the sixth century these remedies were available under all contracts for the sale of goods, and this solution was adopted in the Middle Ages in all countries that adopted Roman law as the basis of their civil law (e.g. territories of today's Germany, France,

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84 Spindler, 'Contracts', p. 213.
85 Within the EU, most legal systems – with the exception of the common law and Nordic jurisdictions – belong to the civil law family.
87 If the seller breached good faith, the buyer could sue for specific performance under actio empli. But in practice it was rather difficult to prove that the seller had concealed hidden defects on purpose, hence the recourse to actio redhibitoria or actio quanti minoris.
Towards new rules on sales and digital content

Italy and Spain). This, in turn, directly influenced the content of the modern civil codes adopted in continental Europe in the 19th and 20th centuries.

Gradually, the buyer’s freedom to choose between rescission and total refund or partial refund came to be limited in some countries. For instance, the French and Austrian civil codes allowed a claim for specific performance (repair or replacement), and introduced a hierarchy of remedies, whereby – if the seller offered repair or replacement, the buyer would not be able to rescind or demand a refund upfront.88 The German Civil Code – until the 2002 reform of the law of obligations – remained faithful to the Roman solution.89

5.1.3. English Sale of Goods Act 1979

Within the common law tradition, the English Sale of Goods Act 1979 provided that goods must correspond to the description given by the seller, and – under certain circumstances – that they were ‘merchantable’ and fit for the purpose is implied in the contract of sale.90 If any of these 'conditions' was breached, the buyer could ‘repudiate the contract, reject the goods and claim damages, or ... claim damages only’.91 As Zimmermann comments, this legal regime is ‘distinctly different’ from the Roman law approach.92


The 1980 Vienna Convention on the International Sale of Goods (CISG), in an attempt to find a compromise between the common law and civil law approaches, introduced a new approach. First of all, it allows claims for specific performance (Article 46 CISG) – something foreign to both the traditional civil law and traditional common law approaches. The buyer can claim substitute goods (replacement) if the defect amounts to a 'fundamental breach', i.e. the non-conformity 'results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result' (Article 25 CISG). Secondly, the remedy of repair, is available normally 'unless this is unreasonable having regard to all the circumstances'.

Likewise, the buyer may rescind the contract and demand a total refund also only if the breach is 'fundamental' (Article 49 CISG). This is a significant limitation in comparison with Roman law, but it follows the pattern of (English) common law. Finally, a partial refund (price reduction) is allowed in principle, unless the buyer has repaired or replaced the goods (Article 50 CISG).

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88 This was first applied in the Prussian Landrecht of 1794. Also the French code civil of 1804 provided, in Article 1642-1, that if the seller undertook to repair the goods, the buyer could not rescind or demand a partial refund. The Austrian ABGB of 1811 meanwhile allowed rescission only if repair would be disproportionate as a remedy. See Longchamps de Bérier, ‘Skargi edylów’, pp. 432-433.

89 § 459, 462, 477 BGB (from before the reform of 2002). See Zimmermann, Law of Obligations, p. 305, 328. However, standard contract terms often provided such a remedy (Zimmermann, Law of Obligations, p. 328).


5.1.5. Background of general contract law
The hierarchy of remedies, which gives preference to specific performance as the primary remedy, needs to be seen against the background both of general contract law and specific sales law in the Member States. For instance, English general contract law allows the aggrieved party to terminate a contract if the breach of contract is sufficiently serious, whilst in Germany, termination is allowed in case of any non-performance, on condition that the aggrieved party gives the debtor (here the seller) an additional deadline (a second chance to perform).

As for the hierarchy of remedies, under general contract law in civil law jurisdictions, in principle the aggrieved party has the right to choose the remedy, i.e. either to demand specific performance or (if allowed) to terminate (as well as to demand contractual damages on top of these remedies). In common law systems, however, the aggrieved party can normally terminate and sue for damages, while a claim for specific performance is seen as exceptional. Furthermore, in some legal systems (e.g. England, Germany, Poland), termination occurs through notice given to the other party, while in others (e.g. France, Italy, Belgium) only a judge can terminate the contract, but exceptions are provided, e.g. for commercial contracts.

