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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

{COM(2015) 634 final}
{COM(2015) 635 final}
{SWD(2015) 275 final}

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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[1] 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.[2] 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.[3] The Commission's recent estimate[4] 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.[5] 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.[6]

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.[7] 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%)[8] did so domestically. Only 15% of EU consumers purchased online from another EU country in 2014, while 44% did so domestically.[9] 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.[10]

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

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

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

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

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 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.[11] 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[12] 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

11 Including services sold online, but consumed offline.

12 See under http://ec.europa.eu/priorities/soteu/docs/priorities-progress-report_en.pdf

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.

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.[13]

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[14], the Consumer Sales and Guarantees Directive,[15] the Unfair Commercial Practices Directive[16], the Price Indication Directive[17] the Injunction Directive[18] and the Misleading and Comparative Advertising Directive[19].

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

13 See Section 4 for more details

14 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

15 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

16 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

17 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

18 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

19 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

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 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[20] 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[21] 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

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.

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.

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.[22]

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[23] 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.[24] Another group of Member States[25] 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[26] consumers do not have to notify within a certain timeframe, in 12 Member States,[27] the consumer has to notify the defect within 2 months, and in 5 Member States[28] 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[29] 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[30] the period is 3 years and in 2 Member States[31] it is unlimited. In 2 other Member States[32] there is no specific legal guarantee period, but the consumer rights are only limited by the prescription

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

23 Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Luxemburg, 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

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 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[33] individually negotiated contractual terms are also subject to unfairness control. In 6 Member States[34] 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)[35] or a combination of a black list and a list of clauses that are presumed unfair (grey list).[36]

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.[37] 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[38] and merger clauses[39]. 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.[40] As a consequence, for digital content,

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 rules 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

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.[41]

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[42] or started to work[43] 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[44] "*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[45] *"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

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

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

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%[46] 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*".[47]

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 rules for e-commerce applied in the EU.[48] 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.[49] According to a conservative estimate, this means that over 122,000 more businesses would start selling online cross-border.[50]

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.[51] However, as already mentioned above[52] 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.[53] All these differences have a direct impact on traders.

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)

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, NWJ 1988, p.406 ff.; BGH, NJW 1990, p.302 ff.

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 notifcation 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 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.[54] 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.[55] 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%[56]), the overall one-off contract law-related costs currently incurred by EU traders are estimated around €4 billion euros.[57]

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.[58] For instance, the decision of a micro enterprise active in retail trade to export to 4

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.

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)				
		1 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.

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.[59] 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.[60]

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.[61] 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%).

59 See Section 1.2.1

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

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

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.[62] 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.[63] The removal of contract-law related concerns would also increase the average sum spent annually by consumers in online cross-border shopping by 13.6%, which in real terms would represent an additional annual spending of €40 per consumer buying online cross-border.[64]

In addition, if consumers were to shop online cross-border, they would be able to take advantage of existing price divergences[65] 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[66] and for judicial disputes by the revised European Small Claim Procedure.[67]

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.

62 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.

63 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.

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

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.

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.[68]

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.[69]

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-conforming products across borders.[70] 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[71]. 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

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

70 For more information on information campains see: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317_en.htm

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

EU.[72] 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.[73]

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.[74] 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.[75]

However, recent data from 2015 shows also that over the last 12 months, at least 70 millions of consumers[76] (nearly 1 in 3 online users) who have used music, anti-virus software, games or cloud storage services[77] 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.[78]

Only 10% of consumers experiencing problems related to access, quality or the terms and conditions of the supply of digital content receive remedies. Consumers[79] 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).[80] They also include clauses which enable the provider to unilaterally modify the digital content without specifying the conditions for such modifications,[81] 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[82] 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

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

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*."

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.[83]

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.[84] 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.[85]

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 penetration varies significantly between Member States.[86] 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[87]. 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.[88] 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.[89]

Moreover, it can be expected for digital content that other Member States, alongside the UK, the Netherlands and soon Ireland[90], 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.

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.

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"

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[91] 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 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.

91 COM (2013)794final

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[92] 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[93] (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 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.[94] 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.[95]

The relatively low prevalence of contract law-related obstacles for the B2B market has been confirmed by the Stakeholders' Consultation Group[96]: 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

92 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

93 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).

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

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.[97]

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%).[98] 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[99] 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.

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.[100] [101] 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.[102] From the businesses' point of view, the risk of a security breach is not only a technical issue but also a

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

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

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

matter of contract terms governing the service providers' liability and accountability[103]. This conclusion has been confirmed by the Expert Group on Cloud Computing Contracts.[104] 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%).[105] 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.[106] 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[107] insisted on the need not to overburden businesses selling digital content to other businesses with obligations that would hamper their competitiveness in a fast evolving market.[108] 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.[109]

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.[110]

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

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

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

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

107 See Annex 2

108 See Annex 2

109 http://ec.europa.eu/enterprise/sectors/food/files/competitiveness/good_practices_en.pdf

110 See Section 1.2.1

For digital content, existing legislation already contains mandatory rules to some extent. In addition, market trends prompt Members 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.[111] 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[112], 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 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.[113] For example, the recent in-app purchases action[114] enabled providers to negotiate with the Commission and the Consumer Protection Authorities in a coordinated manner instead of 28 separate national authorities.

