

DIGITAL CONTENT & DISTANCE SALES

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New Developments at EU Level

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Digital Content & Distance Sales. New Developments at EU Level
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PREFACE

The Digital Single Market has recently been one of the priorities of the European Commission. As part of the implementation of its Digital Single Market Strategy,¹ the Commission adopted three proposals in December 2015: a proposal for a directive for the supply of digital content (DCD);² a proposal for a directive for the online and other distance sales of goods (ODSD);³ and a proposal for a regulation on cross-border portability of online content services in the internal market.⁴

As these proposals may have a substantial impact not only for e-commerce and digital contracts, but also for the general rules on sales and services contracts, the UGhent and the KU Leuven organised a seminar with national and international specialists in the field to analyse the exact consequences of this proposed legislation. This book comprises the papers presented and discussed at this seminar. It combines contributions that set out the broader legislative and political context and give the reader a general overview of the impact of the proposals (chapters by *Marco Loos* and by *Gert Straetmans* and *Shana Meys*), with chapters with an in-depth analysis of specific aspects of the proposed legislation, its pros and cons and possible improvements. This approach inevitably involves some overlap but this was the deliberate choice of the editors, as it avoids excessive cross-references and allows for reading of the chapters separately, according to the needs of the reader for a helicopter view or a more detailed analysis.

The introductory and general chapter by *Marco Loos* sets out the lengthy road that led to the proposal for an online sales directive and of the proposal for a digital content directive, from the early legislative measures in European (consumer) contract law, to the academic initiatives, the DCFR, the Consumer Rights Directive and the (proposal for a) Common European Sales Law. In addition, he provides a global overview of the contents of both proposals. He

¹ Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the regions: strategy for a digital single market for Europe, 6 May 2015, COM(2015) 192 final.

² Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.

³ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final.

⁴ Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, COM(2015) 627 final.

points out that certain matters remain unresolved, mainly where digital content and the consumer's digital environment are interdependent but without formal interconnection. He questions very critically the need for yet another separate sales regimes specifically for distance contracts and this sets the tone for what will be a recurring criticism throughout this book.

The subsequent chapters provide further detail and analysis of specific aspects of the proposals. *Sophie Stijns* and *Sanne Jansen* address the online sales proposal in more detail, more specifically its scope of application and the rules of conformity. They set out the differences and similarities with the Consumer Sales Directive, the CESL and national contract law. Although the authors see a number of improvements in the proposal in comparison with the Consumer Sales Directive, especially with regard to the rules on conformity, they also criticise the further fragmentation of consumer sales law which the adoption of this proposal would lead to. The application of a different legal system in face-to-face consumer sale transactions compared to online consumer transactions is not transparent to consumers or practicable for traders. They therefore plead for a comprehensive revised and uniform Consumer Sales Directive that would remain applicable to online and distance sales. The parallel chapter of *Reinhard Steennot* and *Simon Geiregat* addresses the scope of application and the conformity requirements in the proposal for a digital content directive. They applaud the broad approach towards digital content, whereby it is irrelevant whether the content is supplied on a tangible medium, whether it is tailor-made and also how the contract is classified. They also welcome the equation of actively provided data to money. The authors, however, propose a number of clarifications or adaptations to enhance legal certainty. They are more sceptical concerning the conformity provisions, as they consider that the provisions provide only limited protection: conformity is in principle only guaranteed by subjective criteria; objective criteria only apply if contractual provisions are absent or non-transparent.

Ignace Claeys and *Jan Vancoillie* address the remedies available to consumers under both proposed directives, as well as the specific provisions of the digital content directive concerning modification of digital content and termination of long-term contracts. The authors are not convinced that the proposals can effectively attain the goals pursued: a high level of consumer protection and increased legal certainty. There are firstly important aspects where the level of protection would be reduced under Belgian law, including the protection against hidden defects that now still applies after the expiry of the two-year period. The authors furthermore favour an integration of the DCD and the ODSO into one instrument, given the blurring borders between tangible goods and digital content. Legal certainty is further not necessarily enhanced by these proposals, which not only contain various ambiguous rules, but also increase the complexity of contract law in general and sales law in particular.