5.2. Approach taken by the Consumer Sales Directive
The currently binding Consumer Sales Directive introduces a hierarchy of remedies, not allowing the consumer to rescind or claim a price reduction before attempting to get the goods repaired or replaced. However, the directive is a minimum harmonisation instrument and therefore national law can be more generous to the consumer.

According to Jan Smits, in eight Member States consumers enjoy 'a free (or less limited [than under the Directive – R.M.J]) choice of remedies'. This is the case, for instance, under the UK Consumer Rights Act 2015 which allows the consumer to reject the goods (and claim a full refund) if they do not conform to the contract for a limited time directly after their delivery. However, most other Member States have followed the hierarchy of remedies model which they either already had, or introduced whilst implementing the directive, which was the case in Germany and in Poland in 2002.

Furthermore, the currently binding Consumer Sales Directive excludes the right to rescind the contract if the defects are 'minor', which can be understood either as 'trivial' (as in German law) or as substantial, but not fundamental (where the latter means that the buyer would not have bought the object had they had known of the defect). Not all Member States have followed this limitation, for instance under UK law the consumer may terminate even if the defects are minor.

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94 Smits, 'The new proposal', p. 11.
95 Through the Law on the Modernisation of the Law of Obligations (Schuldrechtsmodernisierungsgesetz)
96 For Germany see the Schuldrechtsmodernisierungsgesetz; for Poland see, initially the Regulation of 30.5.1995 which allowed consumers to rescind upfront, replaced in 2002 by Regulation of 25.6.2002 and soon afterwards by the Consumer Sales Act 2002 which introduced the hierarchy of remedies. In 2014 the rules on consumer sales have been incorporated into Book III, Title XI of Poland's Civil Code.
5.3. Approach taken by the proposed Online Sales Directive

5.3.1. Hierarchy of remedies upheld, but made obligatory for the Member States

Unlike the withdrawn CESL proposal, which was to allow consumers to terminate in cases of non-trivial defects, the proposed Online Sales Directive upholds the 'hierarchy of remedies', whereby the consumer does not have a free choice between repair, replacement and refund, but must first accept repair or replacement (as chosen by the seller).

However, while the Consumer Sales Directive was a minimum harmonisation instrument, the proposed Online Sales Directive is no longer, meaning that the Member States will not be able to introduce a free choice of remedies on their own. As Jan Smits points out, eight Member States would 'have to adapt their laws and decrease their existing levels of consumer protection.' In particular, the UK would have to amend its Consumer Rights Act 2015, which gives consumers the short-term right of immediate termination in cases of non-conformity (ss 19 and 20), as well as remove the one-go-only rule, whereby the consumer may rescind the contract if the seller failed to repair or replace (no 'third chance' for the faulty seller).

5.3.2. Differences between the Consumer Sales Directive and the proposal

Although, the proposal closely follows the system of remedies already laid down in the [Consumer Sales Directive], there are still some differences between the proposal and the existing directive. First of all, the consumer, if entitled to termination or reduction of price, would be allowed to terminate even if the defect is minor (under the current Consumer Sales Directive this is not possible). As Jan Smits explains, even in cases of 'a small scratch or a cosmetic defect, a minor technical malfunction or a different type of packaging' the consumer would be allowed to terminate.

Secondly, while under the Consumer Sales Directive the consumer may terminate or demand a partial refund only if a repair or replacement is not available, or if the seller did not complete it within a reasonable time and without 'significant inconvenience' to the consumer, under the proposal the consumer would also have a right to demand a refund in two additional circumstances: if the seller declares that they will not complete a first-degree remedy in reasonable time or if it is clear from the circumstances that the seller will not complete such a remedy timeously. Thirdly, a new rule provides that consumers will not be entitled to a remedy if they themselves have caused the non-conformity or its effects.