111 See Section 1.2.1

112 See Section 1.1

113 Article 9 of the Consumer Protection Cooperation Regulation

114 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. 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

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?

General objective: Contribute to faster growth of the Digital Single Market, for the benefit of both consumers and businesses.
Specific Objectives: • Reduce business costs resulting from differences in contract law • Reduce the uncertainty faced by businesses due to the complex legal framework • Contribute to building consumer trust in online cross-border shopping in the EU • Reduce the detriment faced by consumers with respect to non-conforming digital content or certain unbalanced contract terms

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 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 currently no evidence[115] 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.[116]

115 See Section 1.4
116 See Annex 2

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[117]/level of consumer protection	Impact on Rome I
Digital content[118]	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[119]: 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 no 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
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

117 See Section 1.2.1 for a detailed description of the relevant substantial law areas
118 For digital content, options 1, 2, and 4 are the same.
119 See Annex 2 to the consultation for a detailed summary.

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[120]	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**
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

120 For goods, options 3 and 4 are the same.

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[121] 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.[122] Therefore, this option has not been taken into consideration as it was not considered sufficient to meet the objectives.

121 COM(2011)0636final

122 See Section 1.2.3.

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[123] EU companies, will incur one-off costs of approximately €6,800[124] 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,[125] 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.[126] 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 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

123 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% (lowe 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.

124 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

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

126 On this issue see further analysis in Section 1.1, Section 6.2 and Annex 3

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.[127] 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.[128] 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[129] more businesses could be expected to start selling online cross-border.[130]

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[131].
- 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.

Position of SMEs

- SMEs, in particular micro and small businesses, will benefit compared to the current situation: the

127 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.

128 "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.

129 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

130 See footnote 50 and Annex 4

131 See Annex 4

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)[132] 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[133], 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%)[134] 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 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

132 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

133 See Section 1.1.

134 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.

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.[135] 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[136] 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.[137]
- 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 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%).[138] 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.)

135 See footnote 63 and Annex 4

136 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

137 See Section 6.2 and Annex 4

138 See Section 6.2 and Annex 4

reflects the overall outcome of the planned legislative action, including a possible substitution effect between offline and online trade. The model[139] 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. [140]
- 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. [141]
- 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 CO2 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 CO2 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 CO2 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.[142]
- 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 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)

139 See details on the model in Annex 4

140 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.

141 http://www.retailmenot.com/corp/static/filer_public/86/ed/86ed38d1-9cb9-461c-a683-ab8e7b4e1ffc/online_retailing_in_europe_us_and_canada.pdf

142 For a detailed assessment of the impacts on the level of consumer protection in each Member State see Section 6.2 and Annex 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.[143]
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[144]. ○ 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 subject to their own (third country) law.
Competitiveness of business

143 See Annex 4

144 See Annex 4

- 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. o 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.[145] 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
o 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.[146] o 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
o See analysis under Option 1
Impacts on Fundamental Rights (Charter of fundamental Rights)
Consumer Protection (Article 38)
o 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. o 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)
o 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. o 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)
o 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. o 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.

145 See Annex 4

146 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

Economic impacts
Operating costs and conduct of business
○ For the impact of fully harmonised rules specific for **digital content**, see analysis under Option 1. ○ At €212 bn, the value of the market for **goods**, 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.
Administrative burdens on businesses
○ There will be no change in the information obligations imposed on businesses supplying digital content or goods.
Trade flows
○ The existence of fully harmonised EU rules on **digital content** 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. ○ 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. ○ As regards **goods**, 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.
Competitiveness of businesses
○ For **digital content**, 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. ○ Without EU action to reduce contract law barriers for **goods**, 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.
Position of SMEs
○ For the impact of the fully harmonised rules for **digital content** on SMEs, see analysis under Policy Option 1. ○ SMEs, in particular micro and small businesses, would continue to face disproportionate contract law-related costs when selling **goods** 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.
Functioning of the internal market and competition
○ Competition in the **digital content** 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. ○ However competition for **goods** 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.
Innovation and research
○ The overall growth and the increased competition in the **digital content** market would drive innovation and research. ○ However, a limited development of economies of scale due to less access to bigger markets when selling **goods** will reduce the resources available to businesses for research and development.
Public authorities
○ A full harmonisation Directive on **digital content** 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 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. o Fully harmonised rules for digital content would facilitate enforcement in cross-border cases and information campaigns all over the EU. o 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
o For the impact of fully harmonised rules specific for **digital content**, see analysis under Option 1. o 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. o 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. o 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
o 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
o 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
o 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 (Article38)
o 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. o 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)
o See analysis under Option 1
Freedom to conduct a business (Article 16)
o 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. o However differences in national consumer contract law rules will still hinder online cross-border trade of **goods**.
Right to an effective remedy (Article 47)
o 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. o 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
o 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[147] 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 that their own. o 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
o The EU rules will not impose further information obligations on businesses.
Trade flows
o 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
o 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
o Micro and small businesses will have to comply with the new rules on **digital content**. Since SMEs constitute the vast majority (around 99%)[148] 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. o 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 finding customers.
Functioning of the internal market and competition

147 See Policy Option 1

148 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.

