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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposals for Directives of the European Parliament and of the Council**

**(1) on certain aspects concerning contracts for the supply of digital content**

**and**

**(2) on certain aspects concerning contracts for the online and other distance sales of goods**

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# 1 WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM

## 1.1 Introduction

### Context

Following the Guidelines of President Juncker, the European Commission has set the creation of a Digital Single Market as one of its key priorities to generate additional growth in Europe. The Digital Single Market Strategy<sup>1</sup> identified as one of its three main pillars to boost the EU's digital economy "*better access for consumers and businesses to online goods and services across Europe*".

The Digital Single Market Strategy considers e-commerce as a main driver for growth. The e-commerce market has indeed grown rapidly in recent years within the overall retail sector. According to Ecommerce Europe, the value of retail e-commerce in the EU in 2014 reached a total of €370 billion and grew by 13.4% compared with 2013.<sup>2</sup> Others estimate the online retail sales growth at an average annual rate of 22% in the period 2000-2014, surpassing €200 billion in 2014 and reaching a share of 7% of total retail in the EU.<sup>3</sup> The Commission's recent estimate<sup>4</sup> is within the range of the above estimates at €231 billion (around 1.8% of EU GDP). Enterprises' turnover from retail e-commerce as a share of total retail turnover has risen by 85% from 2009 to 2014.<sup>5</sup> In the same period final expenditure of households (which follows retail sales in terms of volume and trends) only increased by 2.8%, showing again that retail trade is growing much faster online than offline.<sup>6</sup>

However, e-commerce still has a significant untapped potential. The share of e-commerce in the total retail sector remains significantly lower in Europe compared to the United States: In 2014, the share of e-commerce in total retail was 7.2% in the EU compared to 11.6% in the USA.<sup>7</sup> A main reason why the EU is currently lagging behind the US on exploiting the growth potential of e-commerce is the insufficient development of cross-border e-commerce within the EU. In 2014, only 12% of EU retailers sold online to consumers in other EU countries, while more than one third (37%)<sup>8</sup> did so domestically. Only 15% of EU consumers purchased online from another EU country in 2014, while 44% did so domestically.<sup>9</sup> As for traders' online purchases, a very large majority (83.3%) are made domestically, with only an average of 12.2% coming from other EU countries.<sup>10</sup>

Thus, instead of taking full advantage of the opportunities of the Digital Single Market, businesses and consumers are too often constrained to their own domestic markets. The Digital Single Market Strategy however promotes better access for consumers and businesses to online trade of goods and services across Europe. The aim is for EU businesses to become more competitive by being able to sell more easily to more than just their national or a couple of neighbouring national markets. An increased offer would also strengthen competition in the markets. This would not only bring consumers a wider choice of products

1 Commission Communication 'A Digital Single Market Strategy for Europe', COM (2015) 192 final, available at: [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf)

2 European B2C E-commerce Report 2015. Ecommerce Europe. Excluding Bulgaria, Cyprus, Croatia, Lithuania, Luxembourg, Malta, Slovenia and Slovakia for which data are not available. <http://www.ecommerce-europe.eu>, p.29

3 Euromonitor International data quoted in Duch-Brown N. and Martens B. "The European Digital Single market", JRC IPTS Digital Economy Working Paper, forthcoming 2015

4 Estimate based on the results of the "Consumer surveys identifying the main cross-border obstacles to the Digital Single Market and where they matter most", GfK, 2015, [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/docs/21.09\\_dsm\\_final\\_report.pdf](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/docs/21.09_dsm_final_report.pdf)

5 From 3.9% to 7.3%, Eurostat, E-commerce by enterprises: summary of EU aggregates (NACE Rev. 2 activity) [isoc\_ec\_eu\_en2]-

6 Eurostat, National Accounts 2014, excluding Bulgaria Cyprus, Croatia, Lithuania, Luxembourg, Malta, Slovenia and Slovakia

7 <http://www.retailresearch.org/onlineretailing.php>

8 Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015), p.27, <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2032>

9 Eurostat survey on ICT usage in households and by individuals (2014), isoc\_ec\_ibuy

10 Flash Eurobarometer 413 "Companies engaged in online activities" (2015) p.61, <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2058>

at more competitive prices, but also increase their confidence to buy abroad because they would trust the high level of European consumer protection.

However, the commercial and technological pace of changes due to digitalisation is very fast. If EU businesses are to become more competitive and if EU consumers are to have trust in high-level EU consumer protection standards allowing them to engage in the Digital Single Market, the EU needs to act now to reap the benefits of digitalisation. Otherwise, changes may come too late and opportunities could be lost.

### *Approach*

Within this context, in order to quickly strengthen the competitiveness of EU businesses and boost EU growth, the Commission decided to deal as a priority with the digital dimension of retail, namely the supply of digital content and the online sales of goods. Already the Political Guidelines of President Juncker announced "*ambitious political steps towards a connected Digital Single Market notably ... by modernising and simplifying consumer rules for online and digital purchases*". The Digital Single Market Strategy includes in its list of key actions both "*harmonised EU rules for online purchases of digital content*" and "*key mandatory EU contractual rights for domestic and cross-border online sales of goods*". Both these aspects of this digital supply/sales dimension are fundamental and need to be addressed together.

The barriers to the supply of digital content clearly need to be addressed because the supply of digital content has a particularly strong growth potential. Any delay regarding digital content entails the risk that legal fragmentation and hence barriers to trade will increase, as some Member States have already legislated, others are doing so and others still can be expected to follow if no action is taken at EU level.

Goods still represent by far the biggest share of the online market: of the €231 billion estimated total size of the Digital Single Market, some €212 billion stem from retail in goods.<sup>11</sup> The Digital Single Market potential would not be unleashed if only digital content, but not online sales of goods, was addressed. In order to have a sizeable impact on the overall EU economy, the online sales of goods also needs to be facilitated. In President Juncker's progress report<sup>12</sup> on the European Commission's 10 Priorities, the need to "*remove the barriers that today hamper you from buying online the pair of shoes you want from another Member State*" is mentioned as a practical example among many others. Online sales of goods are however not only important from the angle of business turnover, but require also a specific attention from the angle of creating consumers' trust into the Digital Single Market. It is important to give clear rights to consumers in order to mitigate the distance-related risks (no in-person contact with the seller, no "touch and feel" of the product) inherent to these transactions.

Moreover, there is a particular reason coming out of the consultation process why any rules on the online sales of goods should be addressed together with the rules on digital content. The already mentioned risk of legal fragmentation stemming from emerging national legislations on digital content creates an urgent need for the EU to establish quickly uniform rules in order to avoid even more obstacles to the cross-border supply of digital content. One important trend emerging from the different consultations which the Commission has run for the preparation of the present initiative was that any rules on digital content should be as far as possible based on the rules on the sales of goods, deviations being justified only to take account of the specificity of digital content. Indeed this approach is appropriate and has been followed. To ensure such a consistent approach also during the legislative process, both sets of rules should be discussed as far as possible in parallel.

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<sup>11</sup> Including services sold online, but consumed offline.

<sup>12</sup> See under [http://ec.europa.eu/priorities/soteu/docs/priorities-progress-report\\_en.pdf](http://ec.europa.eu/priorities/soteu/docs/priorities-progress-report_en.pdf)

In its approach, the Commission specifically also takes into account the lessons learnt from the proposal for a Regulation on a Common European Sales Law and the legislative process leading to the Consumers Rights Directive. The idea of an optional instrument has been abandoned and it is no longer attempted to deal with an area where problems are identified in a comprehensive manner. Instead, the proposed initiative will be targeted and focused on key national mandatory consumer contract law rules which create obstacles to cross-border trade.<sup>13</sup>

### *Complementarity and coherence with the REFIT exercise*

The context and approach as described above show that it is opportune to act fast on digital content and the online sales of goods. At the same time, it is recognised that harmonising the rules on online sales of goods has one downside, i.e. the risk to have rules on the online sales of goods which are different from the rules on the offline sale of goods. This could mean that retailers who are selling both online and offline would have to apply a different regime and that consumer rights may vary depending on whether they purchase online or offline. Given the increasing importance of the omni-channel distribution model (i.e. selling at the same time via multiple channels such as directly in a shop, online or otherwise at a distance), the Commission will take steps to avoid such a result and ensure that consumers and traders will indeed be able to rely on a coherent legal framework which is simple to apply everywhere in the EU.

Therefore, together with the current work on this digital dimension, the Commission has, in the context of its Regulatory Fitness and Performance Programme (REFIT), launched an in-depth analysis of the existing EU consumer legislation. This Fitness Check is considerably broader than the current initiative as it covers a number of consumer law directives, notably the Unfair Contract Terms Directive<sup>14</sup>, the Consumer Sales and Guarantees Directive,<sup>15</sup> the Unfair Commercial Practices Directive<sup>16</sup>, the Price Indication Directive<sup>17</sup> the Injunction Directive<sup>18</sup> and the Misleading and Comparative Advertising Directive<sup>19</sup>.

Data from the Fitness Check Analysis on the application of the Consumer Sales and Guarantees Directive to off-line sales of goods are likely to be available in the 2nd half of 2016. While these data and therefore the outcome of the Fitness Check exercise on this point are not known at this stage, its possible conclusions pointing to the need for a Commission initiative on the offline sales of goods could feed into the progress made by the co-legislators on the proposal on online sales of goods.

In this way the discussions on offline sales of goods will not have to start at zero and repeat issues that have already been discussed and agreed for the online sales of goods. This also means that any difference in the dates of entry into force of rules on the online and offline sales of goods could be reduced, or even aligned by the co-legislators if they so choose thus actually avoiding any risk of different regimes for online and offline sales. Whilst the outcome of the Fitness Check cannot be prejudged at this stage, fragmentation between the rules on online and offline sales of goods is not likely to occur in practice. The large consultation strategy undertaken for the current proposal on digital content and online sales of goods already covers many issues under the Sales and Guarantees Directive that are

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<sup>13</sup> See Section 4 for more details

<sup>14</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>

<sup>15</sup> 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: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>

<sup>16</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair B2C commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32005L0029>

<sup>17</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0006>

<sup>18</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31998L0027>

<sup>19</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0114>

equally relevant for online and offline sales of goods. In this way, a large part of the analysis work concerning the provisions of this initiative to identify and remedy the possible problems has already been undertaken in the context of the rules for online sales of goods as part of the present initiative.

### *Scope of this impact assessment*

The Digital Single Market Strategy for Europe tackles in a holistic manner all major obstacles to the development of cross-border e-commerce in the EU. Dealing with all those obstacles together and improving the situation for businesses and consumers will bring the expected boost to the Digital Single Market and the overall EU economy. The Digital Single Market Strategy identified differences in contract law between Member States, including differences in the main rights and obligations of the parties to a sales contract, among the barriers to cross-border e-commerce. The present impact assessment focusses on these issues.

## **1.2 Business-to-consumer (B2C) contracts**

### **1.2.1 Existing legal framework**

#### *Overview of the existing EU legislation*

**Substantive law** - The Consumer Rights Directive<sup>20</sup> has fully harmonised certain rules for online sales of goods and supply of digital content (mainly pre-contractual information requirements and the right of withdrawal). However, there are no specific EU rules to protect consumers against non-conforming digital content. There are only minimum harmonisation rules on the notion of conformity with the contract and on remedies for non-conforming goods (under the Consumer Sales and Guarantees Directive) the implementation of which some Member States have chosen to extend to digital content. In addition, for both digital content and goods there are minimum requirements on unfair standard contract terms (under the Unfair Contract Terms Directive). Since these are minimum standards, Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility on different points and to a different extent.

**Conflict of law rules** - The Rome I Regulation<sup>21</sup> allows contracting parties to choose which law applies to their contract and determines which law applies in the absence of choice. A trader who "directs his activities" to consumers in another country may either apply the consumer's national law or choose another law (in practice almost always the trader's national law). In this latter case, however, the trader must also respect the mandatory consumer contract law rules of the consumer's country to the extent that those rules provide a higher level of consumer protection. When the trader does not direct his activities to consumers in a specific Member State but agrees to enter into a contract at the consumer's own initiative, consumers do not benefit from the more protective rules of their national law.

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20 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0083>

21 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ.L:2008:177:TOC>. A detailed explanation of the conflict of law rules can be found in Annex 7.

## *Main differences between consumer mandatory contract law rules affecting cross-border trade of goods*

There are several key contract law areas where differences exist between Member States' national mandatory rules that apply to consumer sales contracts. These differences mainly result from national mandatory rules going beyond EU minimum harmonisation Directives.<sup>22</sup>

Implementation of the Consumer Sales and Guarantees Directive:

- **Hierarchy of remedies:** According to the Directive, if a good is non-conforming a consumer is first required to request repair or replacement. Only as a second step can the consumer ask for termination of the contract or price reduction. 20 Member States<sup>23</sup> have followed this approach while other Member States have gone beyond this minimum requirement offering the consumer from the beginning a free choice between repair, replacement or termination.<sup>24</sup> Another group of Member States<sup>25</sup> have taken over the hierarchy of remedies but also provide for another remedy, namely a right to reject non-conforming goods within a short deadline.
- **Notification duty by the consumer:** Member States are authorised to stipulate that in order to benefit from their rights, consumers must inform the seller of the defect within two months from its discovery. In case of non-notification consumers lose their right to remedies. While in 11 Member States<sup>26</sup> consumers do not have to notify within a certain timeframe, in 12 Member States,<sup>27</sup> the consumer has to notify the defect within 2 months, and in 5 Member States<sup>28</sup> the consumer has to do so within a different period of time.
- **Reversal of the burden of proof:** A consumer can only ask for a remedy if the good was non-conforming when delivered. The burden of proof is reversed during the first 6 months, obliging the trader during this period to prove that no such defect existed at the time of delivery. While 25 Member States have laid down a shift of burden of proof for 6 months, 3 Member States have extended this period (Poland to one year, France<sup>29</sup> and Portugal to two years).
- **Legal guarantee period:** The trader can be held liable for a period of no less than 2 years for defects which were present at the time of delivery. While 23 Member States have made use of this 2 year period, in 1 Member State<sup>30</sup> the period is 3 years and in 2 Member States<sup>31</sup> it is unlimited. In 2 other Member States<sup>32</sup> there is no specific legal guarantee period, but the consumer rights are only limited by the prescription period (time limits in national legislations within which rights can be invoked in court).

Implementation of the Unfair Contract Terms Directive:

- **The scope of unfairness control:** The Directive, which is also applicable to contracts for the supply of digital content, prohibits traders from including in their contracts clauses which have not been individually negotiated and which are unfair to

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22 The information below is mainly drawn from the notifications by Member States to the Commission according to Articles 32 and 33 of the Consumer Rights Directive regarding the transposition of the Unfair Contract Terms Directive and the Consumer Sales and Guarantees Directive; for full notifications see: [http://ec.europa.eu/consumers/consumer\\_rights/rights-contracts/directive/notifications/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/notifications/index_en.htm)

23 Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden

24 Croatia, Cyprus, Greece, Lithuania, Portugal and Slovenia

25 The United Kingdom and Ireland

26 Austria, Bulgaria, Czech Republic, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Poland and the United Kingdom,

27 Belgium, Croatia, Cyprus, Estonia, Finland, Italy, Latvia, Malta, Portugal, Romania, Slovenia and Spain

28 Within reasonable time in Denmark and Sweden; promptly in the Netherlands and immediately in Hungary (in these countries a notification within 2 months is always considered to be within the time limit); within 6 months in Slovakia.

29 2 years as of 18 March 2016; currently 6 months

30 Sweden

31 Finland and the Netherlands

32 Ireland and the United Kingdom



consumers. However, the unfairness control does not cover clauses negotiated individually between the trader and the consumer, nor the definition of the main subject matter of the contract or the adequacy of the price and remuneration. In 7 Member States<sup>33</sup> individually negotiated contractual terms are also subject to unfairness control. In 6 Member States<sup>34</sup> the unfairness control is extended to the main subject matter of the contract or to the adequacy of the price or remuneration.

- **List of unfair terms:** The Directive provides an indicative, non-exhaustive list of 17 clauses which may be regarded as unfair in a contract. Several Member States have gone further, providing a list of clauses that are always considered as unfair (black lists)<sup>35</sup> or a combination of a black list and a list of clauses that are presumed unfair (grey list).<sup>36</sup>

There are also some other mandatory consumer contract law rules which do not have their origin in the implementation of EU consumer law. Some of those rules apply only in a single Member State.<sup>37</sup> These are isolated cases as they concern only specific points for individual Member States. Consequently they are not considered as obstacles for intra-EU cross border trade. There are also two examples of other mandatory contract law rules which exist in several Member States: spares parts<sup>38</sup> and merger clauses<sup>39</sup>. These rules, however, have not been identified by stakeholders as possible barriers to cross-border trade. Therefore, the possible obstacles stemming from different national legislations to be analysed in this impact assessment are only those stemming from national implementation going beyond the minimum rules of the Sales and Guarantees and the Unfair Contract Terms Directives.

### *Different national consumer contract law rules applying to digital content*

Most Member States do not yet have specific national legislation on digital content. Contracts for the supply of digital content is categorised differently from one Member State to another. For instance, depending on the Member State, these contracts are considered as sales contracts, as services contracts or as rental contracts. In addition, contracts for the supply of digital content (for example, music, video games, films, cloud storage services, broadcast of sport events) are also categorised differently within each Member State depending on the type of digital content offered.<sup>40</sup> As a consequence, for digital content, national rights and obligations as well as the remedies for consumers vary within the same Member State as well as between Member States. This is for example the case for the consequences of termination of cloud computing contracts. In France, the courts impose a cooperation obligation upon a service provider to help customers migrate data after the termination of the contract. An analysis of the Dutch provisions on services contracts (under which cloud contracts could legally be qualified) also shows that the provider has a duty to return the stored data received from the customer. In many other Member States, such obligations do not exist.<sup>41</sup>

33 Austria, Czech Republic, Finland, France, Luxemburg, Malta and Sweden

34 Finland, Luxemburg, Malta, Portugal, Slovenia and Sweden

35 Belgium, Bulgaria, Czech Republic, Estonia, Greece, Lithuania, Luxemburg, Malta, Portugal, Slovakia and Spain

36 Austria, France, Germany, Hungary, Italy, and the Netherlands

37 For example, Article L122-8A of the French *Code de la Consommation* protects consumers against unfair exploitation (abuse of weakness) with a criminal sanction in addition to the remedies available to avoid the contract. In the United Kingdom a rule in the new Consumer Rights Act requires that the goods are sold free of any third party rights and claims.

38 While in most Member States there are no specific rules on the availability of spare parts for sold goods, in Spain, Slovakia, Portugal and Romania spare parts should be available to consumers during a certain period of time. A similar rule exists in Croatia, however it is not specifically designed for consumer protection and therefore does not fall under Article 6 (2) of the Rome I Regulation. A similar rule in France concerns only pre-contractual information and the relationship between businesses.

39 Belgium, Finland and the United Kingdom consider that the so-called "merger" clause (a clause which explicitly requires that the contract has to contain all terms that have been agreed between the parties, with the consequence that other statements or agreements do not form part of the contract) is not binding for consumers. In other Member States, for instance in Bulgaria, France and Poland, this clause is not specifically regulated, but if such clause is used, it will be subject to the unfair contract terms regime. Finally, in some other Member States, for instance in Germany, Ireland, Cyprus and Estonia, the merger clause is valid. In practice, in these Member States, the effect of the merger clause will again be substantially mitigated by the unfair contract terms regime. For instance, in Ireland merger clauses are considered by the Irish National Consumer Agency to be contrary to the general unfairness clause stemming from Directive 93/13/EEC on the unfair terms in consumer contracts but they are not expressly included in the Irish grey list. Therefore those differences between Member States do not lead, in practice, to significantly different results.

40 Comparative Study on cloud computing contracts (2014) DLA Piper, p.33 and seq.; Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts; University of Amsterdam: Centre for the Study of European Contract Law (CSECL)/Institute for Information Law (IViR); Amsterdam Centre for Law and Economics (ACLE) p.32 and seq

41 Comparative Study on cloud computing contracts (2014) DLA Piper, p.70

While some of these national rules are non-mandatory and can be modified contractually by the parties, others are of a mandatory character.