5.3.3. Amendments proposed by the rapporteur

The rapporteur proposed to limit the possibility of partial termination by the consumer to those cases where partial performance is possible (proposed modification of Article 13(2)). Therefore, partial termination would be allowed with regard to selected goods only if they 'are separable from the other goods ... unless the consumer

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99 Article 114(2) CESL: 'In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant'.

100 Smits, 'The new proposal', p. 11.


102 Smits, 'The new proposal', p. 11.

103 Beale, 'Scope', p. 16-17.

cannot be expected to accept [partial] performance'. Therefore, the consumer would still have the right to full termination if they are interested in the whole contract only, and not just in part of it.

For instance, a consumer bought 200m² of tiles for his apartment from the end of a line no longer being produced. Upon delivery it turned out that 100m² of the tiles were broken and could not be replaced. The consumer could therefore terminate. However, since he wanted the same tiles throughout the apartment, he had no interest in making only a partial termination and could terminate the whole contract, not just the part regarding 100m² of defective tiles.

5.4. Approach taken by the proposed Digital Content Directive

This proposal introduces a hierarchy of remedies, mirroring in this respect the Consumer Sales Directive and the proposed Online Sales Directive. The hierarchy of remedies means that – leaving aside the right to immediate termination for non-supply (Article 11 DCD) – the consumer, in cases of non-conformity, must first seek cure (specific performance), and only if this is impossible, unlawful or does not occur, may the consumer, in a second step, seek rescission and total or partial refund.

5.5. Analysis

The Consumer Sales Directive and the two proposals are all based on the idea of the hierarchy of remedies. As the Commission admits, the ratio legis for introducing a hierarchy of remedies is to allow businesses to 'face significantly less costs for refunds'. The rule whereby termination is excluded when non-conformity is minor is also meant 'save further costs' to businesses. As Jan Smits explains:

'The idea behind this system is to keep the contract intact for as long as possible and thus reduce [the business's – R.M.] costs. Here lies a clear policy choice that the European legislator already made with the [Consumer Sales Directive] and that is now maintained. This is the choice to balance the far-going rights the directive provides to the consumer with the interest of the seller, who must not be confronted with a claim for termination or price reduction before he had a second chance to properly perform the contract.'

One may wonder, however, whether the consumer rights are indeed 'far-going', when seen against the background of the historical evolution of buyer's remedies (see section 4.1), and the fact that the starting point was the free choice of remedies, rather than giving faulty sellers a 'second chance'. Whilst the second-chance policy is arguably an appropriate solution when equal bargaining power is at stake (commercial sales between two businessmen, private sales between two consumers), in the case of a structural imbalance in business-to-consumer sales, giving professional sellers a 'second chance' does not seem to restore the balance. Furthermore, whilst the seller's right to cure in the case of tangible goods, especially those sold face to face, may be justified (because the seller can easily exchange the faulty goods), another question is whether the hierarchy of remedies is an optimal solution in the context of online sales and the supply of digital content. Granting consumers the right to terminate upfront

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106 Spindler, 'Contracts', p. 204-205.
108 ibid.
would certainly strengthen their bargaining position\textsuperscript{110} and boost competition in the digital single market.

Jan Smits observes that

\begin{quote}
'Turning the current hierarchy of remedies into maximum harmonisation will have severe consequences for those Member States that allow the consumer to terminate immediately without first having gone through the first step of asking for repair and replacement.'\textsuperscript{111}
\end{quote}

All in all, as Esther Arroyo Amayuelas indicates, it is difficult to defend the position that the hierarchy of remedies serves the interests of both parties: clearly, it serves the interest of the seller, but not that of the consumer, who would be better off having the freedom of choice.\textsuperscript{112} However, even the protection of the seller's interest is not certain in the context of cross-border shipments, where the goods need to be sent back and forth and a repair needs to be arranged for.\textsuperscript{113} Finally, the case of international online sales, the consumer is in a weaker position as regards discussing with the seller – in a foreign language – whether the goods have been properly repaired.\textsuperscript{114}