o Due to the existing differences between national legislations on the sale of **goods** as well as the ones for the supply of **digital content** 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.
Innovation and research
oSince 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.
Public authorities/Courts
oMember States will bear the costs of implementation of the minimum harmonisation Directive on **digital content** in their national laws. oThe 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.
Consumers and households
oConsumers will have specific rights when buying/accessing **digital content**. 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. oBoth for **digital content and for goods**, 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.
Macroeconomic environment
oBy 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 **goods and digital content** online cross-border.
Social impacts
Employment and labour markets
oThere 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 **digital content** due to more consumer confidence. However this positive effect will be limited as contract law-related barriers that hinder businesses to sell both **goods and digital content online** cross-border remain and therefore competition will also remain limited.
Environmental Impacts
Transport and the use of energy
oSee analysis under Option 3
Impacts on Fundamental Rights (Charter of fundamental rights)
Consumer Protection (Article 38)
oMinimum harmonisation is likely to result in higher consumer protection, as Member States will be able to go beyond the Directive's minimum standards. oPublic 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.
Personal data protection (Articles 7 and 8)
oSee analysis under Option 1
Freedom to conduct a business (Article 16)
oA 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[149] 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.[150]
- 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.[151]
- 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.[152]
- 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.
- 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

149 ICF in the context of the "Economic Study on Consumer Digital Content Products"

150 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.

151 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.

152 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

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.[153] 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 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

153 See Section 1.2.3

- 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

	Baseline scenario		Option 1		Option 2		Option 3		Option 4		Option 5	
Objectives	**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

	Baseline scenario		Option 1		Option 2		Option 3		Option 4		Option 5	
Impacts	**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.[154] 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.[155] 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[156], 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[157], 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[158] and the review of the Consumer Protection Co-operation Regulation[159] 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,

154 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.

155 See Introduction, Section 5.2 and summary table in the end of this Section

156 See Section 6.1 for the reasons for not following the the trader's law approach.

157 See Section 1.2.3

158 See Section 1.2.3

159 See Section 1.2.3

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 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.[160] 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

160 See Section 1.2.3

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 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 an 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[161], 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[162] and decrease it for the 6 Member States that currently have no hierarchy of remedies[163] and the 2 Member States where beside the hierarchy of remedies a short-term right to reject is currently in place[164]. 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

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

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 to consumers, while maintaining the current level of protection in the remaining 4 Member States.[165]

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.[166] 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[167] 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.[168] 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[169] 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.[170] 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.[171]

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

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

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 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[172]. 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%)[173] consider that a 2-year legal guarantee period is reasonable for white, brown and grey goods[174]. 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[175] and decrease it in the remaining 5 Member States[176].

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[177] 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

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

	Implementation law	Proposal	Implementation law	Proposal	Implementation law	Proposal	Implementation law	Proposal
AT	NO	NO	YES	YES	2 years	2 years	**6 months**	**2 years**
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.[178]

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[179] where the right to termination is excluded for minor defects.

Learning from the past

178 See Annex 3 for more details

179 CY, EL, HR, LT, SI

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 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.[180]

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[181] 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

180 See Section 1.2.3

181 http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/index_en.htm

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.

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**
• Reduce costs resulting from differences in contracts	• Provide businesses and consumers with a set of uniform, targeted rules for sales of digital content	• Variation in number of businesses trading online cross-border; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial • Variation in average number of EU Member States businesses export to; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial
• Reduce uncertainty faced by business due to the complex legal framework	• Eliminate contract law-related barriers to cross-border online trade in goods	• Variation in business confidence in cross-border online selling; Source: retailer survey informing Consumer Conditions Scoreboard, frequency: biennial
• Building consumer trust in online cross-border shopping		• Variation of % of consumers shopping online cross-border; Source: Eurostat Community Survey on ICT usage in households and by individuals, frequency: annual • Variation in consumer confidence in cross-border online shopping; Source: consumer survey informing Consumer Conditions Scoreboard, frequency: biennial
• Reduce detriment faced by consumers when buying non-conforming digital content or faced with certain unbalanced contract terms		• % of consumers getting remedies in case of problems

ANNEX 1 - PROCEDURAL INFORMATION

Lead DG: Directorate General Justice and Consumers

Agenda Planning

Reference AP N°	*Short title*	*Foreseen adoption*
2015/JUST/008	*Digital Contract Rights Proposal*	*9/12/2015*

The Commission had adopted in 2011 a proposal for a Regulation on the Common European Sales Law. While having received strong support from the European Parliament, the proposal did not find a majority in Council. The Commission in its 2015 Work Programme[182] announced that this proposal would be modified in order to fully unleash the potential of e-commerce in the Digital Single Market.

The Digital Single Market Strategy[183] adopted in May 2015 announced for the end of 2015 a proposal covering harmonised rules for online purchases of digital content and key mandatory contractual rights for domestic and cross-border online sales of tangible goods.

Organisation and timing

An Inter-Services Steering Group (ISSG) was set up in May 2015. The ISSG is chaired by the Secretariat General and the following Directorates General have been invited to participate: Justice and Consumers (JUST), Internal Market, Industry, Entrepreneurship and SMEs (GROW), Communication networks, content and Technology (CNECT), Competition (COMP), Economic and Financial affairs (ECFIN), Trade, the Legal Service (SJ) and the Joint Research Centre (JRC).