A more positive note on the ODSO proposal can be derived from the chapter by *Evelyne Terryn* and *Sanne Vandemaele* on commercial guarantees. The authors

discuss the current legal framework, which they consider insufficient as it does not guarantee that commercial guarantees are transparent and provide added value to consumers. The additional information requirements imposed by the ODSO are therefore an improvement, but the authors once more see no justification for a limitation of the proposed changes to online and other distance sales of goods. *Bert Keirsbilck* discusses the provisions of the DCD and ODSO proposals that provide the seller/supplier with a right of redress in case of an act or omission by previous parties in the chain of transactions which triggered the seller/supplier's liability for the legal guarantee towards the consumer. These provisions are clearly inspired by the Consumer Sales Directive and as in the Consumer Sales Directive, the option of direct producer's liability is also disregarded in these proposals.

Eva Lievens has a closer look at the proposal for regulation on ensuring the cross-border portability of online content services, a complex matter that requires a careful balancing of the interests of rights-holders, online content service providers and consumers. The regulation has at least the potential to benefit all parties involved: through uninterrupted access to content for consumers when travelling to other Member States; through a (potential) decreased use of technical means to bypass current territorial restrictions for rights-holders, due to a (potential) increased legitimate access to content and for online content service providers; and through (possibly) new subscribers who value cross-border portability, without significant additional costs. However, Lievens also points out that amendments to the proposal are necessary for these benefits to materialise.

In a final horizontal chapter, *Gert Straetmans* and *Shana Meys* analyse in depth the impact of both proposed directives on the existing level of consumer protection, both from a Belgian and a European perspective. From a Belgian perspective, the answer is nuanced. They note changes that will benefit consumers, including the abolition of the obligation to notify the lack of conformity and the prohibition of the seller to stipulate such an obligation in the contract; the extension of the period during which the burden of proof is reversed and the possibility for the consumer to terminate the contract unilaterally in the case of a distance sales contract, even if the lack of conformity is minor. They also note some novelties that will benefit consumers; including the right to withhold performance and the right to damages for economic loss in the case of supply of digital content. However, *Straetmans* and *Meys* also regard the abolishment of the complementary regime concerning latent defects because of the full harmonisation as a major drawback of the proposals. The effect on the level of consumer protection receives an equally nuanced answer from a European perspective. Adoption of the proposals would entail problems of further fragmentation, delineation and a lower standard of consumer protection for specific aspects. In addition, the authors point out that the rather limited scope of application of the proposals – dealing only with certain aspects of the specific

types of consumer contracts – will lead to different levels of protection between Member States which will thus undermine the uniformity aimed at by the proposals. A solution according to the authors, may therefore be the adoption, over time, of an overall horizontal measure in the form of a Regulation or a Directive that consolidates the consumer sales acquis by eliminating existing contradictions.

The chapters in this book are based on the text of the December 2015 proposals and further developments up to May 2016. At the time of writing this editorial (January 2017), discussions are still ongoing in the Council. An opinion of the European Economic and Social Committee (EESC) was published in July 2016.⁵ Like the contributors to this book, the EESC also criticises the unacceptable difference in the treatment of online and offline sales of goods that the ODSO proposal creates. It considers it more appropriate to regulate online sales of tangible goods during the review of the Consumer Sales Directive as part of the REFIT exercise (Regulatory Fitness and Performance Programme). The results of the external studies supporting the Fitness Check are expected by February 2017⁶ and will hopefully indeed support a revision of the Consumer Sales Directive that can at least incorporate the changes to sales law of the ODSO proposal and possibly also of the DCD. As to the DCD proposal that has been the subject of intense debate in the Council over the last months, political guidelines have been adopted,⁷ as well as a revised text by the Dutch–Slovak presidency. The debate continues concerning a number of technical and policy questions (such as the approach on ‘embedded digital content’; on consumer provision of data other than personal data as possible counter-performance; and on the balance between subjective and objective conformity criteria)⁸ that are also raised by the contributors to this book. We therefore want to thank all the authors for their contribution to the ongoing debate and for their suggestions for improvement that will hopefully lead to better legislation for the Digital Single Market.

Ignace Claeys and Evelyne Terryn
Ghent and Kortrijk, 1 January 2017

⁵ Opinion of the European Economic and Social Committee on the ‘Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content’ (COM(2015) 634 final – 2015/0287 (COD)) and the ‘Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods’ (COM(2015) 635 final – 2015/0288 (COD)), OJ C 264, 20.7.2016.

⁶ http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm.

⁷ Note on the Council Debate 2 June 2016, Interinstitutional file, 2015/0287 (COD), with Annex: ‘basic principles and political guidelines for future work’.

⁸ Note on the Council Debate 1 December 2016, Interinstitutional file, 2015/0287 (COD).

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