Finally some Member States have recently enacted<sup>42</sup> or started to work<sup>43</sup> on specific mandatory rules on contracts for the supply of digital content. However, these rules differ in scope. For example, in the United Kingdom new legislation which sets specific mandatory rules for digital content only covers digital content paid for with money. In the Netherlands, however, digital content supplied on a medium or through downloading that is paid for 'in kind', i.e. against the supply of the consumer's personal data, will also be subject to mandatory rules.

Emerging national legislation on digital content also differs in terms of substance. For instance, in Dutch law the consumer has the right to withhold payment until the trader performs according to the contract, while the UK Consumer Rights Act does not provide consumers with any statutory rights in relation to withholding performance for non-conforming digital content. In Dutch law consumers' rights against the trader are extinguished after two years from the moment the consumer has notified the trader about the defect. In the United Kingdom there is no notification duty for consumers and their rights are prescribed after a period of 6 years (5 years in Scotland).

### **1.2.2 Problem 1: Differences in consumer contract law rules hinder traders from selling digital content and goods online cross-border**

*Differences in national consumer contract laws are important obstacles for B2C online cross-border transactions. They represent additional costs for businesses. Faced with these costs, many businesses prefer to stick to their own domestic markets. Businesses, in particular SMEs, lose opportunities for expansion and economies of scale. Overall additional costs for EU retailers are around €4 billion. If contract law-related barriers were lifted over 122,000 additional retailers would start selling cross-border.*

Consistently during the last years data show that traders consider differences in national consumer protection and contract law rules as important obstacles to trade in other Member States. In 2012<sup>44</sup> "Additional costs of compliance with different consumer protection rules and contract law (including legal advice)" ranked among the top two obstacles to developing cross-border sales and was mentioned by 41% of all retailers. In 2014<sup>45</sup> "differences in national consumer protection rules" and "differences in national contract law" were reported as important obstacles to developing online sales to other EU countries by respectively 41% and 39% of retailers who currently sell online. A vast majority of business organisations responding to the public consultation insisted on the negative effects of legal fragmentation and on the costs that differences in national legislations impose on businesses.

Remedies in case of a non-conforming product are a significant problem. For 49%<sup>46</sup> of retailers currently selling or having sold in the past online cross-border, "guarantees and returns are too expensive". This number is even higher among traders who are not yet active in cross-border trade but are currently trying to sell or considering selling online cross-border in the EU. 67% estimate that "guarantees and returns are too expensive".<sup>47</sup>

62% of EU retailers that are either active or interested in online cross-border trade would "definitely" or "to some extent" start or increase their online cross-border sales if the same

42 See Chapter 3 of the UK Consumer Rights Act 2015: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> and the Dutch Law of 14 June 2015 . <https://zoek.officielebekendmakingen.nl/stb-2015-220.html>

43 Ireland: <http://www.djei.ie/commerce/consumer/issues.htm#crbscheme>

44 Flash Eurobarometer 359 "Retailers' attitudes towards cross-border trade and consumer protection" (2013) p. 26

45 Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015) p.43

46 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), Q.6a breakdown by type of product and sector (B2B-B2C),

47 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), Q.6b. breakdown by type of product and sector (B2B-B2C)

rules for e-commerce applied in the EU.<sup>48</sup> Removing such obstacles is clearly an incentive for cross-border trade, especially when combined with other measures foreseen in the Digital Single Market Strategy, for instance to reduce parcel delivery costs.

By discouraging traders from expanding their online activities abroad, differences in consumer contract laws prevent businesses from reaping the benefits of economies of scale. By selling to other Member States and building their share in new target markets, businesses could decrease their production and development costs and increase their efficiency. This problem is particularly relevant for SMEs, i.e. 99% of all European businesses. SMEs are often confined to a small home market with high production and development costs. A reduction of e-commerce costs would enable SMEs to achieve growth through exports and economies of scale that cannot be achieved from the domestic market alone.

The extent to which contract law-related obstacles cause businesses to miss out on the opportunities offered by online cross-border trade is significant. It is estimated that if the barriers related to contract law were lifted, the number of businesses selling online cross-border could increase by more than 5 percentage points (an increase of around 12% in relative terms) compared to the current situation.<sup>49</sup> According to a conservative estimate, this means that over 122,000 more businesses would start selling online cross-border.<sup>50</sup>

### *Differences in mandatory consumer contract law rules for goods and digital content create additional costs for traders*

While online traders may choose to apply their own contract law when selling to a consumer in another Member State, they also have to respect the mandatory consumer contract law rules in the consumer's Member State which provide a higher level of consumer protection, in case they direct their offer to consumers in the Member State concerned. Such mandatory rules currently exist mainly for goods.<sup>51</sup> However, as already mentioned above<sup>52</sup> mandatory rules for the supply of digital content are also emerging in some Member States, creating differences between national rules governing these contracts. In addition, in some Member States, certain contracts for the supply of digital content are assimilated to a sales contract, and therefore the differences in consumer mandatory rules for the sale of goods would also apply to digital content.<sup>53</sup> All these differences have a direct impact on traders.

For instance, a Polish trader directing his selling activities to consumers in Sweden should respect the three-year legal guarantee period under Swedish law instead of the two-year period that applies when he is selling to Polish consumers. Likewise, a Portuguese trader may refuse a request from a Portuguese consumer to replace a non-conforming product 3 months after discovery of the defect, if the Portuguese consumer has not complied with his obligation to notify the defect within 2 months after discovery. However, a Portuguese trader targeting a German consumer will not be able to rely on such a notification duty and will have to replace a non-conforming product sold to a German consumer also 3 months after discovery, because such notification duty does not exist under German law.

Businesses may adopt different practices and approaches towards contract law-related differences when selling cross-border. Some bear the additional costs of adapting their contracts according to the laws of the Member States that they target. Others do not adapt their contracts but may shoulder additional costs to assess the legal and financial risk in case

48 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), Q.11 breakdown by type of product and sector (B2B-B2C)

49 Regression analysis based on business replies to the Flash Eurobarometer 413 "Companies engaged in online activities" (2015) regarding the following concerns "Guarantee and returns" and "Not knowing the rules which have to be followed". See Annex 4. The base is represented by enterprises already active online.

50 See Annex 4. The estimated number of additional companies that would start selling online cross-border is of 122,324. This is a conservative estimate that applies the percentage point increase to the estimated number of companies already active online (the target group for Flash Eurobarometer 413). It does not take into account the companies currently not engaged in online transactions, but which could start selling online cross-border once the barriers are removed

51 See Section 1.2.1

52 See Section 1.2.1

53 For example, in Germany, when digital content can be saved by consumers on a medium or on the hard drive of their computer, German courts apply sales law rules to the contracts. See BGH, NJW 1988, p.406 ff.; BGH, NJW 1990, p.302 ff.

of disputes with consumers in the targeted Member States. The costs stemming from differences in consumer contract law are mainly one-off costs (namely the costs for identifying the foreign rules, possibly translating them, analysing them and consequently possibly adapting general terms and conditions and even the business model accordingly), but also ongoing costs for periodical adaptations to changes in national laws or costs specific to litigation where expert opinion on foreign contract laws is needed.

This has been confirmed through in-depth interviews held with businesses with experience or interest in cross-border online sales.<sup>54</sup> According to this information, some traders adapt their contract terms and conditions to the consumer contract law rules of the Member States where they target their activities. To do this, some seek external professional advice from lawyers or consulting businesses, at a cost ranging from €4,000 to €12,000 per Member State. Other traders believe that they should adapt their contracts but currently do not, because the costs involved would be too high. Among those who do not adapt their terms and conditions, some rely on national certification schemes such as quality labels and trust marks to ensure that their company complies with local consumer contract legislation. In the latter case, companies have to incur one-off costs to obtain the trust mark as well as periodic renewal costs. Again others rely on the platforms through which they sell their products to comply with the legislation of the targeted Member States. Finally, other traders do not take any measures at all in that respect, but satisfy all customers' requests without examining their legal grounds according to consumer contract law rules.

The one-off contract law-related costs incurred by businesses are estimated at around €9000.<sup>55</sup> These figures are confirmed by a major EU retailers' association responding to the public consultation, which reported contract law-related costs of €9,000-10,000 for its members to enter the market of one Member State. If one focuses, following a conservative approach, only on one-off costs incurred by exporting retailers (B2C) who actually examine the applicable foreign law in advance (47%<sup>56</sup>), the overall one-off contract law-related costs currently incurred by EU traders are estimated around €4 billion euros.<sup>57</sup>

The impact of these one-off costs is likely to vary depending on the size of the company, and would particularly affect micro and small enterprises with a smaller turnover, as shown in Table 2.<sup>58</sup> For instance, the decision of a micro enterprise active in retail trade to export to 4 Member States would entail contract law-related costs of approximately €36,000, which would surpass 10% of its annual turnover.

**Table 2: Contract law-related costs for businesses as a share of their annual turnover**

Wholesale and retail trade						
	Average annual turnover per firm	Number of Member States entered (with transaction costs per Member State = €9,000)				
		Member State	2 Member States	3 Member States	4 Member States	27 (EU)
Micro	358 439	2.51%	5.02%	7.53%	10.04%	67.79%
Small	6 333 525	0.14%	0.28%	0.43%	0.57%	3.84%
Medium	45 049 125	0.02%	0.04%	0.06%	0.08%	0.54%
Large	439 583 481	0.002%	0.004%	0.01%	0.01%	0.06%

Source: Eurostat Structural Business Statistics 2012, SME Panel Survey

Disproportionate contract law-related costs may thus constitute an additional disincentive for micro or smaller retailers to expand their business by entering foreign markets.

54 6 businesses, among which 5 SMEs, from Belgium, Denmark, Luxemburg, Sweden and United Kingdom were interviewed in June - August 2015. See Annex 2

55 This calculation is based on data from a SME Panel Survey (2011). This data can still be used in the present context, after the entry into force in 2013 of the Consumer Rights Directive, as they do not take into account costs related to pre-contractual obligations. See Annex 5 for detailed calculations.

56 Flash Eurobarometer 321 "European contract law in consumer transactions" (2011), p. 58 found that 18% of retailers currently involved in cross-border trade are not at all informed about the consumer protection provisions in the contract laws of the EU countries where they target consumers, and another 32% are not well informed. It is assumed that these exporters have not sought legal advice on foreign law at all. On the opposite side, 8% said they are fully informed and 39% well informed, hence it is assumed that only 47% actually examine the foreign contract law in advance

57 For more details on the calculation see Annex 5

58 Economies of scale in entering more than one Member State might be expected, but were not taken into account in order to limit complexity.

### *The complex legal situation of digital content leads to uncertainty*

Specifically for digital content, legal uncertainty already exists at national level because the qualification of the contract for the supply of digital content is not always clear. This leads to uncertainty about, for instance, which remedies apply under which conditions.<sup>59</sup> This uncertainty becomes even more important for traders willing to sell cross-border, as they will often not know whether there are rules applying to digital content in the Member State they want to export to, what is the content of those rules and whether they are mandatory. Traders are likely to face difficulties to evaluate the legal risk when developing a new business model that could apply to several Member States or even all over the EU. Results from a recent study based on interviews with EU businesses selling digital content online show that approximately a quarter of the businesses interviewed were dissuaded from engaging in cross-border activities due to legislative gaps and differences between Member States' national contract law rules.<sup>60</sup>

#### **1.2.3 Problem 2: Consumers are not confident when buying digital content and goods online cross-border**

*Consumers prefer to stick to their own domestic markets due to perceived uncertainty. They miss opportunities and face a narrower range of goods at less competitive prices. If contract law-related barriers were lifted, between around 8 and 13 million additional consumers would start buying online cross-border.*

*Detriment to consumers is also caused by the lack of a clear contractual framework for digital content. This detriment is estimated between €9 - 11 billion in the EU just for music, anti-virus, games and cloud storage services.*

While 61% of EU consumers feel confident about purchasing online from a retailer/provider located in their own country, only 38% feel confident about purchasing online from another EU country.<sup>61</sup> Consumers' confidence in buying cross-border has been low over the years. Between 2012 and 2014, consumer confidence about purchasing online from another Member State only increased from 36% to 38%. From 2006 to 2011, the share of consumers being equally confident in buying in other EU countries as in their own went up from 30% to 34% (reaching the top level in 2008 with 35%).

The low level of cross-border e-commerce in the EU is thus mirrored in the low level of consumer confidence in buying cross-border. Consumers would benefit from increased involvement in cross-border trade. Stronger confidence in cross-border trade would boost the volume of transactions and increase consumer welfare through increased availability of a wide variety of products at more competitive prices.<sup>62</sup> It is estimated that reducing contract law-related consumer concerns would increase the number of consumers buying online cross-border by around 7 percentage points compared to the current situation (an increase of circa 13.5% in relative terms); this means that between around 8 to 13 million additional consumers would start buying online cross-border, raising the total number of consumers shopping online cross-border up to almost 70 million.<sup>63</sup> The removal of contract-law related concerns would also increase the average sum spent annually by consumers in online cross-

<sup>59</sup> See Section 1.2.1

<sup>60</sup> Economic study on consumer digital content products, ICF International, 2015 (to be published)

<sup>61</sup> Eurobarometer 397, "Consumer attitudes towards cross-border trade and consumer protection" (2014)

<sup>62</sup> See Annex 4 for an overview of the expected increased household consumption and the decrease in consumer prices per Member State and for the EU.

<sup>63</sup> The estimated increase in cross-border buyers when contract law related barriers are removed is based on a regression analysis carried out on data from the "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most" (GfK for the European Commission, 2015). When extrapolating this increase to the general population, a conservative estimate consists of replicating only the relative increase in cross-border buyers from the survey sample to the general population as represented in Eurostat data (15% of people buying online from other EU countries); a more optimistic scenario applies the percentage point increase in the survey sample to the population of citizens purchasing online (50% according to Eurostat). Thus, the indicative range of 64.4 to 69.6 million consumers buying online cross-border provides a realistic estimate.

border shopping by 13.6%, which in real terms would represent an additional annual spending of €40 per consumer buying online cross-border.<sup>64</sup>

In addition, if consumers were to shop online cross-border, they would be able to take advantage of existing price divergences<sup>65</sup> between Member States, as shown in Table 3. For example, a Swedish consumer could pay 17% less buying clothes in Germany while a UK consumer could pay 20% less buying household appliances in Ireland. Whilst these price differences do not take account of factors such as differences in taxation and delivery costs (in part to be addressed by other initiatives in the Digital Single Market strategy), they nevertheless point to important potential opportunities for consumers.

**Table 3: Differences in price levels for consumer goods across the EU (EU-28 average=100)**

	Household Appliances	Footwear	Clothing	Consumer Electronics
Most expensive country	Malta = 147	Denmark = 129	Sweden = 121	Malta = 116
Cheapest country	Hungary = 74	Bulgaria = 73	Hungary = 70	Czech Republic= 85
Difference	73	56	51	31
Cheapest country/most expensive country, in %	50%	57%	58%	73%

Source: Eurostat 2015, Statistics explained, Comparative price levels of consumer goods and services

### *Uncertainty when buying digital content and goods hinders cross-border trade*

Consumers' lack of confidence can be attributed to a number of different factors. For instance, the difficulty to obtain redress is an issue; 23% of online consumers express concerns that it may be more difficult to solve problems cross-border. The redress situation for online transactions for extra-judicial disputes will be improved by the Online Dispute Resolution platform to be launched at the beginning of 2016<sup>66</sup> and for judicial disputes by the revised European Small Claim Procedure.<sup>67</sup>

A lack of awareness by consumers about their rights may also play a role; 11% of EU online consumers do not know their rights when buying online from another EU country. Consumers also fear that other laws protect them less than their own; 8% are concerned that the level of consumer protection they will enjoy when buying from another EU country will be lower than in their own country.<sup>68</sup>

One of the major factors creating a lack of confidence for consumers to shop online cross-border is their uncertainty about their key contractual rights. Data shows that the lack of certainty about contract law rights is often related to non-conforming products. Indeed, a quarter of the top 12 main concerns of EU online consumers about online cross-border are related to non-conforming products: 20% of consumers believe that it will not be easy to get a non-conforming product replaced or repaired, 20% think it will not be easy to return products and get reimbursement and 15% are concerned that the product will not be delivered at all or will be wrong or non-conforming.<sup>69</sup>

To remedy this uncertainty, a possible approach could consist in better informing consumers about their rights. The Commission has been very active in informing consumers about their rights buying cross-border. As most recent example, the Commission launched in 2014 a major information campaign on consumer rights, among others when buying non-

64 The calculation refers to the average sum of money spent by persons buying online cross-border intra EU ( goods and offline services, plus digital content). The estimate (referring to the intra EU online cross-border purchases) is based on the data from the Consumer Survey "Identifying the main cross-border obstacles to the Digital Single Market and where they matter most," (GfK for the European Commission, 2015). It should be noted that the figure refers only to a first-round direct effect and does not give a picture of the impact on various aspects of the economy (which is instead tackled in the macro CGE model explained in Annex 4).

65 Price differences may be attributed to a wide range of factors such as labour costs.

66 For more information on the Online Dispute Resolution platform see see : [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm)

67 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.07.2007. The Commission proposed in 2013 the amendment of this regulation (COM (2013)794final). The revised regulation is in the final stages of the legislative process and is very likely to enter into application in 2017.

68 GfK for the European Commission, "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most", 2015. Respondents could select up to 5 answers from a total of 23 options.

69 GfK for the European Commission, "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most", 2015

conforming products across borders.<sup>70</sup> However, information activities in this area have their limits.

Firstly, in the current legal situation, the protection consumers enjoy by their national law when buying cross-border depends on whether a trader actively directs its commercial activities to the consumer's country. A consumer who chooses to make a purchase from a foreign trader who does not actively direct its commercial activities to the consumer's country will not benefit from the potentially higher level of protection of his own country. For example, an Austrian consumer who purchases clothes in an Italian e-shop which does not actively direct commercial activities to Austria will have to notify the defect to the Italian trader to benefit from the legal guarantee while under his own law he does not have such obligation. If the consumer's Member State is targeted by the trader's commercial activities the consumer is protected by his own law to the extent that the mandatory consumer contract law rules of his own law exceed the level of protection of the trader's law. This differentiation, i.e. whether a foreign trader actively directs its commercial activities to the consumer's country, implies a legal assessment which depends on the circumstances of the relevant case and is done on a case-by-case basis<sup>71</sup>. An information campaign cannot realistically enable a consumer to make such an assessment.

Second, to be effective, information campaigns must include simple messages which can be remembered. Consumer information campaigns at EU level in areas which are only minimally harmonised cannot include such a simple message, except that consumers enjoy in the EU common minimum rights when buying faulty products from other Member States. These campaigns cannot inform consumers about simple and clear rights, such as a single legal guarantee period. Therefore, better consumer information on its own is not sufficient to eliminate consumers' uncertainty.

### ***Consumers' detriment due to lack of clear contract law rights for digital content***

A very large share of consumers are watching films, listening to music, playing games, watching sport events or communicating online on their electronic devices everywhere in the EU.<sup>72</sup> Online access of digital content is much more prevalent among younger internet users, showing that in the near future the overall number of online digital content users could be expected to increase significantly.<sup>73</sup>

Digital content provided without paying money, for instance by simply 'registering', accounts for a very large proportion of consumer digital content. Recent data shows that around 30% of consumers (legally) accessing antivirus and navigation software or cloud storage services, 77% of those streaming events and more than 50% of those watching films and TV content, reading e-books or playing games do so without paying money.<sup>74</sup> The importance of digital content not supplied against money is confirmed by additional recent data. During the last 12 months, 82% and 80% respectively of EU internet users watched sport events and audio-visual content (films, series, video clips and TV content), 77% listened to music, 76% played games and 64% accessed e-books while not paying money.<sup>75</sup>

However, recent data from 2015 shows also that over the last 12 months, at least 70 millions of consumers<sup>76</sup> (nearly 1 in 3 online users) who have used music, anti-virus software, games

70 For more information on information campaigns see: [http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317_en.htm)

71 For more information on the notion of "directing activities" and the assessment made following the case law of the European Court of Justice see Annex 7

72 For example, according to Flash Eurobarometer 411, 2015 "Cross-border access to online content" (Summary p.6), during the past 12 months 60% of EU internet users have accessed music online, 59% have watched audio-visual content (films, TV content, video clips etc.) online and 37% have downloaded or played games online.