The ISSG met 4 times until the submission of the Impact Assessment to the Regulatory Scrutiny Board in September 2015. The ISSG approved the Inception Impact Assessment that was published on 23 July 2015 and the Impact Assessment Report.

Consultation of the Regulatory Scrutiny Board

The Impact Assessment Report was examined by the Regulatory Scrutiny on 14 October 2015. The Board…. [*To be completed after the board meeting explaining how the Board's recommendations have led to changes compared to the earlier draft. This should be presented in tabular format – the first column identifying the Board's recommendation and the second column how the IA Report has been modified in response*];

Board's Recommendations	**Implementation of the recommendations into the revised IA Report**

[182] COM(2014) 910 final of 16.12.2014 p. 6, Section 2, 3rd Paragraph and Annex 2, p. 12, Item No 60:
[183] COM(2015) 192 final of 6.5.2015

1. The report should clarify and justify the introduction of two different regimes for online and offline sales of tangible goods and why action is considered necessary now, before the conclusion of the planned fitness check of consumer law.	• Section 1.1 (Introduction) and Section 2 (Why does the EU need to act): The Introduction and Section 2 have been modified to better explain the political and economic reasons why this initiative should be submitted now, why the rules on the online sales of tangible goods should be submitted together with the rules on digital content and how the risk of different regimes for online and offline sales can be reduced. • Section 5.2 (Impacts of Policy Option 1): The impacts are analysed separately for businesses selling online, offline or both online and offline. • Section 6.2 (Preferred Policy Option): The possibility of divergent regimes for online and offline sales of tangible goods is taken into account in the presentation of the preferred policy option.
2. The report should clarify why the present proposal is likely to be more successful than previous similar endeavours	• Section 1.1 (Introduction) explains how the current proposals draw on the lessons learnt from the proposal for a Common European Sales Law and the initial Commission proposal for the Consumer Rights Directive. • Section 4.3 (Discarded options) explains that options on an optional instrument or a comprehensive set of rules were discarded because of the lessons drawn from past experiences. • Section 6.2 (Preferred Policy Option) describes the present more targeted, problem-oriented approach chosen

3. The report should assess the trade-off between foreseen positive impacts of increased legal clarity through full harmonisation and potential negative effects of decreased consumer protection in some Member States. The report should elaborate on the extent to which the proposal reaches a balanced trade-off between predictability for traders and consumers, and adjustment of the level of consumer protection.	• Section 5 (Impacts of Policy Options): describes the impact of the different options in terms of consumer protection and the advantages/disadvantages for businesses if they want to sell cross-border. The level of consumer protection under each option is assessed in combination with the level of legal certainty provided to businesses. • Section 6.1 (Comparison of Policy Options) assesses the impact of the level of consumer protection on consumer's trust and the effect of the different policy options in terms of reducing legal uncertainty for businesses. For Policy Option 1 more in particular, it is concluded that while in a few Member States on individual points the level of consumer protection may decrease, the impact on the overall positive effects (for both businesses and consumers) on cross-border trade is likely to be minor. • Section 6.2 (Preferred Policy Option): The conclusion that the preferred option strikes the appropriate balance between the level of consumer protection and legal certainty is again explained with some more detail in Section 6.2. Detailed information has been added here and in Annex 8 to explain the exact impact of the main elements of the online sales of tangible goods proposal on the level of consumer protection in each Member State.
3.1 The report should clarify the position of Member States and other stakeholders regarding the different options.	• Section 4.2 (The Options): A summary of the position of Member States and other stakeholders for both digital content and tangible goods has been added to the description of each option. Section 6.2 (Preferred policy option) and Annex 8 describe the position of the different stakeholders on the substance of the proposal.
3.2 The report should, where appropriate, provide arguments to explain why certain positions of stakeholders are not taken up.	• Section 6.1 (Comparison of the policy options) describes the advantages and disadvantages of each option, thereby explaining why certain positions of stakeholders are not taken up. • Section 6.2 (Preferred policy option) elaborates on the reasons why on the substance of the proposal a particular option is preferred, although sometimes stakeholders from a certain category had different views. Further information is provided in Annex 8, where a detailed assessment of the preferred option and of the position of each stakeholder category is presented for all main elements of the proposal.

3.3 The report should include, as far as possible, quantitative estimates of the costs of the options, including for impacted businesses.	• Section 5 (Impacts of Policy Options): The assessment of the impacts has been enriched with further quantified estimates. One-off adaptation costs are presented for businesses selling online and/or offline under each option. Quantified estimates have also been included on the one-off costs for SMEs in particular. The macroeconomic benefits are more clearly presented (for policy options 1 and 2). This analysis is also reflected in Annex 3, which presents who will be affected by the initiative and how.
4. Other comments included in the Quality Checklist for the RSB Opinion.	• Section 1.2.3 (Uncertainty when buying digital content and tangible goods hinders cross-border trade) has been modified to explain why information measures on their own are not sufficient to address the lack of consumers' confidence. • Section 1.2.4 (No policy change/baseline scenario) includes a more detailed presentation of how the current situation would evolve, taking into account the other initiatives announced in the Digital Single Market Strategy. • Section 4.2 (The Options): the policy options are better presented in a tabular form. • Section 5 (Impacts of Policy Options): The assessment of social impacts has been improved. • Stakeholders' and Member States' positions are better reflected throughout the main report (in particular Sections 4 - 6). • Section 6.1 (Comparison of Policy Options): The comparison of options is done in a more systematic way, based on the policy objectives and the main impacts of each option. Consistency with the summary tables of comparison is improved. The summary table on "Achievement of objectives" also better reflects the degree of effectiveness of each option by adding a level of assessment. • Clarification and consistency issues (calculations, repetitions, distinguishing between tangible goods and digital content where appropriate) have been addressed throughout the report.
Board's Recommendations (2nd Opinion)	**Implementation of the recommendations into the revised IA Report**