### 6. Maximum versus minimum harmonisation and other options

#### 6.1. The issue: two levels of harmonisation

#### 6.1.1. Definition

The harmonisation ('approximation') of national rules by way of an EU directive issued on the basis of Article 114 TFEU can take, essentially, two forms: minimum harmonisation or maximum harmonisation.\textsuperscript{115} Keeping in mind that a directive contains legal norms \textit{addressed to the Member States}, one can compare maximum harmonisation to mandatory rules (which simply must be followed without any deviations) and minimum harmonisation to semi-default rules (which must be followed to a certain extent, beyond which the addressee of the norm enjoys freedom of action). In domestic legal systems, semi-default rules are found e.g. in labour law, tenancy law or precisely consumer law – they impose a certain minimum level of protection (of the worker, consumer or tenant) but allow the parties to provide for more favourable terms in the contract itself. Likewise in the case of minimum harmonisation by EU directives: Member States must reach a certain \textit{minimum standard} of consumer protection, which will be uniform across the EU, but they are still allowed to enact rules \textit{more favourable} to consumers.

\textsuperscript{110} Mak, \textit{The new proposal}, p. 24.
\textsuperscript{111} Smits, 'The new proposal', p. 13.
\textsuperscript{112} Esther Arroyo Amayuelas, \textit{La Propuesta de Directiva relativa a determinados aspectos de los contratos de compraventa en línea y otras ventas de bienes a distancia} (2016) 3 \textit{InDret: Revista Para El Análisis Del Derecho}, p. 18.
\textsuperscript{113} Arroyo Amayuelas, 'La Propuesta', p. 18.
\textsuperscript{114} Arroyo Amayuelas, 'La Propuesta', p. 18-19.
\textsuperscript{115} See e.g. Kunkiel-Kryńska, \textit{Metody...}, passim. Filip Grzegorczyk identifies five forms of harmonisation: full, optional, partial, alternative and minimal (F. Grzegorczyk, F. Grzegorczyk, \textit{Jednolity rynek europejski jako determinanta rozwoju prawa konsumenckiego w Unii Europejskiej} [Single European market as a factor determining development of consumer law in the European Union] (2010) 19.4 \textit{Kwartalnik Prawa Prywatnego} 905, p. 905-906. Nonetheless, both maximum and minimum harmonisation can contain options, alternatives or only partially cover a given field of law.
For instance, the Consumer Sales Directive, as a minimum harmonisation instrument, obliges the Member States to allow the consumer, as a first-degree remedy, to demand repair or replacement. Only if that fails, may the consumer terminate the contract and demand a refund. However, precisely because the CSD is a minimum harmonisation directive, the Member States may be more consumer friendly and provide that consumers may terminate the contract and demand a refund upfront, without waiting for the (unsuccessful) repair.

The situation is different in the case of maximum harmonisation, which can be compared to mandatory rules – the Member States are obliged to implement the rules of a maximum harmonisation directive into their national law, but are not allowed to enact any legal norms that would deviate from them. This means that the norm of the EU directive and the norm of national law implementing it must be identical as to their scope (hypothesis) and effects (disposition). Differences between the national implementing rules and their 'model' in the directive may be concerned with terminology, legislative technique, etc., but may not affect content. This does not prevent the national legislature from pursuing so-called 'spill-over' or 'spontaneous' harmonisation, i.e. copying the EU rules also to areas beyond what is required in the EU directive.

For instance, the Consumer Rights Directive – a maximum harmonisation instrument – gives consumers the right to terminate a contract concluded online without giving any reasons within a 14-day deadline. In order to comply with the directive, Member States must provide, in their national law, such a right only to consumers. However, nothing prevents them from enacting a national rule granting a right to terminate an online contract also to business parties. In fact, this regulatory strategy of 'spontaneous harmonisation' can be seen as beneficial for the coherence of national private law, because it will prevent differentiation between online contracts on the basis of the type of customer (consumer or professional).