73 During the past 12 months, 87 % of EU internet users aged 15-24 have accessed music online, 80% have watched audio-visual content (films, TV content, video clips etc.) online and 58% have downloaded or played games online. Ibidem. p.6

74 ICF International, "Economic Study on Consumer Digital Content Products", 2015 and GfK for the European Commission, "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most", 2015

75 Flash Eurobarometer 411, "Cross-border access to online content", 2015 (Summary p.7)

76 ICF International, "Economic Study on Consumer Digital Content Products", 2015. See Annex 6

or cloud storage services<sup>77</sup> have experienced problems with their digital content related to quality, access or contract terms and conditions. Among online consumers who purchased or tried to purchase digital content online cross-border and experienced problems, 16% reported having received the wrong digital content, 13% a digital content of lower quality, 9% faulty digital content and 10% reported not having been able to access the digital content.<sup>78</sup>

Only 10% of consumers experiencing problems related to access, quality or the terms and conditions of the supply of digital content receive remedies. Consumers<sup>79</sup> reported that the reasons invoked by providers for not providing a remedy were that they were not obliged to do so either by the contract or by law, or that the consumer did not sufficiently prove that there was a problem with the digital content.

Digital content is usually offered to consumers off-the-shelf, on the basis of non-negotiable contracts. The user can influence neither the digital content features nor the contract clauses. Many consumer contracts for digital content include clauses which exclude contractual remedies or limit them severely (for example by excluding liability altogether or offering service credits as the only available remedy).<sup>80</sup> They also include clauses which enable the provider to unilaterally modify the digital content without specifying the conditions for such modifications,<sup>81</sup> or set conditions which do not enable consumers to easily identify that a modification has taken place (for example by inviting consumers to check regularly the terms of the contract<sup>82</sup> or the Service Level Agreement to learn about such changes instead of expressly informing consumers and allowing them to stop the use of the service in case they disagree with the changes). Often, when consumers want to change supplier, they have no guarantee that they will retrieve their data. These problems were reported by a relatively lower share of consumers, but they account for a sizeable share of consumer detriment.<sup>83</sup>

As a result of the problems faced with digital content and of the relatively low share of consumers receiving remedies, consumers suffer financial and non-financial detriment. In the last 12 months before the survey, the combined financial and non-financial detriment resulting only from the most recent problem with just four types of digital content is estimated in the range of €9 - 11 billion in the EU.<sup>84</sup> This number is likely to increase in line with the growth of the digital content market in the EU and the expected increase of the number of EU consumers accessing digital content online in the near future.<sup>85</sup>

#### **1.2.4 How would the problem evolve in the absence of EU action: No policy change/baseline scenario**

The e-commerce market in the EU is growing rapidly, at double-digit annual rates, many times faster than the growth in total retail sales. However, the extent of e-commerce

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77 Data were collected from consumers, focusing on problems experienced with only these four main types of consumer digital content products: music, anti-virus software, games and cloud storage.

78 GfK for the European Commission, "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most", 2015

79 Approximately 50% of consumers who did not receive a remedy did not report a specific reason for this. This paragraph concerns the remaining share of consumers who provided information on the reasons why the supplier did not provide them a remedy.

80 Examples of clauses identified during the work of the Cloud Computing Expert Group: "Any use of the cloud services is done at your own risk and you will be solely responsible for any damage to your computer system or other device or loss of data that results from using the cloud service"; "Service credits are your sole and exclusive remedy for any performance or availability issues for any service under the agreement and this SLA."

81 Examples of clauses identified during the work of the Cloud Computing Expert Group: "X reserves the right at any time to modify this Agreement and to impose new or additional terms or conditions on your use of the Service. If you do not agree with them, you must stop using the Service and contact X Support to retrieve your Content. Your continued use of the Service will be deemed acceptance of such modifications and additional terms and conditions"

82 Examples of clauses identified during the work of the Cloud Computing Expert Group: "We may modify this agreement at any time by posting a revised version on the legal information section of the Portal or by notifying you in accordance with subsection 9(a). Modified terms that relate to changes or additions to the Product or that are required by law will be effective immediately, and by continuing to use the Services you will be bound by the modified terms. All other modified terms will be effective upon renewal (including automatic renewal) of an existing Subscription or order for a new Subscription."

83 ICF International, "Economic Study on Consumer Digital Content Products", 2015. An average of approx. 4% of consumers experiencing problems reported problems with contract terms restricting trader's liability, unilateral modification clauses, non-retrieval of user generated data etc. Despite the relatively lower share of consumers experiencing problems with terms and conditions (compared to quality and access problems), problems relating to the above issues account for 36 to 40 per cent of the estimated gross financial consumers' detriment. See Annex 6.

84 ICF International, "Economic Study on Consumer Digital Content Products", 2015. See Annex 6

85 For the digital content sector as a whole, there has been strong growth in the recent years. 80% of (or 317 million Europeans) used the internet in 2014. Alongside increased internet penetration and usage, a growing number of smartphones, e-readers and tablet users are fuelling demand for digital content. Taking into account the significantly higher share of internet users aged 15-24 currently accessing digital content online (compared to the average of total EU population, see footnote 73), this increase can be reasonably expected to become apparent in the near future.



penetration varies significantly between Member States.<sup>86</sup> While the growth and size of national e-commerce sales is influenced by many factors, such as the quality, availability, and cost of high-speed internet services, the role of traditional distance sales channels (catalogues) and general economic conditions, data suggest that the size of the overall retail market influences the size of the domestic e-commerce sector<sup>87</sup>. National e-retailers appear to be held back by the scale of their national markets. Similarly, consumer e-purchases are restrained by the limited domestic offer. The implication is that without EU intervention the growth of cross-border e-commerce in the EU will continue to be held back by uncertainty and regulatory fragmentation.

Without EU intervention to tackle these problems, businesses will continue to face unnecessary costs and consumers will remain unsure about their rights and face unnecessary difficulties in enforcing them. Businesses will still have to comply with the national mandatory consumer contract law rules when selling online to other EU countries. Some 57% of businesses have indicated that differences in Member States' e-commerce laws discourage them from selling across borders.<sup>88</sup> Businesses that adapt their terms and conditions or want to assess in advance the legal and financial risk in the event of disputes will continue to face additional contract law-related costs of about €9,000 per Member State to which they wish to export. Overall contract law-related one-off costs, which have already reached around 4 billion, will increase in line with the number of EU businesses exporting to other Member States, and the number of Member States to which they export.<sup>89</sup>

Moreover, it can be expected for digital content that other Member States, alongside the UK, the Netherlands and soon Ireland<sup>90</sup>, will enact specific but different mandatory consumer national laws for digital content. This will impose additional costs for those businesses who want to sell digital content in other Member States.

Contract law-related costs will continue to impose an especially disproportionate burden on SMEs, and in particular micro and small businesses who wish to expand their activities cross-border. It will hinder SMEs from exploiting economies of scale.

Additional contract law-related costs absorb resources that businesses could otherwise use for more productive activities, such as research and development. As a barrier to market entry, these costs also reduce incentives for innovation. The persistence of contract law-related barriers to market entry will continue to limit competition, resulting in less consumer choice and higher prices. Although one might expect the percentage of consumers buying online cross-border to continue to increase at a moderate rate, the persistence of contract law-related concerns will deter a share of EU consumers from buying online cross-border; they will thus continue not to benefit from better prices in other EU Member States.

Consumers will continue to benefit from the rights and remedies in existing EU legislation. Enforcement of the existing EU consumer protection legislation should be strengthened by the revision, announced in the Digital Single Market Strategy, of the Consumer Protection Cooperation Regulation, which will clarify and develop the powers of enforcement authorities and improve the coordination of their market monitoring activities. Furthermore, the Online Dispute Resolution platform should make it easier for consumers to reach an out-of-court settlement and the improved Small Claims procedure<sup>91</sup> will make it easier to obtain court redress.

Differing national regimes will however remain an obstacle to efficient enforcement. The continued existence of different national regimes will impose an additional burden on

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86 "Online Retailing in Europe, US & Canada, 2015-2016", Centre for Retail Research, 2015

87 *Ibidem*

88 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), p.53

89 See Section 1.2.2

90 See Section 1.2.1 "Different national consumer contract law rules applying to digital content"

91 COM (2013)794final

national court systems, which will be required (as at present) to apply the laws of other EU Member States in some disputes. In addition, the lack of legal clarity could have a negative impact on the ability to exercise one's right to an effective remedy before the courts. All in all, the added workload will to some extent decrease the overall efficiency of justice compared to the current situation.

A number of other measures announced by the Commission in the Digital Single Market Strategy to secure Europe's position in the digital economy will also benefit both consumers and businesses. For example, giving copyright law a more European dimension, notably through cross-border portability and other measures to improve consumers' cross-border access to legally acquired content, will remove a key obstacle to cross-border online sales. This will form a comprehensive package with action against geo-blocking that is not compatible with a single market and with action on company-erected barriers that come under the competition sector enquiry into e-commerce. The actions set out in the Strategy will substantially contribute to market transparency and improve competition both in terms of prices and consumers' access to a wider variety of products. At the same time they create a level playing field for companies to engage in cross-border trade and help them scale up. In the first half of 2016 the Commission will also launch measures to improve price transparency and enhance regulatory oversight on parcel delivery. This action will address the problems related to the delivery and return costs, which were identified in recent surveys as major consumer concerns when it comes to online purchases from other EU countries. Parcel delivery has also been identified as a major obstacle by EU retailers, especially by SMEs that lack purchasing power in relation to postal operators. Measures towards affordable, high-quality cross-border parcel delivery services will thus enhance both consumers' and retailers' confidence in engaging in cross-border e-commerce. Reducing VAT-related burdens and obstacles to selling across borders is another action that is expected to yield significant savings for EU businesses that wish to make cross-border sales. All these measures, which fall under the first pillar of the Digital Single Market, are complemented by additional actions under the two other pillars of the Strategy, such as the on-going consultation and analysis of the role played by platforms in the market, including in terms of B2B level-playing field and enforcement of consumer rules.

However, the 16 actions announced in the Strategy are to be considered as a whole, as their synergy will deliver maximum impact and address long standing bottlenecks hampering the achievement of a truly integrated market. The achievement of its intended benefits requires that each one of the key obstacles is addressed. Therefore, without additional action on contract law-related barriers - one of the major obstacles identified by the Digital Single Market Strategy - its benefits will remain limited and incomplete.

### **1.3 Business to Business (B2B) contracts**

#### **1.3.1 Existing EU legal framework for B2B transactions**

B2B contracts are dominated by the principle of contractual freedom. Thus, very limited EU legislation applies to these contracts: only the Directive on Electronic Commerce<sup>92</sup> has introduced some rules on pre-contractual information for electronic contracts. A set of rules concerning goods was introduced by the 1980 UN Convention on Contracts for the International Sales of Goods<sup>93</sup> (CISG). For digital content there is currently no EU legislation on conformity and remedies. For both goods and digital content national contract laws apply. These rules are generally not mandatory and can therefore be waived or changed by agreement of the parties. For digital content, the rules may differ not only as to the

<sup>92</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>

<sup>93</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) The CISG is not ratified by all Member States (UK, Ireland, Portugal and Malta are not members).

substance of the rules themselves but also as to the legal qualification given to contracts for the supply of digital content.

### 1.3.2 Contract law rules do not seem to be a major hindrance for cross-border B2B online transactions

*The evidence on whether specific contract law-related obstacles hinder B2B cross-border trade is not conclusive. A very large majority of stakeholders insist that the focus of the current EU initiative should remain on B2C.*

Among businesses currently selling online to other businesses, 49% sell cross-border within the EU. Around half of these businesses derive up to 25% of their annual turnover from cross-border sales.<sup>94</sup> Contract law obstacles highlighted in the B2C context hindering businesses from selling cross-border are not as significant in the B2B context. While 35% of businesses trying or considering B2C cross border sales regard guarantees and returns as a major problem, this is the case for only 14% of businesses active in B2B. It should be noted that the share of 14% of companies reporting the above contract law-related problems for B2B transactions as major ones are all SMEs. This may be an indication that such problems are more prevalent for SMEs compared to large companies.<sup>95</sup>

The relatively low prevalence of contract law-related obstacles for the B2B market has been confirmed by the Stakeholders' Consultation Group<sup>96</sup>: a large majority of stakeholders highlighted that contract law rules do not represent an important obstacle for businesses to sell cross-border to other businesses. Indeed, according to a recent business survey, over 80% of businesses that sell, used to sell, or are considering selling to other businesses in other EU countries reported that differences in national rules would not directly influence the scale of their cross-border activities.<sup>97</sup>

The major concerns reported by businesses that are trying or considering buying online from other EU countries are not related to contract law. They relate to the cost of resolving cross-border complaints and disputes (46%), high delivery costs (42%), lack of language skills (29%), data protection (29%), foreign suppliers refusing to deliver to their country (26%), product labelling requirements and copyright (each 25%) and payment systems (24%).<sup>98</sup> Contrary to the retail sector, there is currently no evidence of actual or perceived problems related to differences in contract law rules that hinder EU businesses from buying online from other Member States.

As a consequence, a very large majority of stakeholders<sup>99</sup> who responded to the public consultation considered that the focus of the initiative should remain on B2C and not include B2B contracts. Discussion with Member States also showed a clear lack of demand for an initiative tackling contractual issues for B2B. Business organisations in the Stakeholders' Consultation Group referred to the generally non-mandatory nature of B2B rules. They highlighted the significance of freedom of contract as an overarching principle in B2B contracts, be it in terms of the freedom to choose the law that will apply to the contract or the freedom to adapt B2B contract law default rules which would in many cases pre-empt potential problems regarding contractual issues.

94 Flash Eurobarometer 413 "Companies engaged in online activities" (2015). Breakdown of results by product sold and type of activity: For 25.3% of companies selling B2B online, 1-25% of their online sales came from other EU countries. For 9.6% this share was between 26-50%, only for 1.7% the share was 51-75% and for 3.8% of companies' intra-EU online cross-border sales accounted for 76-100% of their total e-sales.

95 Ibidem. Due to the low sample of large enterprises responding to these questions, it would need to be further investigated whether such problems are also relevant for large companies.

96 See Annex 2

97 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), breakdown of results by product sold and type of activity. Only 18,3% of businesses that sell, used to sell, or are considering selling to other businesses in other EU countries reported that they would definitely start or increase online cross-border sales if the same rules for e-commerce applied in the EU

98 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), p.76

99 See Annex 2

The underlying message confirmed by both recent data and stakeholders is that, contrary to consumers who are generally less well informed about products, market characteristics and business practices and find themselves in a structurally imbalanced position compared with the trader, this is mostly not the case for professional business-buyers, where imbalances in bargaining power are due to the respective market situations which will be different on a case-by-case basis.

### 1.3.3 Specific issues related to digital content in the B2B context

Certain specific contract law-related problems in the B2B context have been identified in relation to cloud computing services.

The possibility to access the cloud and use digital content such as applications and software or store data can spare businesses the expense of purchasing, installing and maintaining hardware and software locally; however, in 2014 only 19% of EU enterprises used paid cloud computing services, mostly for hosting their e-mail systems and storing files in electronic form.<sup>100 101</sup> Almost half (46 %) of those firms used advanced cloud services relating to financial and accounting software applications, customer relationship management or to the use of computing power to run business applications.

Four out of ten businesses (39%) that used the cloud in 2014 reported the risk of a security breach as the main limiting factor in the purchase of cloud computing services.<sup>102</sup> From the businesses' point of view, the risk of a security breach is not only a technical issue but also a matter of contract terms governing the service providers' liability and accountability<sup>103</sup>. This conclusion has been confirmed by the Expert Group on Cloud Computing Contracts.<sup>104</sup> Experts pointed out the important financial risk of cloud services' users who face contractual clauses unreasonably limiting the liability of cloud service providers in case of a security breach. Indeed, businesses, and in particular SMEs, which do not necessarily have sophisticated backup solutions, may lose entire parts of their business if they do not have access to their data for a period of time.

Moreover, issues of uncertainty about the location of data may arise, due to the fact that cloud service providers may use data centres in different countries. This factor was reported as limiting the use of cloud computing, particularly for large businesses already using the cloud (46%).<sup>105</sup> Other contract law issues may exist. For example, the question arises whether traders should have an obligation to help customers transfer their data when they want to change provider. Understanding the exact quality level of the service that was promised is also challenging for users, in particular when they have to demonstrate that the service did not function properly. These issues have been identified by the Expert Group on Cloud Computing Contracts as also affecting businesses and in particular technologically less equipped SMEs.<sup>106</sup> In reply to the public consultation, the main EU SMEs organisation pointed out the need to protect SMEs in this area.

However, despite these similarities between the problems faced by consumers and SMEs as cloud service users, there are also specificities that have to be taken into account to determine the right approach of intervention for each sector. Both the Expert Group on Cloud Computing Contracts and the Stakeholders' Consultation Group<sup>107</sup> insisted on the

100 Eurostat, Statistics explained "Cloud computing - statistics on the use by enterprises" [http://ec.europa.eu/eurostat/statistics-explained/index.php/Cloud\\_computing\\_-\\_statistics\\_on\\_the\\_use\\_by\\_enterprises](http://ec.europa.eu/eurostat/statistics-explained/index.php/Cloud_computing_-_statistics_on_the_use_by_enterprises)

101 If one excludes SMEs, the percentage of businesses using cloud computing goes up to 35%, which shows that cloud usage is still limited among SMEs.

102 Eurostat, see footnote 100

103 See Expert group meeting on cloud computing contracts, synthesis of the meeting of 5/6 March 2014; [http://ec.europa.eu/justice/contract/files/expert\\_groups/5\\_6\\_march\\_meeting\\_synthesis\\_final\\_en.pdf](http://ec.europa.eu/justice/contract/files/expert_groups/5_6_march_meeting_synthesis_final_en.pdf)

104 Expert Group on Cloud Computing Contracts - Detailed information on the composition of the Expert Group and minutes of the meetings available at: [http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index\\_en.htm](http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index_en.htm)

105 Eurostat, Statistics explained "Cloud computing - statistics on the use by enterprises" [http://ec.europa.eu/eurostat/statistics-explained/index.php/Cloud\\_computing\\_-\\_statistics\\_on\\_the\\_use\\_by\\_enterprises](http://ec.europa.eu/eurostat/statistics-explained/index.php/Cloud_computing_-_statistics_on_the_use_by_enterprises)

106 See Expert group meeting on cloud computing contracts, synthesis of the meeting of 27/28 March 2014, part III, availability; [http://ec.europa.eu/justice/contract/files/expert\\_groups/27\\_28\\_march\\_final\\_synthesis\\_en.pdf](http://ec.europa.eu/justice/contract/files/expert_groups/27_28_march_final_synthesis_en.pdf)

107 See Annex 2

need not to overburden businesses selling digital content to other businesses with obligations that would hamper their competitiveness in a fast evolving market.<sup>108</sup> They also made clear that while it is true that SMEs users are often the weak part in cloud computing contracts, the freedom of contract in the B2B environment should not be jeopardized. A recent experience in the food supply chain shows that in order to find solutions to the asymmetry and possible misuses of bargaining powers between businesses, a non-legislative approach could be a possible alternative.<sup>109</sup>

Overall contract law related problems in B2B relations may stem from differences in bargaining power, difficulties to agree on the applicable law or difficulties to find information about foreign law, especially for SMEs. The need to also protect SMEs has been recognised in the Digital Single Market Strategy and will be analysed in the context of other actions announced in the Strategy.