1. The report should include a summary table describing the possible temporary discrepancies between contract rules for online and offline sales in specific EU Member States introduced by this proposal.	• Section 6.2 (Preferred Option): A summary table has been added, describing the differences between the main consumer contract law rules under the current national laws of all EU Member States and the proposed fully harmonised rules. In the event of a temporary divergence between the regimes on offline and online sales of tangible goods, the differences explained in this table would constitute the main points of discrepancies.
2. While the risk of having two different regimes for online and offline sales during a transitional phase is stated as small and largely manageable, the report should elaborate on the possible impact of such a situation, especially for small market operators and consumers.	• Section 5.2: The possible impacts on businesses of potential differences for a transitional period between the regimes for online and offline sales of goods are further analysed. • Section 6.2: A sub-section has been added to better explain how any potential differences between the regimes for online and offline sales of goods would affect businesses selling through both channels, and more specifically those who only sell domestically. It is furthermore explained how businesses could be expected to deal in practice with such potential temporary divergence. Finally, the impact of possible differences between the two regimes is also examined from the consumers' side. • Annex 3: A more detailed analysis of possible impacts of any potential temporary differences between the two regimes has been added, both for businesses and consumers. The specific impact of a possible difference is analysed per each main consumer contract law rule separately.
3. The report should further explain how the learnings from the previous attempts to harmonise consumer law have been used to set the level of consumer protection for the proposed substantive provisions.	• Section 6.2: A sub-section clarifies further that the level of consumer protection set in the proposed instrument is likely to be more successful, based on the experience drawn from previous attempts.
4. Although it may not be quantifiable, the report should acknowledge the probable adjustment in employment from the offline to the online sector, which would	• Section 5.2: Further explanation has been added to the analysis of Option 1 on the possible negative effects of additional growth of online sales on physical stores, as well as on the growing importance of multi-channel or omni-channel business models.

somewhat reduce the net gains in terms of job creation.	

Overall Board's examination inputs

The revised Impact Assessment contains some improvements which take into consideration the Board's recommendations. In particular, additional explanation was included on why action is deemed to be necessary now, before the conclusion of the planned fitness check of the consumer law acquis, and why the present proposal is likely to be more successful than previous similar attempts to pursue approximation of national laws. Moreover, further clarification and justification was provided on the risk of having two distinct regimes for online and offline sales during a transitional phase, especially the impact of such a situation on businesses and consumers, in the light of the second opinion of the Board. Finally, the position of the different groups of stakeholders and the costs that the different options may have on each of them were further clarified.

Evidence used

The initiative was built upon a large set of data from the following sources. The quality of the results of the referred studies and surveys was assessed.

Surveys

Several surveys collected data from businesses and consumers on their experiences with contract law related problems. They include a survey carried out in 2015 in order to identify the main cross-border obstacles to the Digital Single Market[184], Eurostat statistics 2014[185]; Eurobarometers[186] and an SME panel[187].

Studies

An economic study provided a better understanding of consumer digital content markets and evaluated the detriment suffer by consumer when purchasing digital content[188]. Legal studies provided an overview of the national rules may apply to cloud computing contracts[189] and the mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and in particular online[190].

External expertise

[184] GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, (2015) and the Flash Eurobarometer 413 - Companies engaged in online activities (2015). http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf
For more detailed explanation about these surveys see annex 2

[185] In particular: Eurostat survey on ICT usage in households and by individuals (2014); Eurostat, E-commerce by enterprises: summary of EU aggregates (NACE Rev. 2 activity); Eurostat 2014, statistics explained. "Comparative price levels of consumer goods and services" and Eurostat, Statistics explained "Cloud computing - statistics on the use by enterprises"; http://ec.europa.eu/eurostat/statistics-explained/index.php/Internet_and_cloud_services_-_statistics_on_the_use_by_individuals

[186] Flash Eurobarometer 358, "Consumer attitudes towards cross-border trade and consumer protection" (2014); http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf
Flash Eurobarometer 396 (2014) "Retailers' attitudes towards cross-border trade and consumer protection" (2015). http://ec.europa.eu/public_opinion/archives/ebs/ebs_396_en.pdf

[187] A SME panel survey conducted within the Europe network and which gathered responses from 1047 micro, small and medium sized businesses.

[188] Economic study on consumer digital Content products, ICF International, 2015 (to be published).

[189] Comparative Study on cloud computing contracts (2014) DLA Piper, *http://bookshop.europa.eu/en/comparative-study-on-cloud-computing-contracts-pbDS0115164/*

[190] Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and in particular online. Prof. Behar-Touchais,2015

The Commission set up an Expert Group on Cloud Computing Contract[191] to identify safe and fair contract terms and conditions for cloud computing contracts for consumers and small firms; the work of this group fed also into the preparation of the Impact Assessment.