It must be noted, however, that maximum harmonisation does not exclude leaving the Member States with a number of regulatory options to choose from, as is the case in the Unfair Commercial Practices Directive where Member States may choose between public or private enforcement, or in the case of the Commercial Agency Directive which allows Member States to choose what remedies the commercial agent should be entitled to.

6.1.2. Examples of maximum and minimum harmonisation instruments
Overall, minimum harmonisation remains the prevailing trend within EU directives in the field of private law. Nonetheless, there have been individual directives following the maximum harmonisation approach since the 1980s. The first one was the Product

116 A. Kunkiel-Kryńska, Metody..., [przyp. 2], s. 203.
117 R. Mańko, Kompetencje..., p. 49.
118 R. Mańko, 'Kompetencje...', p. 49.
120 Loos, 'The influence'; Mańko, EU competence in private law..., p. 16.
123 Grzegorczyk, 'Jednolity rynek europejski', p.906; Mańko, 'Kompetencje...', p. 50.
Towards new rules on sales and digital content

Liability Directive. At present, there are three EU directives in the field of private law/consumer law that are maximum harmonisation instruments: the Unfair Commercial Practices Directive, the Timesharing Directive (2008/122) and the Consumer Rights Directive.

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6.1.3. Alternative options

Optional instruments – EU rules that do not replace national law, but coexist with it, and that are used if the parties so wish, but are not mandatory – could be a potential way out of the maximum versus minimum harmonisation dilemma. Currently, optional instruments are used largely in the field of EU civil procedure. Examples include the European Small Claims Procedure, the European Order for Payment Procedure and the European Account Preservation Order. Optional instruments are also used in the field of intellectual property (European Trademark) and company law (European company, European cooperative, European grouping of interests). Nonetheless, since optional instruments do not aim to harmonise (approximate) national laws, they must be


125 Directive 2005/29/EC.


127 See Article 4 CRD.

enacted with reference to a legal basis other than Article 114 TFEU – this can be either Article 81 TFEU, Article 118 TFEU (which likewise provides explicitly for optional intellectual property instruments) or – in the absence of a specific basis – Article 352 TFEU (the flexibility clause).

Another alternative option contemplated by the Commission at an early stage and actually picked up by some stakeholders (SMEs) was what is referred to as the country of origin principle. In practice this would mean that sellers (perhaps not all, but only SMEs) would be allowed to offer their goods and digital content on the basis of their domestic law. For instance, a Polish online shop could offer its goods to Czech customers on the basis of Polish, rather than Czech law. However, the current rules on the conflict of laws in the EU provide for the contrary: in case of consumer sales, it is the law of the country where the consumer is resident that applies. Therefore, in order to introduce the country of origin principle, an amendment of the Rome I Regulation would be necessary. The option was abandoned by the Commission in the two proposals and it does not seem likely to be taken seriously into account at this stage.

Finally, an option advocated by some scholars as an alternative to the minimum versus maximum harmonisation dilemma is cross-border-only unification of sales rules by way of a regulation. The idea is that EU rules would apply only to cross-border transactions, whilst national laws would apply to domestic transactions. However, despite its arguable simplicity and its respect for national legal cultures, the idea has yet to be taken up by either stakeholders or EU institutions.

6.2. Approach taken by the Consumer Sales Directive

The Consumer Sales Directive is a minimum harmonisation instrument. This has allowed certain Member States to uphold or introduce more consumer-friendly rules than the minimum provided for in the directive (see section 3-5).

6.3. Approach taken by the proposed Online Sales Directive

The proposed Online Sales Directive would be a maximum harmonisation instrument, meaning that the Member States would not be allowed to grant consumers stronger protection than under the directive. Consequently, a number of Member States would have to lower their consumer protection standards or refrain from raising them. The rapporteur has not proposed to modify this regulatory approach. However, this approach has been criticised by the European Economic and Social Committee.

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130 Article 81(e) TFEU specifically allows the EU to enact legislation guaranteeing effective access to justice.