## **2 WHY DOES THE EU NEED TO ACT?**

When selling goods to consumers in other Member States, businesses are confronted with different mandatory consumer contract law rules resulting from the current possibility given to Member States to go beyond the minimum requirements set out by EU legislation.<sup>110</sup>

For digital content, existing legislation already contains mandatory rules to some extent. In addition, market trends prompt Member States to take action independently. Several Member States have recently enacted or started preparatory work to adopt mandatory rules on contracts for the supply of digital content. These national rules differ however in scope and in content.<sup>111</sup> It is to be expected that other Member States will follow this trend if the EU does not act. Given the heterogeneity of the online market for digital content it would be difficult for the market to overcome the existing legal complexity and fragmentation. Contractual practice so far has not produced consumer rights with an adequate level of consumer protection.

All these different national mandatory rules –both affecting digital content and the online sale of goods - create costs and complexity for businesses and negatively affect the volume of cross-border trade as well as consumer welfare. Consumers are deprived of more offers at more competitive prices.

As already explained<sup>112</sup>, in order to rapidly strengthen the competitiveness of EU businesses and boost EU growth, it is necessary to act now and to deal as a priority with the digital dimension of retail, i.e. both the supply of digital content and the online sales of goods. For digital content, there is in addition a specific need for the EU to act swiftly in order to prevent legal fragmentation from increasing and to raise the potential of the current digital revolution and growth opportunities. Finally, in order to maintain consistency between the rules on digital content and on the sale of goods as far as the specificity of digital content does not require deviations, it is reasonable to discuss both sets of rules together.

This initiative complies with the principle of subsidiarity, as Member States on their own initiative would not be able to remove the barriers that exist between national legislations. Each Member State individually would not be able to ensure the overall coherence of its legislation with other Member States' legislations. This is why an initiative at EU level is necessary. The legal basis for the initiative would be Article 114 TFEU on its own or in combination with Article 81 TFEU, depending on the option retained.

Such an initiative will provide consumers with harmonised contract law rights when buying goods online. It will reduce costs for businesses as they will no longer have to face different

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<sup>108</sup> See Annex 2

<sup>109</sup> [http://ec.europa.eu/enterprise/sectors/food/files/competitiveness/good\\_practices\\_en.pdf](http://ec.europa.eu/enterprise/sectors/food/files/competitiveness/good_practices_en.pdf)

<sup>110</sup> See Section 1.2.1

<sup>111</sup> See Section 1.2.1

<sup>112</sup> See Section 1.1

consumer mandatory rules resulting from the current possibility given to Member States to go beyond the minimum requirements set out by EU legislation. Consumers would benefit from more offers at better prices. In addition, for digital content, an initiative at EU level would secure the development of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from a high level of consumer protection. It will create legal certainty for businesses which want to sell their digital content in other Member States.

Harmonised contract law rules in the EU would facilitate coordinated enforcement actions undertaken by the Consumer Protection Co-operation authorities. They will provide a consistent legal basis for these actions which result in negotiated undertakings at the EU level. These coordinated actions offer businesses a "one-stop-shop" enforcement approach and strengthen enforcement of EU legislation for the benefit of EU consumers.<sup>113</sup> For example, the recent in-app purchases action<sup>114</sup> enabled providers to negotiate with the Commission and the Consumer Protection Authorities in a coordinated manner instead of 28 separate national authorities.

Finally, the present initiative will add value to other measures in the Digital Single Market. Other measures, such as reducing VAT-related burdens, developing high-quality cross-border parcel delivery services or a modernised copyright law will create new opportunities for European consumers and companies. These opportunities can only be exploited to their maximum extent if they are completed by an initiative on contract law-related obstacles, as contracts are the tools for all transactions related to these other measures.

### 3 WHAT SHOULD BE ACHIEVED?

<p><b>General objective:</b> Contribute to faster growth of the Digital Single Market, for the benefit of both consumers and businesses.</p>
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<p><b>Specific Objectives:</b></p>
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- |   |
|---|
| <ul style="list-style-type: none"> <li>• Reduce business costs resulting from differences in contract law</li> <li>• Reduce the uncertainty faced by businesses due to the complex legal framework</li> <li>• Contribute to building consumer trust in online cross-border shopping in the EU</li> <li>• Reduce the detriment faced by consumers with respect to non-conforming digital content or certain unbalanced contract terms</li> </ul> |
|---|

The general objective of the initiative is to contribute to faster growth of the Digital Single Market using the potential of e-commerce. The initiative will increase most consumers' trust in the Digital Single Market by providing a high level of consumer protection and ensure more offers and better prices for consumers. At the same time, it will create a friendly environment for businesses and contribute to increasing the volume of cross-border trade. More concretely, with regard to online sale of goods, the aim is to avoid the patchwork of different key mandatory consumer contract rules between the Member States which creates costs and uncertainty for both businesses and consumers. For digital content, the aim is to avoid fragmentation and uncertainty for businesses and consumers as well as consumer detriment. Consumers should have concrete rights when they acquire digital content but do not get what was promised.

### 4 WHAT ARE THE VARIOUS OPTIONS TO ACHIEVE THE OBJECTIVES?

#### 4.1 Scope: B2C transactions

While differences in mandatory consumer contract law rules have been identified as one of the main obstacles that hinder the development of cross-border e-commerce, there is

<sup>113</sup> Article 9 of the Consumer Protection Cooperation Regulation

<sup>114</sup> For further information on the in-app purchases Consumer Protection Cooperation action, see the Commission's press release of 22.12.2014: [http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222_en.htm). Another recent example is the CPC coordinated action on car rental; see the press release of 13.07.2015 [http://ec.europa.eu/justice/newsroom/consumer-marketing/news/150713\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/news/150713_en.htm)

currently no evidence<sup>115</sup> that differences in contract law rules do hinder EU businesses from buying online from other Member States. While SMEs face some problems as cloud service users, business representatives have argued in the Stakeholders Consultation Group that these issues would be best addressed in other initiatives announced in the Digital Single Market Strategy. During the public consultation, all stakeholders and Member States argued that the current initiative should focus on B2C contracts only, with the exception of the main SMEs association which supported the extension of rules on digital content to B2B transactions.<sup>116</sup>

## 4.2 The options

### Option 1 - Setting up targeted, fully harmonised rules for the supply of digital content and targeted, fully harmonised rules for online sales of goods

	Level of harmonisation	Legislative/non legislative	Substantial law areas covered <sup>117</sup> /level of consumer protection	Impact on Rome I
Digital content <sup>118</sup>	Full: Member States will not be able to maintain or introduce more protective rules	Legislative	Targeted: conformity requirements, remedies, modalities how to exercise those remedies and consumer rights relating to modification and termination of long term contracts; high level of consumer protection	None
goods	Full: Member States will not be able to maintain or introduce more mandatory consumer protective rules	Legislative	Targeted: conformity requirements, remedies and modalities how to exercise those remedies; higher level of consumer protection than the existing harmonisation level, but on specific points lower than some national laws	None

**Positions of stakeholders<sup>119</sup>:** For digital content, the vast majority of consumer representatives favour fully harmonised rules, provided that a high level of consumer protection is guaranteed. The majority of businesses also support a full, targeted harmonisation. However, several IT associations and big companies do not see the need for such harmonised rules. Nevertheless, they acknowledge that if legislative action should be taken at all, it should be at EU level. The majority of responding Member States supports harmonised EU rules for online sales of digital content. For goods, consumer representatives would favour harmonised rules, provided that the level of consumer protection is increased in comparison to the current situation. Businesses also generally support harmonisation, in particular the fact that it would be full harmonisation. Member States are more divided; while some would support EU harmonised rules, others do not see the need to act at this stage. However, a majority of stakeholders and Member States warn about the possible fragmentation between online and offline sales of goods.

### Option 2 - Setting up targeted, fully harmonised rules for the supply of digital content / Application of the trader's law combined with the existing harmonised rules on goods

	Level of harmonisation	Legislative/non legislative	Substantial law areas covered/level of consumer protection	Impact on Rome I
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<sup>115</sup> See Section 1.4

<sup>116</sup> See Annex 2

<sup>117</sup> See Section 1.2.1 for a detailed description of the relevant substantial law areas

<sup>118</sup> For digital content, options 1, 2, and 4 are the same.

<sup>119</sup> See Annex 2 to the consultation for a detailed summary.

Digital content	Full: Member States will not be able to maintain or introduce more protective rules	Legislative	Targeted: conformity requirements, remedies, modalities how to exercise those remedies and consumer rights relating to modification and termination of long term contracts; high level of consumer protection	None
Goods	Application of the trader's law with the existing rules for goods subject to EU minimum harmonisation.	Legislative	No further harmonisation – existing minimum harmonisation rules remain. Consumer protection will depend on the protection granted by the trader's law	Derogation from Article 6 of the Rome I Regulation is needed. This could be implemented in a separate legal instrument without formally amending the Rome I Regulation. Such a derogation to the Rome I Regulation would need to be based on Article 81 TFEU; it would not apply in Denmark and might not apply in the UK and Ireland.

**Positions of stakeholders:** For digital content, see under Option 1. For goods, consumer representatives unanimously oppose such an approach. Some businesses would favour harmonised rules but some would see the application of traders' law as a good solution. Among Member States which answered to this question in the context of the public consultation, a number of them explicitly oppose any form of the application of the home option and a re-opening of the Rome I Regulation while a couple showed some openness.

### Option 3 - Setting up targeted, fully harmonised rules for the supply of digital content / No policy change for goods

	Level of harmonisation	Legislative/non legislative	Substantial law areas covered/level of consumer protection	Impact on Rome I
Digital content	Full: Member States will not be able to maintain or introduce more protective rules	Legislative	Targeted: conformity requirements, remedies, modalities how to exercise those remedies and consumer rights relating to modification and termination of long term contracts; high level of consumer protection	None
Goods <sup>120</sup>	N/A	N/A	N/A	N/A

**Positions of stakeholders:** For digital content, see under Option 1. For goods, a majority of stakeholders and Member States warn about the possible fragmentation between online and offline sales of goods. In line with this, many suggest waiting for the end of the REFIT Fitness check evaluation.

### Option 4 – Minimum harmonisation rules for the supply of digital content / No policy change for goods

	Level of harmonisation	Legislative/non legislative	Substantial law areas covered/level of consumer protection	Impact on Rome I
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<sup>120</sup> For goods, options 3 and 4 are the same.



Digital content	Minimum: Member States would be able to maintain or introduce more consumer protective rules	Legislative	Targeted: conformity requirements, remedies, modalities how to exercise those remedies and consumer rights relating to modification and termination of long term contracts; high level of consumer protection	None
Goods	N/A	N/A	N/A	N/A

**Positions of stakeholders:** For digital content, the vast majority of consumer representatives favoured fully harmonised rules, provided that a high level of consumer protection is guaranteed. Businesses oppose minimum harmonisation. Member States also generally preferred full harmonisation over minimum harmonisation. For goods, see under Option 3.

#### Option 5 – A voluntary European model contract combined with an EU trust mark

	Level of harmonisation	Legislative/non legislative	Substantial law areas covered/level of consumer protection	Impact on Rome I
Digital content	N/A	Non-legislative	Depending on the outcome of stakeholders' discussion	None
Goods	N/A	Non-legislative	Depending on the outcome of stakeholders' discussion	None

**Positions of stakeholders:** For digital content and for goods, stakeholders and Member States in their majority are rather sceptical about the added value of such an approach, with limited exceptions.

*Note: all the options presented would apply to cross-border and domestic online sales.*

### 4.3 Discarded options

Building in particular on the experience drawn from the negotiations of previous initiatives aiming at harmonising contract law rules, such as the proposal for a Regulation on a Common European Sales Law and the Consumer Rights Directive, the following options are discarded:

- **Optional instrument:** while having received strong support from the European Parliament, the proposal for a Regulation on a Common European Sales Law<sup>121</sup> did not find a majority in Council. One of the main reasons for this opposition in the Council was the optional character of the proposal. Therefore, this option has not been taken into consideration as it was not considered politically feasible.
- **Comprehensive, instead of targeted, problem-focussed set of rules:** another main lesson drawn from the experience with the negotiation of the proposal for a Regulation on a Common European Sales Law is not to provide for a truly comprehensive set of rules, but a much more targeted and problem-oriented regulation approach. Therefore, this option of a truly comprehensive set of rules has not been taken into consideration as it was not considered politically feasible.
- **Information measures:** While information is important and useful to improve consumer knowledge about their rights, information measures on their own are not sufficient. First, information measures would not create sufficient consumer trust as they could not ensure that all consumers benefit from the protection provided by their national law when buying cross-border. Second, information campaign can realistically not eliminate the uncertainty faced by consumers when buying online outside their home market in the context of a rather complex legal framework characterised by minimum harmonisation.<sup>122</sup>

121 COM(2011)0636final

122 See Section 1.2.3.

Therefore, this option has not been taken into consideration as it was not considered sufficient to meet the objectives.

## 5 WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTIONS AND WHO WILL BE AFFECTED?

### 5.1 No policy change/baseline scenario: See Section 1.2.4

### 5.2 Option 1: Setting up targeted, fully harmonised rules for the supply of digital content and targeted, fully harmonised rules on online sales of goods

#### Economic Impacts

##### Operating costs and conduct of business

- Fully harmonised rules specific for **digital content** throughout the EU will remove the complexity caused by different national rules that currently apply to contracts for the supply of digital content. It would also prevent legal fragmentation that otherwise will arise from new national legislations.
- All businesses supplying digital content to consumers both domestically and cross-border, i.e. around 228,500<sup>123</sup> EU companies, will incur one-off costs of approximately €6,800<sup>124</sup> to adapt to the new rules on digital content. The overall one-off adjustment costs for all EU businesses could thus be estimated at about €1.55 bn.
- Increased consumer rights for digital content may increase the number of requests for remedies, since consumers would have specific and clear rights that they would be more likely to invoke. This could entail an increase in businesses' costs for providing remedies. However, these costs will only be imposed on businesses that supply non-conforming digital content to their customers, and would in practice be an incentive for those businesses to improve the quality of digital content offered.
- On the other hand, greater clarity on consumer rights stemming from fully harmonised rights is expected to result in simpler complaint handling for businesses and a reduction in time and staff training costs required for resolving issues. This can be expected to counterbalance part of the increased costs for providing remedies.
- By fully harmonising the remaining consumer contract law rules for the online sale of **goods** which constitute obstacles for cross-border trade, all key mandatory consumer protection contract law rules that would fall under the scope of article 6(2) of the Rome I Regulation would no longer differ among Member States' national legislations. Therefore, there will be no more differences between national consumer contract laws that could constitute an obstacle to cross-border e-commerce.
- All businesses selling goods online, i.e. around 1.1 million EU companies,<sup>125</sup> will have to incur the one-off costs of approximately €6,800 per company to adapt to the new legislation for the online sales of goods. The overall one-off costs for all EU companies selling online would thus amount to close to €7.5 bn. Businesses currently selling only offline will not have to incur any adaptation costs.
- The possibility that for a transitional period the rules on online and offline sales of goods may differ is very limited in practice, since all necessary steps will be taken to ensure coherence between the two regimes.<sup>126</sup> If such differences were to actually occur for a short transitional period, they could affect businesses selling both online and offline. Businesses also selling cross-border would not be negatively affected, since any additional costs arising from a potential divergence of regimes in their domestic market would be counterbalanced by the significant cost savings resulting from not having to adapt to other Member States' national consumer contract laws when selling online cross-border. Therefore, any possible negative effects would only concern those businesses that currently

<sup>123</sup> Average between low (196,000) and high (261,000) estimates. The number of enterprises selling online is obtained by multiplying the total number of enterprises corresponding to the NACE categories covered by EB 413 (NACE: C, G, H, I, J - Source: Eurostat Structural Business Statistics) by the indicator on the % of enterprises selling through computer mediated networks (source: Eurostat survey on ICT use by enterprises). In doing that it is assumed that the incidence of enterprises selling online among micro-enterprises is between 50% (low estimate) and 70% (higher estimate) of that observed for 10+ enterprises. The percentages of businesses (base: EB 413 enterprises selling online) selling digital services entirely delivered online to individual consumers (proxy for in digital content) and selling online to consumers and selling goods to consumers (proxy for goods online) are then applied to obtain the estimate on the current number of companies selling digital content online to consumers and companies selling goods online to consumers.

<sup>124</sup> Based on data from the IFF Research study "Consumer Rights and Business Practices (March 2013), prepared for UK Department for Business Innovation and Skills. Estimate includes the average costs per business for updating terms and conditions (approx. €5,300) and for developing new versions of documentation (including receipts, invoices and consumer contracts) when terms and conditions are changed (approx. €1,500) See pages 26-27 of the full report [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274801/bis-13-914-iff-report-consumer-rights-and-business-practices.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274801/bis-13-914-iff-report-consumer-rights-and-business-practices.pdf)

<sup>125</sup> 1,068,500 companies, average between low (916,000) and high (1,221,000) estimates. For the calculation of estimates see footnote 123

<sup>126</sup> On this issue see further analysis in Section 1.1, Section 6.2 and Annex 3

sell and will continue to both online and offline but only domestically. However, in practice the impact of such a differentiation would overall not be very important and could be dealt with through adapted business practices. For example, if the reversal of the burden of proof period is extended, in 26 Member States there might be a transitional divergence on the respective rules for online and offline sales. However, recent data show that the shift of the burden of proof often operates de facto throughout the entire 2-year legal guarantee period, and there is very limited change in traders' behaviour before or after the 6 months on this point. Therefore the practical impact on businesses of possibly temporarily divergent rules on this point would not be significant. Moreover, as indicated by retail representatives during the consultation process, omni-channel businesses could cope with possible, transitional differences between the regimes for online and offline sales of goods by applying the respective higher standards, which would enable them to use a single business model and thus save any potential additional costs.

- Around 50% of the total one-off adaptation costs (e.g. about €4 bn) would be incurred by businesses currently selling online only domestically.<sup>127</sup> Among those businesses, some may continue to sell only domestically also in the future, and therefore would not directly benefit from the cost savings resulting from a single consumer contract law regime throughout the EU. Nevertheless, a significant share of EU companies is deterred from selling cross-border also because of consumer contract law differences.<sup>128</sup> Therefore, at least a part of these previously deterred companies can be reasonably expected to start selling cross-border once the consumer contract law-related barriers are lifted. New exporters who would already have adapted to the new rules for the online sales of goods would then be able to sell to consumers in other Member States without having to comply with potential more protective mandatory consumer contract law rules. In this way a business could save up to €90,000 if it wishes to sell in 10 Member States and up to €243,000 if it wishes to sell to all 27 other Member States.
- Businesses currently selling online cross-border would only have to incur once these adaptation costs, and would then be able to expand their cross-border activities to more Member States at no additional adaptation costs. They would thus save the costs of about €9,000 currently incurred to find about the mandatory consumer contract law rules in each additional Member State they wish to sell to.
- Eliminating consumer contract law differences for **both the supply of digital content and the online sale of goods** could increase the number of EU businesses currently selling online cross-border by 5.3 percentage points (or 12% in relative terms). According to a conservative estimate, this means that over 122,000<sup>129</sup> more businesses could be expected to start selling online cross-border.<sup>130</sup>

#### Administrative burdens on businesses

- There will be no additional information obligations on businesses

#### Trade flows

- Trade flows will increase. Removing contract law-related barriers that hinder cross-border online trade could increase exports of Member States within the EU in nominal terms by an average of 0.04%, ranging from +0.14% in Slovakia to +0.0% in Lithuania and Croatia<sup>131</sup>.
- There will be no discrimination or any kind of obstacle to the activity of businesses from third countries. When selling to EU consumers and in case the litigation ends up in an EU court, the latter will be subject to the same rules as EU businesses.

#### Competitiveness of businesses

- Removing contract law-related barriers will facilitate cross border trade. This will put pressure on competition in domestic markets. For digital content, businesses may seek to increase their prices to cope with the costs associated with the new obligations on conformity, remedies and other rights. However, higher competition will encourage businesses to become more innovative, improve quality or reduce prices in order to stay competitive.

<sup>127</sup> Estimate based on the share of respondents to the Digital Single Market firms survey. Among companies selling goods to consumers online, 54% sell only domestically.

<sup>128</sup> "Differences in national consumer protection rules" and "differences in national contract law" were reported as important obstacles to developing online sales to other EU countries by respectively 41% and 39% of retailers who currently sell online. Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015) p.43.