The Commission also held in-depth interviews with six companies from different Member States, in order to gather information on business practices and contract law related costs faced by businesses when selling abroad

[191] http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index_en.htm

ANNEX 2 - STAKEHOLDER CONSULTATION

1. Summary of the consultation strategy/process

In line with the Commission's minimum standards regarding participation and openness to stakeholders' views presented in the Better Regulation Guidelines[192], an extensive consultation strategy has been developed to ensure a wide participation throughout the policy cycle of this initiative starting from the CWP 2015 adopted in December 2014 until the meeting of the Impact Assessment Regulatory Scrutiny Board on the Impact Assessment Report in October 2015. This strategy was based on a mix of public and targeted consultations. The Commission has sought a wide and balanced range of views on this issue by giving the opportunity to all relevant parties (businesses, consumers, national authorities, lawyers and academics) to express their opinions.

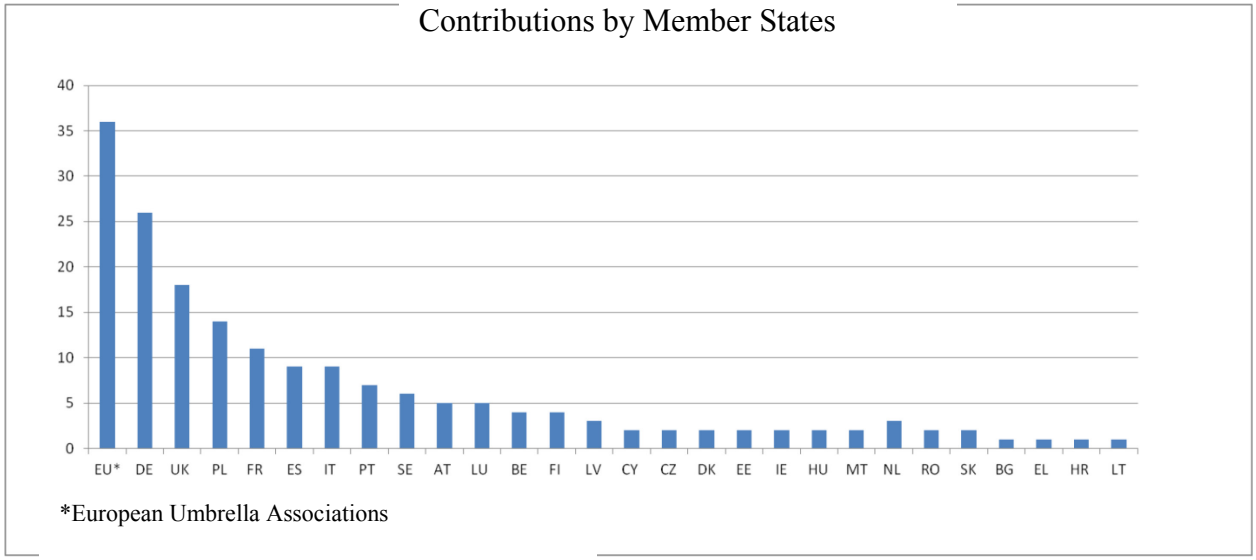
The Commission organised an extensive consultation process which included a public consultation, specific consultations targeting main stakeholders and Member States as well as consumers and businesses surveys as described below:

- **Inception Impact Assessment**

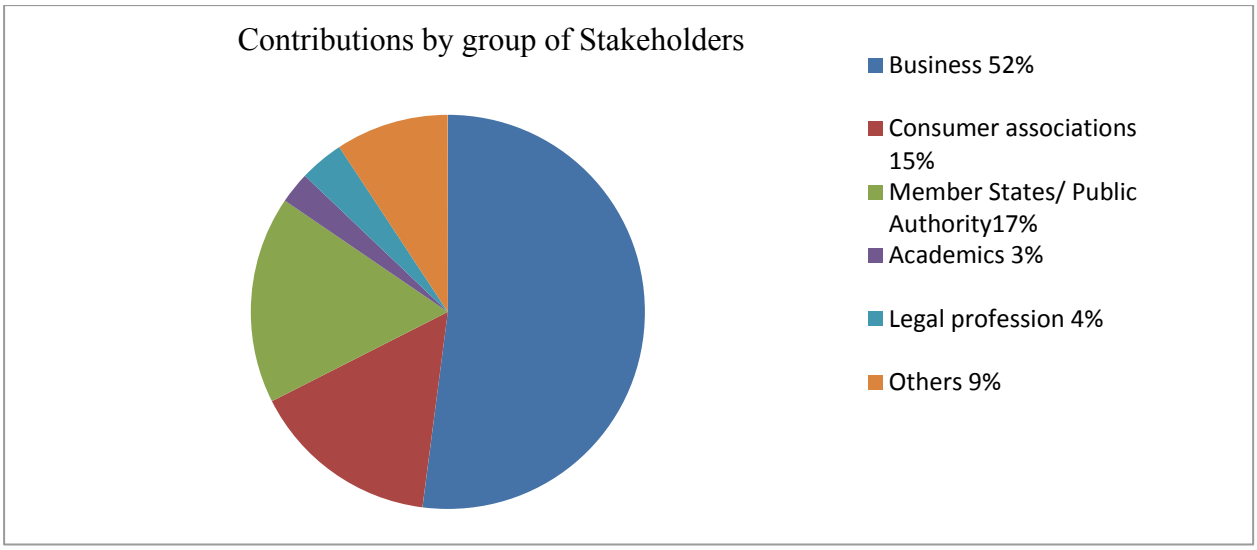
In line with the Commission's new better Regulation Guidelines, the inception impact assessment for this initiative was published online for stakeholder comments. No stakeholders sent comments on the inception impact assessment.