131 European Commission, *Inception impact assessment…*, p. 4. The Commission contemplated this approach with regard to the online sale of tangible goods. See also R. Mańko, *Contract Law and the Digital Single Market…*, p. 23-26 for a detailed analysis of this regulatory option.


134 *Opinion of the European Economic and Social Committee* of 27.4.2016 (2016/C 264/07), rapporteur: Jorge Pegado Liz, paras. 1.4, 4.2.2 and 4.2.5.3.
6.4. Approach taken by the proposed Digital Content Directive

The proposed Digital Content Directive is also framed as a maximum harmonisation instrument. Although of all the Member States only the UK has specific rules on contracts for supply of digital content,\(^{135}\) other countries, such as Austria,\(^ {136}\) Germany\(^ {137}\) and the Netherlands,\(^ {138}\) apply the rules for sales or services to digital content contracts. If the Digital Content Directive is adopted in its current state, i.e. especially with regard to the priority of contractual standards of quality over objective ones (see section 3), those Member States would have to lower their existing consumer protection standards. The same is true for the UK, since the Consumer Rights Act 2015 also provides for the priority of objective quality standards over the fine-print terms of contract. In contrast to its approach regarding the Online Sales Directive, the EESC was in favour of maximum harmonisation for the Digital Content Directive, 'as long as a higher level of protection is guaranteed for consumers'.\(^ {139}\)

6.5. Analysis

The choice between minimum and maximum harmonisation is ultimately a political one, involving the need to balance both the regulatory interests of the Member States and the Union on the one hand, and the interests of consumers and traders on the other. Nonetheless, even in cases of maximum harmonisation traders will still have to ensure compliance with the remaining part of national law in the country to which they are selling goods or supplying digital content, as both the OSD and DCD proposals are 'pointillistic' in that they regulate only a narrow array of consumer rights, and – unlike the CESL – do not attempt to provide for comprehensive regulation of the entire contractual relationship.

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\(^{135}\) Consumer Rights Act 2015, Chapter 3.

\(^{136}\) In Austria, the definition of a 'thing' (Soche) encompasses both tangible and non-tangible objects (§ 285 ABGB), therefore ordinary rules on sale or other contracts apply to 'digital things'. See H. Koziol, R. Welser and A. Kletečka, 1 Grundriss des bürgerlichen Rechts (14th ed, MANZ 2014), p. 103; B. Eccher, in H. Koziol et al (ed), Kurzkommentar zum ABGB (3rd ed., Springer 2010), p. 276

\(^{137}\) § 453 BGB provides for the application of rules on sales to digital content. The German Supreme Court ruled that rules on lease should also be applicable to digital content (BGH, Urteil vom 15. November 2006 – XII ZR 120/04, NJW 2007, 2394).

\(^{138}\) With regard to sale of digital content on a durable medium, the ordinary rules on sale are applicable. With regard to sale of digital content without any durable medium (i.e. downloaded), a legislative intervention from March 2014 made the rules of the Civil Code on consumer sale applicable (see Wet van 12 maart 2014, Staatsblad 2014, No. 140). As regards the streaming of digital content (e.g. watching a film online), the rules on the services contract are applicable (Wet van 4 juni 2015, Staatsblad 2015, No. 220). See Rafał Mariko, Contracts for supply of digital content to consumers, EPRS Briefing, PE 581.980 (2016), p. 3. I would like to thank Prof. Marco Loos for kindly clarifying the position of Dutch law for me.