<sup>129</sup> See Annex 4. The estimated number of additional companies that would start selling online cross-border is of 122,324. This is a conservative estimate that applies the percentage point increase to the estimated number of companies already active online (the target group for Flash Eurobarometer 413). It does not take into account the companies currently not engaged in online transactions, but which could start selling online cross-border once the barriers are removed

<sup>130</sup> See footnote 50 and Annex 4

<sup>131</sup> See Annex 4

## Position of SMEs

- SMEs, in particular micro and small businesses, will benefit compared to the current situation: the smaller a business is the more significant cost savings from fully harmonised cross-border rules for **goods** will be. When selling online, SMEs will only have to adapt their terms and conditions once to the new harmonised rules. They will be able to trade with up to 27 other Member States on this basis.
- SMEs will have to incur the one-off costs of approximately €6,800 to adapt to the new legislation for the online sales of goods. The overall one-off costs for SMEs selling online (about 98% of all EU companies selling online)<sup>132</sup> would thus amount to about €7.3 bn. SMEs currently selling only offline will not have to incur any adaptation costs at all. As a fragmentation between the rules on online and offline sales of goods seems in practice not very likely or would probably not have a significant impact<sup>133</sup>, SMEs selling both online and offline will only be faced with limited costs for not more than a relatively short transitional period of different regimes for their online and offline sales. In any case, retail business representatives have mentioned during the consultation process that omni-channel businesses could cope with possible, only transitional differences between the online and the offline regimes for goods by applying the respective higher standards to all of their sales and in this way keeping a single business model.
- SMEs, in particular micro and small businesses will be able to supply **digital content** cross-border as well as domestically based on a clear set of fully harmonised EU rules. While SMEs will have to comply with the new EU consumer mandatory rules for digital content, these rules will be largely harmonised. Therefore SMEs will have to incur the costs of approximately €6,800 to adapt to the new legislation only once, avoiding the additional costs that would arise from legal fragmentation due to divergent new national legislations. Since SMEs constitute the vast majority (around 92%)<sup>134</sup> of all EU businesses supplying digital content, almost all the overall one-off adaptation costs, i.e. €1.5 bn, will be incurred by SMEs.
- Increased consumer rights for digital content may increase the number of consumer requests for remedies. However, the obligations concerning remedies will only impose costs on those businesses that supply digital content that does not conform to the contract. In addition, greater clarity on consumer rights is expected to result in simpler complaint handling for businesses and a reduction in time and staff costs required to resolve issues.

## Functioning of the internal market and competition

- By making it easier for traders to expand their online activities abroad, fully harmonised rules on **goods and digital content** will strengthen competition.
- These fully harmonised rules will also allow businesses to better exploit economies of scale: they will be able to build their share in new markets, decrease their production or development costs and increase their efficiency.

## Innovation and research

- Cost savings and enhanced competition could on the one hand provide businesses with greater opportunities for R&D and other forms of investment, and on the other hand increase incentives to invest in R&D and other efficiency-enhancing measures.
- However, applying the same standards for paid digital content also to content provided against another counter performance may, to a certain extent, discourage businesses from developing new business models based on a counter performance other than money.

## Public authorities

- Full harmonisation Directives would entail implementation costs for all Member States. However, they would enable Member States to better adapt the new EU rules to their own legal system, for instance by ensuring consistency with their general contract law rules (which will not be affected by the new EU legislation). The introduction of fully harmonised rules on the sale of **goods** in particular would entail, to a different extent depending on the previous implementation, the partial amendment or repeal of the relevant implementation provisions of the current Consumer Sales and Guarantees Directive. As this option would leave the Rome I Regulation untouched, there would be no effects on the international private law rules in force.
- A Regulation would be directly applicable in all Member States, and could thus incur minimal

<sup>132</sup> Estimate based on the share of respondents to the Digital Single Market firms survey (EB413). Among companies selling goods to consumers online, 98% are SMEs

<sup>133</sup> See Section 1.1.

<sup>134</sup> Estimate based on the share of respondents to the Digital Single Market firms survey. Among companies selling digital content to consumers online, 99% are SMEs.

implementation costs. However, it would become integral part of a national law which is not adapted to the Regulation. Therefore, it would either lead to adaptation of related national legal areas which will cause implementation costs or would cause frictions/overlaps with related national legal areas.

- Fully harmonised rules should facilitate enforcement in cross-border cases and information campaigns all over the EU. It would provide the competent authorities with a clear message that could be more easily communicated throughout the EU, enabling them for example to inform all EU consumers about a single legal guarantee period or give them a concrete picture on what their rights are and how they can exercise them across the EU.

### Consumers and households

- Consumers (including active consumers) will benefit from fully harmonised rights for **digital content** at a high level of protection. They will have clear rights when they access digital content from anywhere in the EU. This will increase their confidence in buying/accessing such products/services and contribute to reducing consumers' detriment, since there will be a set of clear rights that will enable consumers to address the problems they face with digital content.
- The fully harmonised key consumer contract law rules on the online sale of **goods** would improve the overall level of consumer protection in the EU. While broadly following the current level of the Consumer Sales and Guarantees Directive, they would raise the EU level of consumer protection on important issues that would significantly contribute to boosting consumers' confidence when buying online. Even though in a very few Member States, -which have gone beyond the Sales and Guarantees Directive in their implementation-, the level of protection on individual points may be lowered, this will be counterbalanced by the overall very high level of consumer protection throughout the EU, the increase of consumers' confidence in cross-border purchasing and the enhanced cross-border enforcement of consumer protection rules, facilitated by fully harmonised clearer and simpler rules applicable throughout the EU.
- Fully harmonised rules for both the **supply of digital content and the online sale of goods** would reduce contract law-related consumer concerns and could increase the number of consumers buying online cross-border by about 7 percentage points (or 13.5% in relative terms); this means that between around 8 and 13 million additional consumers could start buying online cross-border, raising the total number of consumers shopping online cross-border to between around 64 and 70 million.<sup>135</sup> The average sum spent annually by consumers in online cross-border shopping would also increase by about 14%, which in real terms would represent an additional annual spending of €40 per consumer buying online cross-border.
- Consumers will benefit from a wider choice of products, since they will have access to offers from traders across the EU, at more competitive prices. Consumer prices are projected to drop in all Member States, ranging from -0.35% in Spain to -0.05% in Lithuania and Romania. The average decrease in consumer prices across the EU can be estimated at -0.25%. In addition, household consumption, which mirrors consumers' welfare, would equally rise in every Member State, ranging from +0.05 in Lithuania to +0.38 in Spain, with an average of +0.23 for the EU28 (which corresponds to about €18 bn). Consumer welfare gains are likely to be higher than suggested by the increase in real consumption, as consumers would also enjoy a wider choice of products and services: a considerable benefit that cannot be captured by the volume of consumption. A study on e-commerce in goods<sup>136</sup> found that consumer welfare gains from increased choice in an integrated Single Market for e-commerce would be even higher than gains from lower prices.

### Macroeconomic environment

- Full harmonisation of rules on **digital content** will increase consumer confidence, which should lead to an increase of domestic and cross-border trade of digital content and thus will have positive effects on household consumption and GDP.<sup>137</sup>
- By eliminating costs for businesses selling **goods** to other Member States, this option would also generate an increase of supply in cross-border trade of goods.
- As a result of fully harmonised rules on both **digital content and the online sale of goods**, EU

<sup>135</sup> See footnote 63 and Annex 4

<sup>136</sup> Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retails of goods, Civic Consulting, 2011, p.5

<sup>137</sup> See Section 6.2 and Annex 4

GDP is projected to permanently increase in real terms by 0.03% or about €4 bn per year, with the highest increase in Slovenia (+0.06%) and the lowest in Romania (0.0%).<sup>138</sup> Discounting to today's prices, the net present value of the additional output over a 10-year period would be about €28 bn.

- The estimated impact on main macro –economic variables (GDP, Household consumption etc.) reflects the overall outcome of the planned legislative action, including a possible substitution effect between offline and online trade. The model<sup>139</sup> also reflects the adaptation process of offline businesses as a result of increased competition coming from online cross-border trade, meaning that they will have to become more efficient to remain in the market.

## Social impacts

### Employment and labour markets

- Higher levels of economic activity are expected to have a positive net effect on the levels of employment in the EU. To illustrate the possible effects of this option on employment, it can be assumed that the permanent increase of EU GDP by €4 bn per year would lead to a net increase in employment in the order of magnitude of approximately 60,000 jobs.<sup>140</sup>
- In the context of this impact assessment it is not possible to further allocate these estimated employment effects among different sectors of the economy. This would require more specific assumptions about future business models, thus adding highly speculative elements to the analysis. However, it can be assumed that an additional growth in online sales could to some extent have a negative effect on physical stores. This is of course already a current trend, resulting from digitalisation and internet penetration. Indeed, current estimates foresee that the rapid growth of online sales means that sales in-store will be negative in 2015 by -1.4% in Europe and -1.9% in the U.S.<sup>141</sup>
- However, online will continue to be one channel of distribution rather than being the sole channel. Multi-channel or omni-channel business models are increasingly applied by businesses which operate online as well as in physical stores, to cope with competition.

## Environmental Impacts

### Transport and the use of energy

- Fully harmonised rules across the EU will boost online sales of **goods**. This could in turn increase the use of transport for delivery purposes, leading to an increase in CO<sub>2</sub> and other vehicle emissions. However, more online purchases could also limit the number of buyers actually using their vehicles to make their purchases, and thus counterbalance the increase in CO<sub>2</sub> emissions. For example, if 10 people order products online and these are delivered at home by one single truck, this would probably lead to a decrease of the CO<sub>2</sub> compared to a situation where these 10 people may use their personal car to go to the shop and buy the product.
- An increase of trade of **digital content** supplied online will have no environmental impacts, since no transport for delivery is required. An increase in trade of digital content on a medium could entail a certain increase of transport for delivery. However, such increase is not expected to be significant, given the weight of the media concerned and that the trend of the digital content market is rapidly shifting towards in formats.

## Impacts on Fundamental Rights (Charter of Fundamental Rights)

### Consumer Protection (Article 38)

- A set of fully harmonised rules for online sales of **goods** will ensure a fully harmonised high level of consumer protection throughout the EU in conformity with Article 38 of the Charter of Fundamental rights. However, these rules will replace the current national rules for goods, which could lead to changes to the level of protection consumers enjoy in certain Member States. Member States will not be able to adopt or maintain more protective measures.<sup>142</sup>
- A set of fully harmonised rules for **digital content** will enhance consumer protection throughout the EU, since it will provide EU consumers with clear and specific rights when they buy/access digital content at home or in other Member States.
- Public authorities will not be competent to enforce EU rules towards third country businesses that do not have subsidiaries in Europe. However, consumers will be able to take court action in their

<sup>138</sup> See Section 6.2 and Annex 4

<sup>139</sup> See details on the model in Annex 4

<sup>140</sup> According to Eurostat, EU GDP is currently at about €14 trillion and employment at about 220 million, and thus the output per worker is about €60,000 to €65,000. If EU GDP increases by about €4 billion following the removal of barriers to cross-border trade, and assuming that other variables remain the same, this could be expected to lead to a net increase in employment in the order of magnitude of approximately 60,000 jobs.

<sup>141</sup> [http://www.retailmenot.com/corp/static/filer\\_public/86/ed/86ed38d1-9cb9-461c-a683-ab8e7b4e1ffc/online\\_retailing\\_in\\_europe\\_us\\_and\\_canada.pdf](http://www.retailmenot.com/corp/static/filer_public/86/ed/86ed38d1-9cb9-461c-a683-ab8e7b4e1ffc/online_retailing_in_europe_us_and_canada.pdf)

<sup>142</sup> For a detailed assessment of the impacts on the level of consumer protection in each Member State see Section 6.2 and Annex 8

own countries under the Brussels I Regulation, and, in the cases foreseen by the Rome I Regulation, request the application of the more protective measures of their own law.

#### **Personal data protection (Articles 7 and 8)**

- No impact. The rules provided will be in full conformity with Articles 7 and 8 of the Charter and current and future EU legislation on data protection, in particular Directive 95/46/EC (that is likely to be replaced by the future General Data Protection Regulation). These rules will clarify the contractual obligation of the trader when **digital content** is supplied against a counter performance other than money (for example personal data), but will not lay down specific rules on personal data protection.
- Rules covering digital content provided against personal data will increase consumers' awareness of the economic value of their personal data and further contribute to better protection.

#### **Freedom to conduct a business (Article 16)**

- Businesses will be facilitated to sell **goods and/or digital content** in the EU, both domestically and cross-border. Their ability to expand their business will therefore be reinforced.

#### **Right to an effective remedy (Article 47)**

- Clear contract law rights for online contracts (in particular for digital content) will have a positive impact on the ability to exercise one's right to an effective remedy before the courts. The new rules will clarify the remedies available in case of disputes.

### **5.3 Option 2: Setting up targeted, fully harmonised rules for the supply of digital content – Application of the trader's law combined with the existing harmonised rules on goods**

#### **Economic impacts**

##### **Operating costs and conduct of business**

- For the impact of fully harmonised rules specific for **digital content**, see analysis under Option 1.
- For **goods**, the current minimum harmonisation rules will continue to apply, and the differences between national legislations will be maintained. Traders will however be able to sell goods to consumers in every Member State under their own law, as there will be a derogation from Article 6(2) of the Rome I Regulation. They will no longer be obliged to comply with the mandatory consumer protection rules that provide for a higher level of consumer protection than under their national law and therefore will not incur additional costs.
- New exporters who were previously deterred from selling online cross-border because of the additional contract law-related costs as well as existing exporters who wish to expand their cross-border activities to more Member States could therefore save up to €90,000 if they wish to sell in 10 Member States, and up to €243,000 if they wish to sell to all 27 other Member States.
- Eliminating supply-side barriers for **both the supply of digital content and the online sale of goods** could increase the number of EU businesses currently selling online cross-border by 5.3 percentage points (or 12% in relative terms). According to a conservative estimate, this means that about 122,000 more businesses could be expected to start selling online cross-border.<sup>143</sup>

##### **Administrative burdens on businesses**

- No additional administrative burdens will be imposed on traders.

##### **Trade and investment flows**

- Trade and investment flows will be improved as businesses will be able to sell **digital content and goods** more easily in other Member States. In particular, eliminating contract law-related costs for businesses selling goods will facilitate cross-border trade. This would however be counterbalanced to some extent by the fact that consumers' confidence will not be improved, as the demand-side concerns would not be addressed and consumers would no longer benefit from the more protective rules of their own country.
- Removing only supply-side barriers to cross-border online trade could increase exports of Member States within the EU in nominal terms by an average of 0.01%, ranging from +0.04% in Slovakia to 0% in Belgium, Czech Republic, Estonia, Hungary, Lithuania, United Kingdom and Croatia<sup>144</sup>.
- There will be no discrimination or any kind of obstacle to the activity of businesses from third countries active in the digital content market. When selling to EU consumers, the latter will be

<sup>143</sup> See Annex 4

<sup>144</sup> See Annex 4

subject to their own (third country) law.

### **Competitiveness of business**

- Traders would not face additional contract law-related costs when selling **goods** in other Member States, and thus the number of traders seeking to export to other Member States can be expected to increase. This is likely to increase competition and encourage businesses to become more innovative and improve the quality of their products or to reduce prices in order to stay competitive.

### **Position of SMEs**

- Micro and small businesses selling **goods** cross-border would benefit in particular, by saving costs of complying with more protective mandatory rules of the consumer's national law. SMEs will be able to trade in all 27 other Member States at no additional contract law-related costs.
- Due to the possible decrease of consumers' confidence in buying goods cross-border, SMEs (more than bigger, better-known businesses) may be faced with a difficulty to sell to consumers in other Member States, since consumers will be more likely to trust more well-known, familiar brands than small businesses abroad.
- For the impact of the fully harmonised rules for **digital content** on SMEs, see analysis under Policy Option 1

### **Functioning of the internal market and competition**

- By eliminating contract law-related barriers for businesses, competition will be strengthened in both domestic and cross-border markets.

### **Innovation and research**

- Cost savings and enhanced competition will on the one hand provide businesses with greater opportunities for R&D and other forms of investment, and on the other hand increase incentives to invest in R&D and other efficiency-enhancing measures.
- However, applying the same standards for paid services and those provided against another counter performance may, to a certain extent, discourage businesses from developing new business models based on a counter performance other than money.

### **Member States/Public authorities**

- A full harmonisation Directive will entail implementation costs for Member States. However, it will be possible for them to adapt the EU rules to their own legal system.
- A Regulation will be directly applicable in all Member States, and could thus incur minimal implementation costs. However, it will become an integral part of a national law which is not adapted to the Regulation. Therefore, it will either lead to adaptation of related national legal areas which will cause implementation costs or will cause frictions/overlaps with related national legal areas.
- Fully harmonised rules for digital content products should facilitate enforcement in cross-border cases and information campaigns all over the EU.
- This option requires a derogation to the Rome I Regulation on the law applicable to contractual obligations. Most Member States are reluctant towards this prospect and political feasibility of this option could be thus undermined.

### **Consumers and households**

- For the impact of fully harmonised rules specific for **digital content**, see analysis under Option 1.
- The current minimum harmonisation consumer protection rules for the sales of **goods** will be maintained. However, European consumers would no longer benefit from a higher level of consumer protection that their own national law going in its implementation beyond the Consumer Sales and Guarantees Directive may provide on top of the trader's law. Vice versa, consumers may benefit from a potentially higher level of the trader's law if that goes on specific points beyond their own national law. In addition, such a change might entail the removal of protection offered by mandatory consumer contract law rules in transactions of consumers with traders from third States.
- Fully harmonised rules for the supply of **digital content** and the removal of contract law related costs for businesses selling **goods** online would lead to an increased cross-border supply and would thus increase the choice of products offered to consumers and put competitive pressure on prices. The average decrease in consumer prices across the EU can be expected to be -0.06%, ranging from -0.10% in Spain to -0.01% in Lithuania. Household consumption, which mirrors consumers' welfare, would rise by an average of +0.07 for the EU28, ranging from +0.01 in Lithuania to +0.11 in Spain. However, the positive effect on household consumption may be to a certain extent offset by a decrease of consumer confidence, as consumer concerns regarding cross-border trade would not be



addressed and consumers may not benefit from the more protective rules of their own country.

### Macroeconomic environment

- Full harmonisation of rules on **digital content** will increase consumer confidence which should lead to an increase of domestic and cross-border trade of digital content.
- This option would eliminate contract law-related costs and remove the supply-side obstacles for businesses selling **goods** to consumers in other Member States. It would therefore facilitate cross-border trade of goods, but would still not address the demand-side obstacles relating to consumer confidence when buying online cross-border. EU GDP can be expected to permanently increase in real terms by 0.01% or about €1.4 bn, from +0.02% in Slovenia and +0.01% in 13 Member States to 0% in the remaining 14 Member States.<sup>145</sup> Discounting this back to today's prices, the net present value of the additional output over a period from 2020-2029 would be about €9 bn.

### Social impacts

#### Employment and labour markets

- Higher levels of economic activity are expected to have a positive net effect on the levels of employment in the EU. The possible effects of this option on employment can be assumed to be in the order of magnitude of approximately 20,000 jobs, resulting from the projected increase of EU GDP by 1.4 bn.<sup>146</sup>
- However, in the context of this impact assessment it is not possible to further allocate these estimated employment effects among different sectors of the economy, as this would require rather speculative assumptions about future business models.

### Environmental Impacts

#### Transport and the use of energy

- See analysis under Option 1

### Impacts on Fundamental Rights (Charter of fundamental Rights)

#### Consumer Protection (Article 38)

- A set of fully harmonised rules for **digital content** will enhance consumer protection throughout the EU, since it will provide EU consumers with clear and specific rights when they access digital content, both in their country of residence and in other Member States.
- For **goods**, European consumers would no longer benefit from a higher level of consumer protection that their own national law going in its implementation beyond the Consumer Sales and Guarantees Directive may provide on top of the trader's law. Vice versa, consumers may benefit from a potentially higher level of the trader's law if that goes on specific points beyond their own national law. Such a change might also entail the removal of protection offered by mandatory consumer contract rules in transactions between EU consumers with traders from third countries.