- **Public Consultation**

An open 12 weeks web-based public consultation ran from 12 June to 3rd September 2015. The aim of this public consultation was to collect interested parties' views on the possible ways forward to remove contract law obstacles related to the online purchases of digital content and tangible goods. The public consultation resulted in **189 responses** from all categories of stakeholders from across the EU.



[192] SWD(2015) 111



Main trends

Digital Content

Consumer associations: The vast majority of consumer associations recognise a *need to act* at EU level and favour *full harmonisation* provided that a high level of consumer protection is guaranteed. Consumer associations support a *broad definition of digital content*, not precluding future technological developments.

Given that digital content is increasingly provided against users' data or other counter-performance, *all kinds of counter-performances should be covered*. The content should be as comprehensive as possible, including conformity criteria, remedies and the exercise of such remedies.

The vast majority of consumers associations support a mixture of subjective and objective *conformity criteria*. Remedies applicable to digital content should be as consistent as possible with those on tangible goods and differentiations should only be madebecause of the speicificities of digital content. Consumer associations support the inclusion of a right to damages, where damage has been done to the digital content and hardware of the consumer. On the *legal guarantee period* the majority of them advocate for a long or indefinite period, but would also support the introduction of a reasonable time limit that, however, should not be shorter than the one for goods (2 years). On the *burden of proof*, consumer representatives argue that traders should have to prove that a defect did not exist, since it is difficult for consumers to prove the cause of a defect.

Traders should be able to *modify the features* of the supplied digital content, provided that this is foreseen in the contract and that consumers have the *right to terminate* the contract at no cost. Users should have the *right to terminate long term contacts* by prior notice, provided that this is not subject to formal requirements that would limit the exercise of the right to terminate. After termination of the contract, the supplier should refrain from continuing to process the consumer's personal data. Consumers should be able to retrieve their data within a reasonable time, without inconvenience and in a commonly used format to avoid lock-in effects caused by possible lack of interoperability between different suppliers' platforms.

Business The majority of respondents from the business' side confirm that there is a *need for action* at EU level, given that some Member States have already put in place legislative

initiatives and more are likely to follow, which could lead to fragmentation. IT associations are divided: while according to some there is no evidence that consumer and contract law variations are an important obstacle to cross-border trade, others state that "action at EU level, rather than national level, is critical". Businesses would in principle support a *full, targeted harmonisation*. The main SMEs umbrella association agrees that a new harmonised European legislation could increase the protection of consumers when buying digital content, and suggests the initiative should cover all aspects of the contractual relationship. Retail associations consider that the legal void only regards remedies and guarantees. IT associations are divided on the options: while some would prefer the home option, others would support full harmonisation or no action. With the exception of the main SMEs association, which supported the extension of rules on digital content to B2B transactions, all businesses associations argued that the current proposal should cover only B2C contracts.

A vast majority of the businesses call for a technology- and future-proof *broad definition of digital content*. In particular, they argue that having a narrow definition would fragment the market and not be in line with the evolution of a market where interplay between different types of services is more and more frequent. However, representatives of companies active in the development of digital content express the need to differentiate between categories of digital content. Some asked that the proposal shall not deal with digital services such as storage and sharing services as well as services processing data and user generated content.

On the *counter-performance other than money* businesses are divided: while some are against such an extension and advise against overlaps with data protection rules, others would favour such an inclusion.

The majority support a *mixture of objective and subjective conformity criteria*. As to *remedies*, they underline that suppliers of digital content should have the choice to bring the goods into conformity before giving the possibility to the consumer to terminate the contract. For some IT associations, consumers should only have a right to terminate the contract and to receive a reimbursement of the price, but not the right to request that the content is brought into conformity, as this may be too costly for traders. Other IT associations do not consider remedies for non- conformity to be appropriate at all for digital content. The vast majority state that a right to damages should not be included in the proposal. On the *burden of proof*, for some general businesses associations, SMEs and IT associations, non-conformity should be proven by the consumer, for other associations there should be a reversal of the burden of proof for a period that varies from two to six months. They are almost unanimously against an indefinite shift of the burden of proof but would prefer a reasonable period.

The vast majority of businesses organisations want traders to be able to *modify the features* of the digital content, in order to keep up with technological and market developments. Many among them support that this possibility should be foreseen in the contract, that the consumers should be informed about the modification and should have the *right to terminate the contract*.

According to the majority of businesses users should have the right to *terminate long term contracts, upon prior notification to the trader.* Representatives of the digital technology industry 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, 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. Some IT associations and companies are not in favour of a right to retrieve or transfer user-generated content.