\(^{139}\) EESC opinion of 27.4.2016, para. 4.3.2.4.
7. Mandatory versus default rules

7.1. The issue: freedom of contract versus consumer protection

The rules found in private law legislation, such as in Civil Codes or other statutes, can be either mandatory or default.\textsuperscript{140} A mandatory rule (\textit{jus cogens}) is one that the parties are not allowed to deviate from in a contract or other juridical act. A default rule (\textit{jus dispositivum}) is a rule which will apply only to the extent that the parties have not agreed otherwise in a contract or other juridical act. Some scholars also speak of 'semi-mandatory' (or 'semi-default'\textsuperscript{141}) rules, meaning those that can be deviated from, but only unilaterally, especially to the benefit of an economically weaker party (consumer, worker, tenant). However, even for the parties it is not always easy to discern whether a given default rule serves their interests or should be modified in the contract.\textsuperscript{142}

Whilst private law is essentially a 'self-service' part of the legal system which relies on the autonomy and initiative of private parties, in certain areas there is a need to safeguard the public interest and for that reason the legislator introduces mandatory and semi-mandatory rules. For instance, in many legal systems the rules regarding the time-barring of claims (statute of limitations) are mandatory, meaning that the parties may not modify the time-limits after which claims will become time barred. Such rules are mandatory in the interests of legal security and the administration of justice. However, it is often difficult, even for judges, to discern mandatory from default rules, and interpretation in either direction remains the subject of controversies.\textsuperscript{143}

Default rules safeguarding consumer interests will have a lesser impact, as parties (i.e. the business and the consumer) can deviate from them in the contract.\textsuperscript{144} In practice, consumer contracts are usually pre-formulated by the trader, and the consumer accepts them by clicking (in the digital environment) or signing, or simply tacitly, by using a given service (e.g. by boarding public transport the consumer agrees to the terms and conditions of the transportation company).

Finally, as Gerald Spindler rightly points out, the assessment as to whether an individual contract term deviates from default rules in favour of the consumer or to the consumer's detriment must 'take into account the \textit{individual consequences} of the contractual agreement, not the overall effect.'\textsuperscript{145}

7.2. Approach taken by the Consumer Sales Directive

The mandatory nature of the rules of the Consumer Sales Directive is stipulated in the first subparagraph of its Article 7(1), which provides that 'Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, \textit{not be binding on the consumer}.' This rule means that the contractual rights codified in the Consumer Rights Directive


\textsuperscript{141} Hesselink, 'Non-Mandatory', p. 57, 60.

\textsuperscript{142} Hesselink, 'Non-Mandatory', p. 66.

\textsuperscript{143} Hesselink, 'Non-Mandatory', p. 69.

\textsuperscript{144} Hesselink, 'Non-Mandatory', p. 73.

\textsuperscript{145} Spindler, Contracts, p. 216, n. 133.
may not be subject to a waiver or restriction. However, this is possible once the consumer brings the defects (lack of conformity) to the seller's attention.

Furthermore, in the case of sale of second-hand goods, the Member States may allow parties in the contract to agree on a shorter period, but this may not be shorter than one year. (Article 7(2) second subparagraph CSD).

Finally, Article 7(2) CSD includes the rules of the directive in the category of overriding mandatory provisions that apply even if the contract is governed by the law of a non-Member State. Article 7(2) CSD operates only if the contract has a 'close connection' with the territory of the Member States.

7.3. Approach taken by proposed Online Sales Directive

The mandatory nature of the rules contained in the proposed Online Sales Directive is stipulated in Article 18 of the proposal. It states that 'Any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them or varies their effect before the lack of conformity with the contract of the goods is brought to the seller's attention by the consumer shall not be binding on the consumer unless parties to the contract exclude, derogate from or vary the effects of the requirements of Articles 5 and 6 in accordance with Article 4 (3)'. Article 4(3) OSD, in turn, provides that 'Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract'. Therefore, the seller's liability for defects may be waived only if the consumer – at the time of concluding of the contract – expressly accepts the 'specific condition' of the goods, i.e. their non-conformity.

7.4. Approach taken by the proposed Digital Content Directive

The wording of the proposed Digital Content Directive on the mandatory nature of its rules is slightly different from the Online Sales proposal. Article 19 DCD stipulates: 'Unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them or varies their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer, shall not be binding on the consumer'. It follows that Article 19 DCD creates a rebuttable presumption of mandatory nature – the rules of the DCD are mandatory, unless the DCD itself provides otherwise. Importantly, Article 18 OSD does not contain such a qualification.