#### Personal data protection (Articles 7 and 8)

- See analysis under Option 1

#### Freedom to conduct a business (Article 16)

- Businesses would have to comply with new rules on **digital content**. However these rules would be fully harmonised and thus would lift any barrier to trade due to differences in consumer mandatory contract law.
- The elimination of the traders' obligation to comply with more protective mandatory rules of the consumer's law when selling **goods** in other Member States would facilitate the expansion of traders' business activities across the EU. The positive effect could be counterbalanced by the fact that demand-side obstacles (consumers' lack of confidence when buying cross-border) would not be lifted.

#### Right to an effective remedy (Article 47)

- A set of fully harmonised rules for **digital content** will enhance the ability to exercise one's right to an effective remedy before the courts. The new rules should clarify the remedies available in case of disputes.
- However, the derogation to article 6(2) of the Rome I Regulation could make it more difficult for consumers who bought a **good** to exercise their right to an effective remedy, since consumers will not be able to make use of the more protective rules of their own law in cross-border sales contracts.

<sup>145</sup> See Annex 4

<sup>146</sup> According to Eurostat, EU GDP is currently at about €14 trillion and employment at about 220 million, and thus the output per worker is about €60,000 to €65,000. If EU GDP increases by about €1.4 billion following the removal of supply-side barriers to cross-border trade, and assuming that other variables remain the same, this could be expected to lead to a net increase in employment in the order of magnitude of approximately 20,000 jobs.

## 5.4 Option 3: Setting up targeted, fully harmonised rules for the supply of digital content – No policy change for goods

<b>Economic impacts</b>
<b>Operating costs and conduct of business</b>
<ul style="list-style-type: none"> <li>○ For the impact of fully harmonised rules specific for <b>digital content</b>, see analysis under Option 1.</li> <li>○ At €212 bn, the value of the market for <b>goods</b>, together with services ordered online but consumed offline, represents more than 90% of the total value of the Digital Single Market. The respective contract law-related barriers that hinder cross-border trade of goods will remain. Businesses will have additional costs when selling cross-border, as described in the baseline scenario in Section 1.3.</li> </ul>
<b>Administrative burdens on businesses</b>
<ul style="list-style-type: none"> <li>○ There will be no change in the information obligations imposed on businesses supplying digital content or goods.</li> </ul>
<b>Trade flows</b>
<ul style="list-style-type: none"> <li>○ The existence of fully harmonised EU rules on <b>digital content</b> will eliminate the current complexity. Businesses will have to apply new EU rules on digital content. However these rules will be fully harmonised, thus minimising the additional costs for businesses. In addition, businesses would avoid additional costs that would arise from legal fragmentation due to divergent new national legislations.</li> <li>○ There will be no discrimination or any kind of obstacle to the activity of businesses active in the digital content market from third countries; when selling to EU consumers, the latter will be subject to the same rules as EU businesses.</li> <li>○ As regards <b>goods</b>, online cross-border trade and investment flows will remain at the same level as in the baseline scenario, since differences of consumer mandatory contract law rules will continue to hinder many businesses from exporting to other Member States.</li> </ul>
<b>Competitiveness of businesses</b>
<ul style="list-style-type: none"> <li>○ For <b>digital content</b>, removing contract law-related barriers will lead to an increase in cross-border trade. This will put pressure on competition in domestic markets. Higher competition will encourage businesses to become more innovative and improve the quality of their products or to reduce prices in order to stay competitive.</li> <li>○ Without EU action to reduce contract law barriers for <b>goods</b>, businesses would be deprived of the opportunity to better achieve economies of scale, through access to a larger market. They will not be able to save on production costs and become more competitive, either by reducing their prices or improving the quality and variety of their products.</li> </ul>
<b>Position of SMEs</b>
<ul style="list-style-type: none"> <li>○ For the impact of the fully harmonised rules for <b>digital content</b> on SMEs, see analysis under Policy Option 1.</li> <li>○ SMEs, in particular micro and small businesses, would continue to face disproportionate contract law-related costs when selling <b>goods</b> online cross-border. SMEs will not have the opportunity to expand their activities and reach a much larger market. By remaining restricted to their national markets, SMEs will continue to face the major problem of finding customers.</li> </ul>
<b>Functioning of the internal market and competition</b>
<ul style="list-style-type: none"> <li>○ Competition in the <b>digital content</b> market -both domestic and cross-border- would be strengthened, since the overall volume of trade would increase as consumers would be more confident in buying digital content.</li> <li>○ However competition for <b>goods</b> in the EU would not increase, since the current contract law-related obstacles for new entrants in domestic markets will be maintained. Less competition will in turn result in less consumer choice and higher prices.</li> </ul>
<b>Innovation and research</b>
<ul style="list-style-type: none"> <li>○ The overall growth and the increased competition in the <b>digital content</b> market would drive innovation and research.</li> <li>○ However, a limited development of economies of scale due to less access to bigger markets when selling <b>goods</b> will reduce the resources available to businesses for research and development.</li> </ul>
<b>Public authorities</b>
<ul style="list-style-type: none"> <li>○ A full harmonisation Directive on <b>digital content</b> will entail implementation costs for Member States. However, it will be possible for them to adapt the EU rules to their own legal system.</li> </ul>

- A Regulation will be directly applicable in all Member States, and could thus incur minimal implementation costs. However, it will become integral part of a national law which is not adapted to the Regulation. Therefore, it will either lead to adaptation of related national legal areas which will cause implementation costs or will cause frictions/overlaps with related national legal areas.
- Fully harmonised rules for digital content would facilitate enforcement in cross-border cases and information campaigns all over the EU.
- For **goods**, there will be no additional administrative burden for government authorities. Courts will decide on cross-border cases on the basis of foreign law which will, to the extent online trade increases, increase the necessary workload, i.e. costs and duration of disputes. While a major part of these costs will be borne ultimately by the parties, the added workload will to a certain extent decrease the overall efficiency of justice.

#### **Consumers and households**

- For the impact of fully harmonised rules specific for **digital content**, see analysis under Option 1.
- In the **goods** market, due to the remaining legal differences and contract law-related costs, some businesses will continue to be discouraged from selling cross-border and competition will remain at suboptimal levels, failing to drive down prices. As a consequence, businesses will not be driven towards innovation and offering a large choice of goods to consumers. Consumers' choice will therefore remain in some cases limited.
- When buying goods, consumers will continue to benefit from the sales remedies provided by the Consumer Sales and Guarantees Directive and the protection against unfair contract terms provided by the Unfair Contract Terms Directive.
- Enforcement of the existing consumer protection legislation is expected to be strengthened due to the revision of the Consumer Protection Cooperation Regulation and redress improved thanks to the operation of the Online Dispute Resolution platform.

#### **Macroeconomic environment**

- By promoting consumer confidence, the new rules on **digital content** could contribute to increasing the demand for digital content and thus have some positive effects on macroeconomic variables such as household consumption and GDP. However, these effects will be somewhat limited since there will be no contribution from the further development of cross-border trade of **goods**, which accounts for more than 90% of the total value of the Digital Single Market, together with services ordered online but consumed offline.

#### **Social impacts**

##### **Employment and labour markets**

- There will be a positive effect as regards employment in the EU, through an increase in household consumption and GDP resulting from an increase in the volume of trade for **digital content**.

#### **Environmental Impacts**

##### **Transport and the use of energy**

- An increase of trade of **digital content** supplied online will not have significant environmental impacts, since no transport for delivery is required. An increase in cross-border trade of digital content on a medium could entail a certain increase of transport for delivery. Such increase is not expected to be significant, given the weight of the mediums concerned and that the trend of the digital content market is rapidly shifting towards the in formats.

#### **Impacts on Fundamental Rights (Charter of fundamental rights)**

##### **Consumer Protection (Article 38)**

- A set of fully harmonised rules for **digital content** will enhance consumer protection throughout the EU, since it will provide EU consumers with clear and specific rights when they buy/access digital content, both in their country and in other Member States.
- When buying **goods**, consumers will continue to benefit from the protection against unfair contract terms provided by the Unfair Contract Terms Directive and the sales remedies provided by the Consumer Sales and Guarantees Directive. Public authorities will not be competent to enforce EU rules towards third country businesses that do not have subsidiaries in Europe. However consumers will be able according to the Brussels I Regulation to take court action in their own countries and request the application, in the cases foreseen by the Rome I Regulation, of the more protective measures of their own law.

##### **Personal data protection (Articles 7 and 8)**

- See analysis under Option 1

### Freedom to conduct a business (Article 16)

- A fully harmonised set of rules for consumer **digital content** will enable businesses to expand their business activities more easily within the EU as consumers will be more confident.
- However differences in national consumer contract law rules will still hinder online cross-border trade of **goods**.

### Right to an effective remedy (Article 47)

- A set of fully harmonised rules for **digital content** will enhance the ability to exercise one's right to an effective remedy before the courts. The new rules should clarify the remedies available in case of disputes.
- Lack of clarity as to the applicable law to online contracts concerning **goods** can have a negative impact on the ability to exercise one's right to an effective remedy before the courts.

## 5.5 Option 4: A minimum harmonisation Directive setting up rules for the supply of digital content – No change for goods

### Economic impacts

#### Operating costs and conduct of business

- A minimum harmonisation Directive will establish EU wide minimum rights for consumer contracts for the supply of **digital content**. Businesses will have to comply with these new rules. All businesses supplying digital content to consumers both domestically and cross-border, i.e. around 228,500<sup>147</sup> EU companies, will incur one-off costs of approximately €6,800 to adapt to the new rules on digital content. The overall one-off adjustment costs for all EU businesses could thus be estimated at about €1.55 bn. Member States will be able, as for goods, to go beyond the minimum standards and raise the level of consumer protection. Traders will therefore have to comply with different mandatory consumer protection rules when targeting a country with a higher level of consumer protection than their own.
- Traders selling **goods and digital content** cross-border will therefore incur additional costs for each Member State they target, amounting to about €9,000 per Member State.

#### Administrative burdens on businesses

- The EU rules will not impose further information obligations on businesses.

#### Trade flows

- Introducing specific rules on **digital content** will to some extent lead to an increase of cross-border trade of digital content, mainly due to the increase of consumers' confidence. However, as for **goods**, there will be legal fragmentation. Businesses will still face additional costs due to differences in mandatory consumer contract law rules.

#### Competitiveness of business

- Traders will still be confronted with a fragmented legal framework across EU Member States both for **goods and digital content**. They will therefore not be able to have full access to an EU-wide market and fully benefit from economies of scale. By continuing to face additional contract law-related costs when selling to other Member States, they will not be able to significantly reduce their production and development costs and therefore their ability to become more competitive will remain limited.

#### Position of SMEs

- Micro and small businesses will have to comply with the new rules on **digital content**. Since SMEs constitute the vast majority (around 99%)<sup>148</sup> of all EU businesses supplying digital content, almost all the overall one-off adaptation costs for businesses, i.e. €1.5 bn, will be incurred by SMEs. In addition, they may still have to incur additional contract law-related costs when they wish to sell to other Member States, since differences in consumer contract law rules will arise due to minimum harmonisation. Therefore, SMEs selling cross-border will have to incur the additional contract law related costs of approximately 9,000 per Member State that they wish to sell to.
- SMEs, in particular micro and small businesses, would continue to face disproportionate contract law-related costs when selling **goods** online cross-border. SMEs are assumed not having the same opportunity as bigger companies to expand their activities and reach a much larger market. By remaining restricted to their national markets, SMEs will continue to face the major problem of

<sup>147</sup> See Policy Option 1

<sup>148</sup> Estimate based on the share of respondents to the Digital Single Market firms survey (EB413). Among companies selling digital content to consumers online, 99% are SMEs.

finding customers.
<b>Functioning of the internal market and competition</b>
○ Due to the existing differences between national legislations on the sale of <b>goods</b> as well as the ones for the supply of <b>digital content</b> that could arise due to minimum harmonisation, businesses will still be faced with contract law-related barriers to entry into the markets of other Member States.
<b>Innovation and research</b>
○ Since businesses will continue to bear additional contract law-related costs when selling to other Member States, they will not be encouraged to allocate resources to research and development.
<b>Public authorities/Courts</b>
○ Member States will bear the costs of implementation of the minimum harmonisation Directive on <b>digital content</b> in their national laws.
○ The existence of national rules going beyond the minimum harmonisation Directive would require national judges dealing with cases with a foreign element to familiarise themselves with the substantive rules applicable in the relevant Member State. This will increase the necessary workload, i.e. costs and duration of disputes. While a major part of these costs will be borne ultimately by the parties, the added workload could to a certain extent decrease the overall efficiency of justice.
<b>Consumers and households</b>
○ Consumers will have specific rights when buying/accessing <b>digital content</b> . Consumers will be more confident when buying digital content domestically and cross-border. The Directive could contribute to reducing the financial and non-financial detriment currently suffered by consumers with respect to digital content, since there will be a set of clear rights that will enable consumers to address the problems faced with digital content.
○ Both for <b>digital content and for goods</b> , due to the remaining contract law-related costs, some businesses will continue to be discouraged from selling cross-border and competition will remain at suboptimal levels, failing to drive down prices. As a consequence, businesses will not be driven towards innovation and offering a larger choice of goods to consumers. Consumers' choice will therefore remain in some cases limited.
<b>Macroeconomic environment</b>
○ By increasing consumer confidence, digital content trade could increase to some extent, with some positive effects on macroeconomic variables such as household consumption and GDP. However, these effects will remain limited as competition will not be enhanced due to contract law-related barriers that hinder businesses from selling <b>goods and digital content</b> online cross-border.
<b>Social impacts</b>
<b>Employment and labour markets</b>
○ There could be a positive effect as regards job creation in the EU, through an increase in household consumption and GDP resulting from an increase in the volume of trade for <b>digital content</b> due to more consumer confidence. However this positive effect will be limited as contract law-related barriers that hinder businesses to sell both <b>goods and digital content online</b> cross-border remain and therefore competition will also remain limited.
<b>Environmental Impacts</b>
<b>Transport and the use of energy</b>
○ See analysis under Option 3
<b>Impacts on Fundamental Rights (Charter of fundamental rights)</b>
<b>Consumer Protection (Article 38)</b>
○ Minimum harmonisation is likely to result in higher consumer protection, as Member States will be able to go beyond the Directive's minimum standards.
○ Public authorities will not be competent to enforce EU rules towards third country businesses that do not have subsidiaries in Europe. However consumers will be able according to the Brussels I Regulation to take court action in their own countries and request the application, in the cases foreseen by the Rome I Regulation, of the most protective measures of its own law.
<b>Personal data protection (Articles 7 and 8)</b>
○ See analysis under Option 1
<b>Freedom to conduct a business (Article 16)</b>
○ A minimum harmonisation Directive is likely to create legal barriers, through differences arising between national legislations going beyond the minimum standards. It will therefore not contribute

significantly to enabling businesses to expand their activities within the EU.

#### **Right to an effective remedy (Article 47)**

- A minimum harmonisation Directive could have a positive impact on the right to an effective remedy by clarifying minimum rules governing remedies before the courts. The new rules should clarify the remedies available in case of disputes.

### **5.6 Option 5: A voluntary model contract, combined with an EU trust mark**

#### **Economic impacts**

##### **Operating costs and conduct of businesses**

- Businesses selling goods online or supplying digital content that choose to adopt the trust mark scheme will have to incur the costs of complying with the standards set out in the model contract (to the extent that they do not already meet them) and undergoing the procedures for obtaining the trust mark.
- Consultations with EU umbrella business associations<sup>149</sup> suggests that the take-up of an EU trust mark could be in the region of 10,000 businesses, based on the amount of current members of affiliated national associations that have signed up to national trust mark schemes; this represents less than 1% of businesses selling **goods** online. Assuming that there will be an additional impetus from the Commission in promoting the trust mark, the take-up of a voluntary model contract could be estimated for the purposes of this Impact Assessment to reach 5% of businesses. Based on this assumption, the overall costs for businesses selling goods online to adapt to the model contract would amount to approximately €374 million.<sup>150</sup>
- Based on the same assumption, the overall costs for businesses supplying **digital content** to consumers to adapt to the model contract would amount to approximately €78 million.<sup>151</sup>
- Businesses will still have to comply with the mandatory consumer protection rules of the consumer's country of residence, in case those provide for a higher level of consumer protection than the ones included in the model contract. They will thus still incur the costs to find out about such potentially more protective national rules of the countries they sell to.

##### **Administrative burdens on businesses**

- Businesses wishing to adopt the trust mark will face significant additional costs to go through certification procedures and periodic audits in order to obtain and keep the trust mark. Based on currently existing trust-marks in the EU, only the annual fees range from €200 to €4,500.<sup>152</sup>
- Administrative costs will also be incurred by the industry association/body responsible for monitoring compliance with the model contract terms, performing audits/controls and awarding the trust mark.

##### **Trade flows**

- The use of a model contract for domestic and cross-border sales of **goods and digital content** could facilitate cross-border online trade in the EU, but contract law differences will remain. The degree of usage and acceptance by business and consumer will greatly depend on the level of consumer protection that will be reflected in the model contract.

##### **Competitiveness of businesses**

- The European model contract would have a limited effect on competition, as contract law-related barriers would remain. The acceptance of the trust mark by EU consumers will depend on the level of consumer protection proposed in the model contracts.
- Depending on the acceptance by consumers, businesses using the model contract may have a competitive advantage compared to those not using it.

##### **Position of SMEs**

- SMEs will have a readily available tool for their cross-border transactions with consumers, both for goods and for digital content.
- SMEs will have to incur the costs of obtaining the trust mark as well as the costs of periodic audits and certifications.

<sup>149</sup> ICF in the context of the "Economic Study on Consumer Digital Content Products"

<sup>150</sup> The average estimate of the number of EU businesses currently selling online cross-border is 1.1 million. Assuming that 5% (55,000) of those businesses would incur a cost of approximately €6,800 to adapt their contract terms and conditions, the overall costs would amount to about €374 million.

<sup>151</sup> The average estimate of the number of EU businesses currently selling online cross-border is around 228,500. Assuming that 5% (11,425) of those businesses would incur a cost of approximately €6,800 to adapt their contract terms and conditions, the overall costs would amount to about €77.7 million.

<sup>152</sup> The European Consumer Centres' Network, "Can I trust the trust mark?", 2013, available at [http://ec.europa.eu/dgs/health\\_food-safety/information\\_sources/docs/trust\\_mark\\_report\\_2013\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/information_sources/docs/trust_mark_report_2013_en.pdf)

○ SMEs will still have to comply with the mandatory consumer protection rules of the consumer's country, in case those provide for a higher level of consumer protection than the clauses included in the model contract. They will thus still incur the costs to find out about such potentially more protective national rules of the countries they sell to.

### **Functioning of the internal market and competition**

○ Businesses would still have to comply with the mandatory consumer protection rules of the consumer's county of residence, in case those provide for a higher level of consumer protection than the ones included in the model contract. They would thus still incur the costs to find out about such potentially more protective national rules of the countries they sell to.

### **Innovation and research**

○ To the extent that contract law-related costs will be reduced, businesses may to some extent be encouraged to allocate resources to research and development.

### **Consumers and households**

○ Consumers will be able to rely on the trust mark to ensure that the minimum standards agreed upon in the model contract are respected by traders. This could to a certain extent increase their confidence when buying online cross-border.

○ However the extent to which consumers' confidence and subsequently cross-border purchases will increase will depend on the level of consumer protection to be agreed upon in the model contract. Since it will by far not be feasible to compile the most protective rules from all Member States' laws, in a number of cases consumers are likely to be faced with a model contract that does not include all the rights that they may currently enjoy in their country. This could affect their confidence and create confusion.

○ Any positive effects of this option will greatly depend on the degree of usage and acceptance of the trust mark by EU businesses.

### **Macroeconomic environment**

○ To the extent that cross-border trade will increase, there will be positive effects on macroeconomic variables such as household consumption and GDP. However, the positive effects will greatly depend on the degree of usage and acceptance of the trust mark by EU businesses and consumers. As it may be impossible to agree upon a level of consumer protection that combines the most protective rules from all Member States or difficult to agree even on a very high level, the level of acceptance by EU consumers may be limited.

### **Social impacts**

#### **Employment and labour markets**

○ Any positive effect on household consumption and GDP will greatly depend on the degree of usage and acceptance of the trust mark by EU businesses and consumers.

#### **Environmental Impacts**

#### **Transport and the use of energy**

○ See analysis under Option 1.

### **Impacts on Fundamental Rights**

#### **Consumer Protection (Article 38)**

○ Consumers will continue to benefit from the potentially more protective national consumer protection rules of their country of residence. However, their perception of the level of protection when buying cross-border will largely depend on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses.

#### **Personal data (Articles 7 and 8)**

○ The rules provided in the European model contract will be in full conformity with Articles 7 and 8 of the Charter and EU legislation on data protection. The model contract will clarify the contractual obligations of the trader when **digital content** is supplied against a counter performance other than money (for example personal data)

#### **Freedom to conduct a business (Article 16)**

○ The adoption of model contract rules and an EU trust mark could facilitate the exercise of businesses' right to conduct and expand their business within the EU.

#### **Right to an effective remedy (Article 47)**

○ This option would have a limited impact on the right to an effective remedy in view of the voluntary nature of the model contract.

## 6 HOW DO THE OPTIONS COMPARE?

### 6.1 Comparison of Policy Options

The policy options are compared in terms of their contribution to the policy objectives set out in Section 3 as well as their main impacts as analysed in Section 5.

#### *Policy Objective: Reduce costs for businesses resulting from differences in national consumer contract laws*

- The 'No policy change/Baseline Scenario' will not achieve the objective. Differences between national consumer contract laws for the online sale of goods would remain and businesses would continue to incur the current contract law-related costs. For digital content, further legal fragmentation due to the likely enactment of mandatory specific rules on digital content contracts in more Member States (in addition to those which have already legislated or are preparing such legislation) will impose further contract law related costs on businesses supplying digital content to consumers in other Member States.
- Policy Option 1 will to a great extent achieve the objective. Consumer contract law rules relevant for cross-border trade of goods would be the same in all Member States. Businesses would thus be able to rely largely on their own law when selling cross-border, and would avoid additional costs. New rules on digital content and to a lesser extent on the online sales of goods will entail additional one-off adaptation costs for businesses, but these would be counterbalanced by the positive effects of a fully harmonised regime across the EU that would prevent legal fragmentation, facilitate cross-border trade and increase consumer trust in and therefore demand for cross-border purchasing.
- Policy Option 2 will fully achieve the objective for businesses selling goods online, as they would no longer have to apply the possibly more protective consumer contract law rules of the Member States in which they wish to sell, but will rely entirely on their own law. For digital content it will achieve the objective in the same way as Policy Option 1.
- Policy Option 3 will achieve the objective for digital content in the same way as Policy Options 1 and 2. For goods, it will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 4 will not achieve the objective. As a result of minimum harmonisation for both digital content and goods traders would still need to comply with different national mandatory consumer contract law rules providing a higher level of consumer protection when selling in other Member States, and thus would incur the current contract law-related costs. For goods, it will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 5 will not achieve the objective, as companies selling goods cross-border will still be obliged to comply with mandatory national rules of the consumer's country of residence, when they provide for a higher level of protection than the model contract, and may thus still face the current contract law-related costs. For businesses supplying digital content to consumers, this option would also not eliminate the risk of further fragmentation and therefore may impose additional costs.

#### *Policy Objective: Reduce legal uncertainty for businesses*

- No policy change/Baseline Scenario will not achieve the objective. Differences between national consumer contract laws for the online sale of goods would remain. Further legal fragmentation on rules for the supply of digital content due to the likely enactment of national mandatory specific rules on digital content will entail further legal uncertainty for businesses supplying digital content to consumers in other Member States.



- Policy Option 1 will fully achieve the objective, since businesses will be able to sell goods online or supply digital content to consumers throughout the EU based on the same set of consumer contract law rules. This will increase legal certainty and contribute to a business friendly legal environment.
- Policy Option 2 will fully achieve the objective. For the online sale of goods businesses will be able to rely on their own law when selling abroad, and therefore there would be no need for them to investigate foreign laws. Moreover, full harmonisation of the rules on digital content will increase legal certainty for businesses and prevent future legal fragmentation.
- Policy Option 3 will achieve the objective for digital content in the same way as Policy Options 1 and 2. For goods, it will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 4 will not achieve the objective, since minimum harmonisation for digital content would create a fragmented legal environment for traders wishing to sell cross-border. For goods, it will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 5 will not achieve the objective, as differences between national laws for the sale of goods will remain and businesses will be obliged to comply with mandatory national rules of the consumer's country of residence, when they provide for a higher level of consumer protection than the model contract. For businesses supplying digital content to consumers, this option would also not eliminate the risk of further fragmentation and therefore may increase legal uncertainty.

***Policy Objective: Contribute to building consumers' trust in online cross-border shopping in the EU***

- No policy change/Baseline Scenario will not achieve the objective. Although consumers would enjoy a high level of protection due to minimum harmonisation rules in combination with the Rome I Regulation, differences between national laws would remain and consumers would still be uncertain as to their rights and the level of protection they will enjoy when buying cross-border.
- Policy Option 1 will fully achieve the objective. Consumers will have a clear set of rights throughout the EU and will thus be more confident in buying goods or accessing digital content cross-border. Although Member States will not be able to adopt or maintain more protective consumer protection rules, the overall level of consumer protection in the EU will rise. While the level of consumer protection in a few Member States on one or a few points will decrease, the impact of this on the overall positive effects on cross border trade is likely to be minor. Recent data show that among the reasons for the lack of consumer confidence when buying cross-border, the fear that other laws protect consumers less than their own is only a minor factor. Uncertainty about consumers' key contractual rights is a considerably more important factor creating their lack of confidence to shop online cross-border.<sup>153</sup> Policy Option 1 would remedy this uncertainty.
- Policy Option 2 will fully achieve the objectives in the same way as Policy Option 1 for digital content. For goods, this option will not achieve the objective; on the contrary it would deteriorate the current lack of consumer confidence. The application of the trader's law for the online sale of goods and the respective derogation from the Rome I Regulation will in practice mean that EU consumers would no longer benefit from the potentially higher level of consumer protection that their own national law going in its implementation beyond the Consumer Sales and Guarantees Directive may provide on top of the trader's law. In some

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<sup>153</sup> See Section 1.2.3

cases they may benefit from a potentially higher level of protection if the trader's law goes on specific points beyond their own national law. However, the fact that they will be potentially deprived from the level of protection they currently enjoy under their national law would fail to increase consumers' confidence in cross-border purchases. In addition, such a change might entail the removal of protection offered by mandatory consumer contract law rules in transactions with traders from third countries.

- Policy Option 3 will fully achieve the objective as far as the rules on digital content are concerned, in the same way as Policy Options 1 and 2. For goods, it will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 4 will to some extent achieve the objective as far as the rules on digital content are concerned. Minimum harmonisation for digital content rules would create minimum rights for consumers of digital content in the EU, and Member States would be able to adopt more protective rules. Consumers' confidence when buying/accessing digital content could be increased to some extent. However, the possible differences between national laws that would emerge as a result of minimum harmonisation would create a legally fragmented environment and undermine consumers' confidence in cross-border transactions. For goods, the option will not achieve the objective, as the situation will be the same as in the No policy change/Baseline scenario.
- Policy Option 5 will to some extent achieve the objective. It would provide consumers with a satisfactory level of consumer protection, however very much depending on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses. Consumers may be more confident to buy from foreign traders to whom the EU trust mark has been awarded.

#### ***Policy Objective: Reduce consumer detriment with non-conforming digital content***

- No policy change/Baseline Scenario will not achieve the objective. In the absence of specific and clear rights on digital content, consumers would continue to suffer detriment caused by unresolved problems with digital content that is not in conformity with the contract.
- Policy Option 1 will fully achieve the objective, since consumers will have clear and specific rights when facing problems with digital content. This will enable them to seek remedies for their problems and thus reduce the financial and non-financial detriment currently suffered in the event of non-conforming digital content.
- Policy Options 2 and 3 will fully achieve the objective, in the same way as Policy Option 1
  - Policy Option 4 will to a great extent achieve the objective. Minimum harmonisation for digital content would create minimum rights for consumers of digital content in the EU, and Member States would be able to adopt more protective rules. This will enable them to seek remedies for their problems and thus reduce the financial and non-financial detriment currently suffered in the event of non-conforming digital content.
- Policy Option 5 will to some extent achieve the objective. It would provide consumers with a satisfactory level of rights that they can invoke in the event of problems faced with non-conforming digital content. The extent to which this option could reduce consumer detriment is highly dependent on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark.

#### ***Main impacts***

- Policy Option 1 will entail overall one-off adaptation costs of about €1.55 bn for all EU businesses supplying digital content online and about €7.5 bn for all EU businesses selling goods online. Under this option, EU GDP is projected to permanently increase in real terms by about €4 billion, and the net present value of this additional output over a period from

2020-2029 would be about €28 bn. The number of consumers buying online cross-border could increase by about 7 percentage points, raising the total number of consumers shopping online cross-border to between 64 and 70 million. The average annual cross-border online spending would also increase by an additional €40 per consumer buying online cross-border. The average decrease in consumer prices across the EU is estimated at -0.25%. Household consumption, which mirrors consumers' welfare, would rise in every Member State at an average of +0.23 for the EU28 (which corresponds to about €18 billion). The level of consumer protection across the EU will be significantly improved.

- Policy Option 2 will entail one-off adaptation costs of about €1.55 bn for all EU businesses supplying digital content online. EU GDP can be expected to permanently increase in real terms by about €1.4 billion. The net present value of the additional output over a period from 2020-2029 would be about €9 billion. The average decrease in consumer prices across the EU can be expected to be at -0.06%, while household consumption could rise by an average of +0.07 for the EU28. The level of consumer protection in the EU for the purchase of goods will be lowered, since consumers will be deprived of the protection currently ensured by the Rome I Regulation.
- Policy Option 3 will entail one-off adaptation costs of about €1.55 bn for all EU businesses supplying digital content online. No macroeconomic benefits can be estimated for this option, since the supply and demand-side barriers will continue to exist in the online market of goods, which represents more than 90% of the total value of the Digital Single Market, together with services ordered online and consumed offline. The level of consumer protection will improve for consumers of digital content in the EU.
- Policy Option 4 will entail one-off adaptation costs of about €1.55 bn for all EU businesses supplying digital content online. No macroeconomic benefits can be estimated for this option, since the supply and demand-side barriers will continue to exist in the online market of goods, which represents more than 90% of the total value of the Digital Single Market, together with services ordered online and consumed offline. The level of consumer protection will improve for consumers of digital content in the EU.
- Policy Option 5 would entail one-off adaptation costs of about €374 million for businesses selling goods online and about €78 million for businesses supplying digital content online. The benefits of this option depend on the extent of usage and acceptance of the model contract and the trust mark by EU consumers and businesses. It can be assumed that the benefits will be significantly limited, based on the estimate that only about 5% of EU businesses would take up the model contract and trust mark.

**Summary table 1 – Achievement of objectives**

Objectives	Baseline scenario		Option 1		Option 2		Option 3		Option 4		Option 5	
	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content
Reduce costs resulting from differences in contract law	0	0	+	+	++	+	0	+	0	0	0	0
Reduce the uncertainty faced by businesses due to the complex legal framework	0	0	++	++	++	++	0	++	0	0	0	0
Contribute to building consumers' trust in online cross-border shopping in the EU	0	0	++	++	-	++	0	++	0	+	+	+
Reduce consumer detriment with respect to non-conforming digital content or certain unbalanced contract terms	N/A	0	N/A	++	N/A	++	N/A	++	N/A	++	N/A	+

Key: (-) means that the option deteriorates the current situation; (0) means that the option does not meet the objective; (+) means that the option meets the objective to some or to a great extent; (++) means that the option fully meets the objective.

**Summary table 2 – Assessment of impacts**

Impacts	Baseline scenario		Option 1		Option 2		Option 3		Option 4		Option 5	
	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content	Goods	Digital content
Economic Impacts	0	0	++	++	+	++	0	++	0	0	0	0
Social Impacts	0	0	++	++	+	++	0	++	0	++	0	0
Environmental Impacts	0	0	0	0	0	0	0	0	0	0	0	0
Impacts on Fundamental Rights	0	0	+	++	-	++	0	++	0	++	+	+

Key: A negative impact is marked as "-"; no impact as "0"; a positive impact as "+"; and a highly positive impact as "++".

## 6.2 Preferred Policy Option

*Fully harmonised contract law rules for online trade will lead to a permanent increase in EU GDP of €4 billion. The harmonisation will target rules related to non-conforming products for both goods and digital content, which have been identified as obstacles to trade.*

The option which contributes most to the achievement of the policy objectives and has the most positive overall impact is Option 1.<sup>154</sup> For digital content, both consumer organisations and business associations in the context of the public consultation support a full harmonisation approach, to ensure consumer confidence and prevent legal fragmentation. For goods, a majority of stakeholders and Member States warn about the possible fragmentation between online and offline sales of goods. While this concern is considered with the greatest care, fragmentation is unlikely to arise in practice and the benefits of acting now outweigh this limited risk.<sup>155</sup> Consumer organisations would support full harmonisation as long as a high level of consumer protection is ensured. On the industry side, although some business associations would prefer the application of the trader's law in consumer sales<sup>156</sup>, the majority of them support the full harmonisation approach to avoid legal barriers.

Businesses will benefit from a single set of contract law rules throughout the EU. They will no longer have to incur costs of adapting their contracts to different Member States' laws when selling in other EU countries. The benefits from the increase of cross-border trade will spill over into domestic economies through increased competition. The overall macroeconomic impacts on GDP, consumer prices and consumer welfare will be positive.

The impact of the preferred option should be seen in the context of the holistic approach of the Digital Single Market Strategy<sup>157</sup>, together with the other initiatives announced there. Altogether, these initiatives aim to tackle all main obstacles to the functioning of the Digital Single Market. This covers among others the initiatives related to the role of platforms, the European Cloud initiative, VAT related burden and parcel delivery. It also covers initiatives related to enforcement/redress, i.e. the entry into operation of the Online Dispute Resolution platform<sup>158</sup> and the review of the Consumer Protection Co-operation Regulation<sup>159</sup> on cooperation between national authorities responsible for the enforcement of consumer protection laws. Together with the recent adoption of the revised online-friendly Small Claims Regulation, these initiatives cover online dispute resolution, some coordination of public enforcement and facilitation of enforcement of judgments, and will therefore be able to optimise the effects of the fully harmonised substantive rules put forward in this initiative.

### Nature of the instrument and legal basis

The initiative would consist of a coherent legislative package of two full harmonisation Directives: one Directive on certain aspects concerning contracts for the supply of digital content and a Directive on certain aspects concerning the online sales of goods. The legal basis could be article 114 TFEU. The choice of Directives leaves Member States more freedom to adapt the implementation to their national law than Regulations would do. For instance, the Directive on the supply of digital content would not determine whether the contract for the supply of digital content is to be considered for example as a sales, services, rental or a *sui generis* contract; it would leave this decision to Member States. A Regulation, however, would require a much more detailed and comprehensive regime than a directive in order to allow its effects to be directly applicable. This would have as a consequence

<sup>154</sup> Annex 8 provides a detailed presentation of the substantive content and reasoning on the rules that should be fully harmonised, including a comparison with Member States' laws where possible. Annex 3 provides an analysis on who will be affected by the retained option and how.

<sup>155</sup> See Introduction, Section 5.2 and summary table in the end of this Section

<sup>156</sup> See Section 6.1 for the reasons for not following the the trader's law approach.

<sup>157</sup> See Section 1.2.3

<sup>158</sup> See Section 1.2.3

<sup>159</sup> See Section 1.2.3

considerably more interference into national laws. It may also jeopardise the future-proof character of the instrument, since, contrary to a Directive, it would have to go to a level of details that would not allow the margin to adapt the implementation of the fully harmonised rules to a technologically and commercially fast-moving market like the one for digital content.

## **Digital content**

### *Types of digital content covered*

The instrument should have a comprehensive scope and cover all types of digital content (for example, music, games, films, software or cloud storage). This would address problems across the different categories of digital content and avoid unjustified discriminations by creating a level-playing field between product categories, the borders of which are extremely vague and subject to fast technological development. Stakeholders consider that frequent interplay exists between different categories of digital content. In the public consultation, such an approach is supported by both consumer organisations and a vast majority of business associations, although businesses involved in the trading of digital content would prefer to make some distinction between different categories of digital content. The vast majority of Member States which responded to the public consultation would be in favour of a broad definition of digital content, given the fast technological and commercial development of digital content.

This instrument would cover digital content supplied not only for a price but also in exchange for (personal and other) data provided by consumers, as these data have an economic value for digital content suppliers. While consumer organisations are in favour of such an approach, businesses are more divided. Some businesses fear a risk of overlap with data protection rules. Of the Member States which responded to the public consultation, four would not be in favour. All the others support this approach or are at least open for discussion.

### *Substantive content – areas of law covered*

The key substantive provisions of the initiative should include those key consumer contract law rights on digital content that consumers should be able to use when faced with the most common problems.<sup>160</sup> These provisions should cover notably remedies, the reversal of the burden of proof, damages, and termination of contracts. In particular, the instrument should include a mixture of contractual and statutory conformity criteria against which the quality of the digital content is assessed. This is favoured by both business and consumer stakeholders. Member States almost unanimously support this approach.

For goods, EU law already foresees a *shift of the burden of proof* from consumer to supplier. That means that the supplier must prove that the goods were in conformity with the contract when they were delivered to the consumer; the consumer does not have to prove that the goods were already defective. Due to the technical nature of digital content and the difficulty for consumers to ascertain the cause of a problem, the reasoning for the shift of the burden of proof applies all the more to digital content. Therefore the burden to prove non-conformity should be reversed and the supplier should prove conformity. This reversal should not be limited in time as (unlike goods) digital content is not subject to wear-and-tear. Consumer organisations pointed to the difficulties which consumers may face with the burden of proof especially in circumstances when the parties involved in the supply would blame each other in case of a problem. Accordingly, they unanimously considered that the trader should have the burden of proof. For the majority of businesses non-conformity should be proven by the

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<sup>160</sup> See Section 1.2.3

consumer. For some of them there should be a reversal of the burden of proof for a period that varies from two to six months.

In addition, the consumer would benefit from a range of *remedies* (bringing the digital content back to conformity, reduction of the price or termination of the contract) addressing both the failure to supply and lack of conformity of the digital content. A limited harmonisation of the right to damages restricted to cases where damage has been done to the digital content and hardware of the consumer would complete other remedies the consumer has vis-à-vis the supplier. While consumer organisations are supportive of this approach, a majority of the main EU businesses associations are reluctant about harmonisation of damages. Member States are divided: a number of them would be in favour of including a right to damages or they are open for discussion while for the others this issue should be left to national legislations.

A few other rights which respond to existing contractual practices in the market should also be established. The consumer's right to *terminate a contract if the supplier modifies it* safeguards on the one hand the possibility for suppliers to adapt their digital content or services; in such a fast-moving market this would be very often positive for the consumer. On the other hand it also allows consumers to get out of a contract if the modified digital content no longer matches what the consumer wanted to acquire at the time of conclusion of the contract. The inclusion of such a rule is broadly supported by all stakeholders, with the exception of a digital technology industry association that seems reluctant towards the right to terminate a contract where discounts were provided to the consumer for a certain period of time. Business associations argue that this right should be granted under the condition that the termination is notified to the trader in advance, while the main European consumer organisation links the exercise of this right to the possibility to retrieve data (see below).