Indeed, upon closer examination it transpires that many rules of the DCD are actually default ones. They either contain a reference to the text of the contract ('as stipulated by the contract' – as in Article 6(1) DCD), or are applicable only if the contract is silent ('[t]o the extent that the contract does not stipulate...' – as in Article 6(2) DCD), or use traditional expressions denoting default rules ('unless otherwise agreed' – as in Article 6(4) DCD)

7.5. Analysis

Mandatory (or, strictly speaking, semi-mandatory) rules enacted in favour of consumers are a classical regulatory instrument protecting the weaker party, i.e. the consumer. The freedom of contract in business-to-consumer relationships, even if provided for in the legal rules, de facto usually is very limited due to the relative
difference in bargaining power of the parties. This is especially so in the case of pre-formulated standard terms of contract that the trader proposes to the consumer on a take-it-or-leave-it basis (without any room for individual negotiations). If the two proposed directives are indeed aimed at granting rights to consumers, the appropriate legal form for doing so is through mandatory rules, which cannot be contracted out.

8. Outlook

In law, coherence is a value in itself. It contributes to the law's transparency, certainty and predictability. It makes legal interpretation easier and more efficient, because if the same set of rules are applicable to a broader array of situations, their interpretation in one area will be applicable to the remaining ones. Therefore, regardless of what choices exactly are made with regard to conformity of goods and digital content, remedies or time limits for the liability of the seller or supplier, it is of the utmost importance that the same set of rules applies to all types of similar transactions – sale of tangible goods online and offline, as well as supply of digital "goods" such as apps, programmes or e-books. The exact choices are a political matter, as they will reflect the balance between the interests of businesses on the one hand, and consumers on the other. What is important however, is that these choices are made uniformly for all types of transactions; otherwise the legal system will become incoherent and non-transparent, with a negative impact on all interested parties.

Taking advantage of the liberal, minimum harmonisation approach of the Consumer Sales Directive, some Member States have retained or enacted rules providing for a higher level of consumer protection. This is also true of the area of contracts for the supply of digital contracts and for digital services not previously regulated by EU law. However, minimum harmonisation obviously does not lead to total uniformity across the EU, and this led the Commission to propose a set of two maximum harmonisation directives in the place of the optional Common European Sales Law. Nonetheless, as many authors have underlined, maximum harmonisation of consumer rights will mean, in practice, that some Member States will have to lower the level of consumer protection. Therefore, concrete choices need to be made very carefully. An alternative approach would be to revert to the minimum harmonisation principle – recently followed, for instance, in the Mortgage Directive – which would make it easier to reconcile the conflicting interests of consumers and businesses.

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In 2015, the Commission presented two proposals for directives: on the online sale of goods to consumers, and on the supply of digital content to consumers. The two proposals need to be analysed in the context of the existing Consumer Sales Directive from 1999, which is currently under revision as part of the REFIT exercise. If the two proposals enter into force, consumer sales transactions will be regulated by three instruments: with regard to tangible goods sold face to face – by the Consumer Sales Directive, with regard to tangible goods sold at a distance – the Online Sales Directive, and with regard to the sale of digital content – the Digital Content Directive. Not surprisingly, the three texts have much in common as regards their structure and subject matter. They all deal with such issues as conformity (lack of defects), the consumer’s remedies in cases of defects, the time limit for bringing such remedies and the burden of proof. They also have two other systemic issues in common: the choice between minimum and maximum harmonisation, on the one hand, and between mandatory and default rules, on the other. The existing Consumer Rights Directive is a minimum harmonisation instrument, and allows Member States to grant consumers a higher level of protection, especially when it comes to the period of seller’s liability or the freedom of choice of remedies to be pursued in the event of defects. Similarly, the absence of any EU legislation specifically addressing contracts regarding the sale or rental of digital content or the provision of digital services means that Member States have been free to protect consumers to the extent they see fit. Since the two proposals are framed as maximum harmonisation instruments, the question of the exact extent of consumer rights and the way they should be exercised is crucial.