The *right to terminate long term contracts* prevents lock-in situations for the consumer and allows switching between providers, thereby contributing to higher competitive pressure on prices and innovation and to a healthy market with lower entry barriers. Consumer organisations argue that users should be able to terminate a long-term contract by prior notice, provided that this is not subject to formal requirements that would limit the exercise of the right to terminate. When creating this right, they also want to make it possible for the consumer to retrieve his data. According to the majority of businesses users could have the right to terminate long term contracts and termination should be exercised in advance and by notice. Representatives of the digital technology industry and other business associations/companies seem reluctant towards the right to terminate a contract where benefits (such as discounts or additional features) were provided to the consumer for a certain period of time. Many business associations would support a general consumer right to retrieve their data. However, some of them raise the issue of possible overlaps with data protection rules or copyright rules. Other businesses, especially IT companies, would not be in favour of a right to retrieve or transfer user-generated content.

The consequences of termination would include not only the return of the price corresponding to the unconsumed content, but also the possibility for consumers to retrieve data without inconvenience. This is an important feature of the termination right because otherwise lock-in effects could be created: this could make it disadvantageous for the consumer to exercise the right of termination and thereby reduce its effectiveness. Consumer organisations support such a right, arguing further that consumers should be able to retrieve their data in a commonly usable format to avoid lock-in effects caused by possible lack of interoperability between different suppliers' platforms. Although many business associations would support a general consumer right to retrieve data, the majority of them raise the issue of possible overlaps with data protection rules, while one association argues that such a right

should be restricted to user generated content provided by the consumer in social media services/platforms.

Unlike goods, a *legal guarantee period* during which the supplier is liable for a lack of conformity does not need to be envisaged; consumer rights would be limited by national prescription periods. Such a guarantee period starting from the time of supply does not fit with the nature of digital content, which is often supplied in a continuous manner over a period of time. Moreover, differently from goods, digital content is not subject to wear-and-tear and a defect in one copy usually means that all copies of the digital content have a similar problem. Consumer and business organisations have different views on this issue: the former plead for a long (or infinite) period of guarantee, the latter for a short one.

## Goods

### *Substantive content – areas of law covered*

The key substantive provisions of the initiative should cover the main differences of national consumer mandatory rules which affect traders' decision whether or to which extent to sell goods cross-border.

The instrument should maintain a mixture of contractual and statutory *conformity criteria* against which the quality of the good is assessed, while clarifying the relationship between the two so that the consumer has clear expectations. Using contractual and statutory conformity criteria is based on the model of the Consumer Sales and Guarantees Directive. In the context of the public consultation, all main consumer and business stakeholders argued in favour of maintaining the approach of the current Consumer Sales and Guarantees Directive as to the criteria establishing conformity of goods. The vast majority of respondents to the public consultation believe the current combination of *subjective and objective conformity criteria* provided for in the Consumer Sales and Guarantees Directive is appropriate.

The *order in which remedies can be exercised* as foreseen in the Consumer Sales and Guarantees Directive should be maintained (repair or replacement of the goods, reduction of the price or termination of the contract). This is supported by business associations while the vast majority of consumers associations support a free choice of remedies. This approach has been implemented by the large majority of Member States and proven its value in practice by providing a balanced distribution of rights between seller and consumer. According to recent consumer data<sup>161</sup>, 77% of EU28 consumers agree that it is reasonable for a seller to offer a repair or replacement –and not a refund- when a problem with a product occurs for the first time. This will maintain the current level of consumer protection in 20 Member States<sup>162</sup> and decrease it for the 6 Member States that currently have no hierarchy of remedies<sup>163</sup> and the 2 Member States where beside the hierarchy of remedies a short-term right to reject is currently in place<sup>164</sup>. A free choice of remedies had been proposed in the Proposal for a Common European Sales Law, based on the optional character of this instrument. It turned out to be one of the most controversial points of this proposal. Learning from this experience was another reason why the model of the Consumer Sales and Guarantees Directive was retained. Certain features of the current Directive are clarified to the benefit of the consumer, such as the fact the consumer would be entitled to termination or price reduction if the seller does not repair or replace the goods within a reasonable time.

Consumers would also have the right to terminate also in case of minor defects. This will increase the level of protection in 24 Member States where such right is currently not given

161 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015, to be published)

162 AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HU, IT, LV, LU, MT, NL, PL, RO, SK, SE

163 EL, CY, HR, LT, PT, SI

164 UK, IE



to consumers, while maintaining the current level of protection in the remaining 4 Member States.<sup>165</sup>

Consumers would *not need to notify a defect within a certain period of time*, as the existing optional possibility for Member States to create such an obligation has adverse effects for the internal market. Differences in requiring compliance with notification periods can lead to consumers losing their rights in cross-border transactions due to their lack of awareness of this notification obligation and is therefore counterproductive to harmonising remedies. This is supported by consumer organisations, which argue that a notification obligation would be disproportionately burdensome for consumers and that the latter are anyway always interested in notifying the trader of any defect as early as possible. This is indeed supported by data which shows that consumers are in general rather active and react in due time. Depending on the type of product, between 37% and 58% of problems were followed up immediately when the problem occurred and between 25% and 32% of problems were followed up within one week.<sup>166</sup> On the other hand, most business associations argue that a lack of notification could impair the ability of the trader to adequately repair or replace a defective product. Such an absence of notification will increase consumer protection in 17 Member States<sup>167</sup> and maintain the current level of protection in the remaining 11 Member States.

The period of time during which the *burden of proof* is reversed in favour of the consumer should also be fully harmonised to increase legal certainty; its length (two years) will be aligned with the legal guarantee period. While business associations plead for maintaining a period of 6 months corresponding to the current minimum harmonisation rules of the Consumer and Sales Directive, this extension is very largely supported by consumer organisations. Such an extension will simplify the remedies regime and allow consumers to exercise their right effectively for the entire length of the guarantee period. Extending the period of reversal of the burden of proof would facilitate the exercise of consumers' rights and is in line with the European Commission's goal to promote a circular economy and the durability of products.<sup>168</sup> The same length for both the legal guarantee period and reversal of the burden of proof period will provide more legal certainty, and result in higher awareness and easier enforcement of the EU rules on the legal guarantee. Moreover, recent survey data<sup>169</sup> suggests that both traders and consumers are largely unaware of the existing burden of proof rules and that a longer period for the shift of the burden of proof to the seller does not make a significant difference in practice, as it often operates *de facto* throughout the entire 2-year legal guarantee period.<sup>170</sup> Thus, the extension of the period of reversal of the burden of proof is not likely to make a large difference in practice for traders. Extending the period of reversal of the burden of proof will increase the level of consumer protection in 26 Member States, and maintain the current level of consumer protection in the two remaining Member States.<sup>171</sup>

The length of the *legal guarantee period* should be fully harmonised and maintained at the level of two years currently provided for in the Consumer Sales and Guarantees Directive and its implementation in the very large majority of Member States. In its Proposal for a Common European Sales Law, the Commission had chosen another approach; it had dropped the guarantee period and introduced a model based only on uniform rules on prescription periods. This approach was discussed with stakeholders and Member States

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165 LV, PT, SK, UK

166 See footnote 163

167 BE, CY, EE, ES, FI, HR, HU, IT, LV, MT, PT, RO, SI, DK, NL, SE, SK

168 Circular Economy Package, to be adopted on 2nd of December 2015

169 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015)

170 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015) : Indeed, only a minority of businesses insist on consumers proving the trader's liability within the entire 2 years legal guarantee period, and there is very limited change in traders' behaviour before or after the 6 months on this point. See more details in Annex 8.

171 FR, PT

during the preparation of the present instrument but did not find support. Therefore the Commission considers it more appropriate to go back to the approach in the Consumer Sales and Guarantees Directive. The existing length of the legal guarantee period is widely favoured by the vast majority of business associations, since it has worked very well in practice. Moreover, according to recent consumer data, roughly equal shares of consumers who experienced problems with a product for which they felt they had a genuine cause for complaint reported that this problem had occurred within the first six months, between 6 and 12 months or between one and two years after purchasing the product<sup>172</sup>. This means that a 2-year period is sufficient to cover the majority of problems reported by consumers. In addition, recent data show that the relative majority of consumers (between 34%-43%)<sup>173</sup> consider that a 2-year legal guarantee period is reasonable for white, brown and grey goods<sup>174</sup>. Consumer organisations, on the other hand, support a longer legal guarantee period of 6 years, especially for durable goods. A 2-year legal guarantee period will maintain the current level of consumer protection in 23 Member States<sup>175</sup> and decrease it in the remaining 5 Member States<sup>176</sup>.

The same period of two years should be applicable to second hand goods (whereas the current Directive foresees a possibility to reduce to one year). While this choice is supported by consumer organisations, most business associations would prefer a shorter legal guarantee period for second hand goods. This will increase consumer protection in 13 Member States<sup>177</sup> which have currently reduced the legal guarantee period for second hand goods to one year, while maintaining the current level of consumer protection in the remaining 15 Member States.

Unlike digital content, *the instrument should not include a right to damages*, as Member States' contract laws already have such a right in case of non-conforming goods; interference in such established well-functioning regimes is not necessary. This position is shared by all stakeholders, including the main European consumer organisation and all main business associations.

Similarly, *the instrument should not fully harmonise the rules on unfair terms*. There is currently no sufficient evidence showing that different rules on (and lists of) unfair terms constitute an obstacle for traders. Consumer associations strongly opposed any full harmonisation approach on unfair terms. On the industry side, one main business association advocated for a fully harmonised black list of unfair terms, while the majority of business associations just pointed out that the current unfair terms regime is sufficient. Moreover, the Unfair Contract Terms Directive will be evaluated in a comprehensive manner during the REFIT Fitness check process which will take place in 2016.

The table below summarises the main differences between the current implementation laws of the Consumer Sales and Guarantees Directive in each Member State and the main fully harmonised rules on the online sale of goods under the proposed instrument.

	Notification duty		Hierarchy of remedies		Legal guarantee period		Reversal of burden of proof period	
	Implementation law	Proposal	Implementation law	Proposal	Implementation law	Proposal	Implementation law	Proposal
AT	NO	NO	YES	YES	2 years	2 years	<b>6 months</b>	<b>2 years</b>

172 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015, to be published)

173 See footnote 171.

174 White goods: Electrical goods used domestically such as refrigerators and washing machines. Brown goods: Light electronic consumer durables such as TVs, radios, cameras. Grey goods: Computing equipment, laptop, smartphones etc.

175 AT, BE, BG, CZ, CY, DE, DK, EE, EL, ES, FR, HR, HU, IT, LV, LT, LU, MT, PL, PT, RO, SI, SK

176 FI, IE, NL, SE, UK

177 AT, BE, HR, CY, CZ, DE, IT, LU, PL, PT, RO, SK, SI

BE	YES	NO	YES	YES	2 years	2 years	6 months	2 years
BG	NO	NO	YES	YES	2 years	2 years	6 months	2 years
CY	YES	NO	NO	YES	2 years	2 years	6 months	2 years
CZ	NO	NO	YES	YES	2 years	2 years	6 months	2 years
DE	NO	NO	YES	YES	2 years	2 years	6 months	2 years
DK	YES	NO	YES	YES	2 years	2 years	6 months	2 years
EE	YES	NO	YES	YES	2 years	2 years	6 months	2 years
EL	NO	NO	NO	YES	2 years	2 years	6 months	2 years
ES	YES	NO	YES	YES	2 years	2 years	6 months	2 years
FI	YES	NO	YES	YES	unlimited*	2 years	6 months	2 years
FR	NO	NO	YES	YES	2 years	2 years	2 years	2 years
HR	YES	NO	NO	YES	2 years	2 years	6 months	2 years
HU	YES	NO	YES	YES	2 years	2 years	6 months	2 years
IE	NO	NO	YES	YES	n/a (prescription rules apply)	2 years	6 months	2 years
IT	YES	NO	YES	YES	2 years	2 years	6 months	2 years
LV	YES	NO	YES	YES	2 years	2 years	6 months	2 years
LT	NO	NO	NO	YES	2 years	2 years	6 months	2 years
LU	NO	NO	YES	YES	2 years	2 years	6 months	2 years
MT	YES	NO	YES	YES	2 years	2 years	6 months	2 years
NL	YES	NO	YES	YES	unlimited*	2 years	6 months	2 years
PL	NO	NO	YES	YES	2 years	2 years	1 year	2 years
PT	YES	NO	NO	YES	2 years	2 years	2 years	2 years
RO	YES	NO	YES	YES	2 years	2 years	6 months	2 years
SK	YES	NO	YES	YES	2 years	2 years	6 months	2 years
SI	YES	NO	NO	YES	2 years	2 years	6 months	2 years
SE	YES	NO	YES	YES	3 years	2 years	6 months	2 years
UK	NO	NO	YES	YES	n/a (prescription rules apply)	2 years	6 months	2 years

*\* The legal guarantee period in these Member States is only limited by the prescription period  
Managing potential temporary differences between rules for offline and online sales*

The possibility that for a transitional period the rules on online and offline sales of goods may differ, would in practice be rather limited. The Commission will take the necessary steps to ensure coherence with the Regulatory Fitness and Performance (REFIT) Programme, which will determine any possible need for an initiative on the offline sales of goods. If such differences were to actually occur for a short transitional period, they could affect businesses selling both online and offline, since the latter would have to comply with two different sets of rules according to their sales channel, as summarised in the table. Businesses also selling cross-border would not be negatively affected, since any additional costs arising from a potential divergence of regimes in their domestic market would be counterbalanced by the significant cost savings resulting from not having to adapt to other Member States' national consumer contract laws when selling online cross-border. Therefore, any possible negative effects would only concern those businesses that currently sell and will continue to both online and offline but only domestically.

However, in practice the impact of such a differentiation in certain key rules for online and offline domestic sales to consumers would overall not be very important and could be dealt with through adapted business practices. For example, in the 26 Member States where there might be a transitional divergence on the burden of proof rules for online and offline sales, this would not make a significant difference in practice: recent data show that only a minority of businesses insist on consumers proving the trader's liability within the entire 2 years legal guarantee period, and there is very limited change in traders' behaviour before or after the 6 months on this point. Therefore, the shift of the burden of proof often operates de facto throughout the entire 2-year legal guarantee period, and thus the practical impact on businesses of possibly temporarily divergent rules on this point would not be significant.<sup>178</sup>

Given the limited practical impacts of such temporary divergences, omni-channel businesses could cope with possible, transitional differences between the regimes for online and offline sales of goods by applying the respective higher standards, which would enable them to use a single business model and thus save any potential additional costs.

On the consumers' side, a possible differentiation for a transitional period between the key rules on offline and online purchases would overall not have a very important impact either: on the contrary, the more protective rules on the burden of proof (in 26 Member States) and the notification duty (in 17 Member States) would boost online purchases, both domestically but most importantly cross-border and would thus contribute to increasing consumer confidence and welfare. There might however be a negative impact in 6 Member States resulting from the possible temporary co-existence of a free choice of remedies for offline purchases and a hierarchy of remedies for online purchases, since such a situation would not contribute to increasing consumers' confidence in buying online. However, this may be to some extent counterbalanced by another element of the proposal which facilitates the right of consumers to terminate the contract compared to the existing situation in 5 of those Member States<sup>179</sup> where the right to termination is excluded for minor defects.

### *Learning from the past*

While similar attempts to approximate contract law rules on the sales of goods in the past were not or only partially successful, the current preferred policy option may overcome the problems faced in the past. This option is part of the broader Digital Single Market strategy, whose objectives have largely been supported by stakeholders and Member States. This option also specifically takes into account the lessons learnt from the proposal for a Regulation on a Common European Sales Law and the Consumers Rights Directive. The

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<sup>178</sup> See Annex 3 for more details

<sup>179</sup> CY, EL, HR, LT, SI

ideas of an optional instrument and a comprehensive set of rules regulating practically all relevant issues, as put forward in the Common European Sales Law, has been abandoned. The approach put forward by the preferred option will be focused on targeted consumer mandatory rights that remedy concrete key obstacles to cross-border trade. It will also only replace one single Directive for a specific sector. Finally, on substance, the preferred policy option offers a new dynamic as it strikes an appropriate balance between a very high level of consumer protection where necessary and a significantly increased legal certainty for businesses through full harmonisation. Concretely, the level of consumer protection set in the instrument is likely to be more successful than the level set in previous attempts: it adopts a practical approach consisting in maintaining substantive solutions that have proven their value in practice (e.g. duration of the legal guarantee period, hierarchy of remedies), while at the same time putting forward new solutions in comparison to past attempts where necessary and supported by recent data (e.g., reversal of the burden of proof). Even in the few Member States where the current national level of consumer protection would be decreased on individual points, the likelihood of a decreasing effect on consumer confidence would be largely outbalanced by the increase of consumer protection on other points, stemming from the overall increase of the EU level of consumer protection. More importantly, fully harmonised rules would address the main concern that consumers have when buying online cross-border: the uncertainty about their key contractual rights.<sup>180</sup>

## **7 HOW WOULD ACTUAL IMPACTS BE MONITORED AND EVALUATED?**

Section 3 above identified four specific objectives to respond to the problems identified in this impact assessment. The analysis in Section 1 showed that the problems faced by both businesses and consumers were largely driven by an absence of clear rules for digital content products, and differences in some key provisions of national contract law rules governing (online) sales of goods. This leads to the definition of two operational objectives that will contribute towards achieving the specific objectives:

- to provide businesses and consumers with a set of uniform, targeted rules for sales of digital content;
- to eliminate contract law-related barriers to cross-border online trade in goods.

Member States will be required to send to the Commission the measures implementing the Directive on certain aspects concerning contracts for the supply of digital content and the Directive on certain aspects concerning the online sales of goods. These measures will set out the text of the adopted legislation by the Member States. The Commission will monitor these measures to ensure that they comply with the Directive.

Comprehensive statistics on online trade in the EU and more precisely retail online trade are available in the Eurostat database. These could be used as primary sources of data for the evaluation. This will be completed by the Consumer scoreboard<sup>181</sup> that is published yearly. In addition, suitable data collection tools could be used such as a specifics survey, a behavioural economics study, or a mystery shopping exercise. Such targeted exercises would aim to identify more precisely the extent to which changes in the indicators could be ascribed to the proposals. For example, while giving consumers the same rights throughout the EU should be expected to make them more confident in asserting their rights in cross-border transactions and thus help to reduce consumer detriment, the share of consumers who receive effective remedies will also be influenced by other factors, such as the effectiveness of the Consumer Protection Co-operation network.

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<sup>180</sup> See Section 1.2.3

<sup>181</sup> [http://ec.europa.eu/consumers/consumer\\_evidence/consumer\\_scoreboards/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/index_en.htm)

The Commission will launch a monitoring and evaluation exercise to assess how effectively the two Directives will achieve the objectives. This exercise will take place no sooner than 5 years after the entry into application of the Directives, to ensure that enough data are available to enable a comprehensive evaluation of their impacts. This exercise will feed into a review process which will examine the effectiveness of the provisions of the Directives.

SPECIFIC OBJECTIVES	OPERATIONAL OBJECTIVES	INDICATORS
<ul style="list-style-type: none"> <li>• Reduce costs resulting from differences in contracts</li> </ul>	<ul style="list-style-type: none"> <li>• Provide businesses and consumers with a set of uniform, targeted rules for sales of digital content</li> </ul>	<ul style="list-style-type: none"> <li>• Variation in number of businesses trading online cross-border; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial</li> <li>• Variation in average number of EU Member States businesses export to; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial</li> </ul>
<ul style="list-style-type: none"> <li>• Reduce uncertainty faced by business due to the complex legal framework</li> </ul>	<ul style="list-style-type: none"> <li>• Eliminate contract law-related barriers to cross-border online trade in goods</li> </ul>	<ul style="list-style-type: none"> <li>• Variation in business confidence in cross-border online selling; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial</li> </ul>
<ul style="list-style-type: none"> <li>• Building consumer trust in online cross-border shopping</li> </ul>		<ul style="list-style-type: none"> <li>• Variation of % of consumers shopping online cross-border; Source: Eurostat Community Survey on ICT usage in households and by individuals, frequency: annual</li> <li>• Variation in consumer confidence in cross-border online shopping; Source: consumer survey informing Consumer Conditions Scoreboard, frequency: biennial</li> </ul>
<ul style="list-style-type: none"> <li>• Reduce detriment faced by consumers when buying non-conforming digital content or faced with certain unbalanced contract terms</li> </ul>		<ul style="list-style-type: none"> <li>• % of consumers getting remedies in case of problems</li> </ul>