Member States: The majority of Member States support *harmonised EU rules* for online sales of digital content. Some of them specified they would prefer full harmonisation or targeted, full harmonisation. As a main trend they believe it is very important to have similar rules regardless of whether the contract concerns digital content or tangible goods . Others would like to see the results of the fitness check of existing EU legislation (REFIT) and the report on the application of the Consumer Rights Directive feeding into the new rules. Some Member States would rather prefer a better application and an assessment of existing rules. In case a new legislative initiative will be discussed, a Member State belonging to this group would be open to support full, targeted harmonisation, if there is no differentiation between digital content and digital content on a tangible medium. Almost all Member States expressed the need for consistency between rules for online and offline sales . In addition to supporting harmonisation, two Member States would be open to a voluntary model contract provided that the stakeholders agree on its content.

With the exception of a Member State that would be open to consider B2B contracts in the cloud computing area, all respondents would prefer the inclusion of *only B2C contracts*.

The vast majority of Member States would favour a *broad definition of digital content,* given that digital content is in continuous evolution. According to three Member States certain digital content in particular digital services or telecommunication and software accessed online should not be included, while digital content downloaded/saved on the consumer's computer should be included. One Member State specified that the scope should not be defined by a list of digital content categories to be included given that digital content is in continuous evolution..

On the inclusion of *counter-performances other than money* four Member States would not be in favour. All the others agree or in three cases are at least open for discussion. According to one Member State different liability and warranty standards should apply, if appropriate, depending on the type of counter-performance.

Member States are almost unanimous in supporting a *mixture of subjective and objective conformity criteria.* Several Member States maintain that the trader should have the *burden of proof* while a number of them affirm that the burden of proof should be on the consumer.

Almost all Member States would support the inclusion of all *remedies* already available for tangible goods, in particular repair and replacement, price reduction and termination of the contract. Three of them express a preference for a *hierarchy of remedies* while one Member State believes consumers should be free to choose the preferred remedy. A number of Member States are in favour of granting the same remedies in case of counter-performances other than money. One Member State explicitly opposed that option.

Several Member States would sustain a single *time limit* in accordance with the Consumer Rights Directive while a couple of them would prefer two time limits, one for the legal guarantee period and one for the prescription period.

On *damages* Member States are divided: a number of them would be in favour of including a right to damages while for the others this issue should be left to national legislations or are open for discussion.

Several Member States maintain that the trader should have the *burden of proof* while a number of them affirm that the burden of proof should be on the consumer but a reversal of this burden should be provided for a certain period after the supply of the digital content, ranging from six months for two Member States to two years for one Member State.

The majority of Member States believe consumers should be able to *terminate long term contracts* and to *retrieve their data*. Two of them specified that consumers should only be able to retrieve user generated content. One Member State would not support the inclusion of the right to terminate the contract because digital content cannot be returned in any meaningful way and is easily copied.

Those Member States answering this question agree on the possibility for the trader to make modifications to the digital content provided that this is not detrimental to the user, but their answers are heterogeneous when it comes to deciding on which basis this possibility should be granted.

Legal professions: Half of legal profession associations (lawyers, notaries) are in favour of harmonised EU rules, while others consider that the EU consumer acquis is sufficient or that voluntary model contracts could be an alternative. Half of the respondents suggest that the new contract rules could apply to SMEs as well, but at a lower level of protection than for consumers. A large majority consider that the scope should include monetary transactions and other types of counter-performance (data), as well as a wide area of rules. They call for a mixture of subjective and objective criteria for conformity. Users should be granted a large choice of remedies, also for non-monetary counter-performance. On the guarantee period a majority of respondents are in favour of a 2 year period, one respondent proposes a 3 year period. They broadly consider that the right to damages is a matter for national law. They generally recognise a right to terminate long-term contracts to consumers under user-friendly conditions. They do not object to "reasonable" modifications of the contract by the trader, and would accept technical protection measures taken by traders after termination of the contract, to avoid further use of the digital content by the consumer.

Tangible Goods

Consumer associations: There is a general recognition that *harmonisation* may improve cross border e-commerce since it has the potential to boost clarity for both consumers and traders. The main consumer umbrella association would support full harmonisation as long as a high level of consumer protection is ensured and existing consumer protection levels across Member States are not reduced. They also raised the issue that possibly diverging rules for online and offline transactions would be problematic, and could only be justified with the creation of a truly high level of consumer protection for online purchases. Consumer associations strongly oppose any form of the application of the trader's law and do not support the inclusion of *B2B contracts*.

The vast majority of consumers associations support a *free choice of remedies* and rejected the inclusion of a *notification duty*, arguing that consumers would be likely to be unjustly deprived of their remedies. On the reversal of the *burden of proof* they advocate for a period longer than 6 months (mainly 2 years). Practically all of them are in favour of a longer *legal guarantee period* (many propose 6 years), especially for durable goods, and oppose any harmonisation of *prescription periods*. Almost none of the associations support the inclusion of *rules on damages* in the proposal.

Business: Businesses are in general in favour of an *action at EU level*: the majority would want full harmonisation of European contract law on the B2C sale of tangible goods. Others specify that targeted full harmonisation would not eliminate all differences, since there would be harmonised rules and other rules. Other associations and companies are doubtful about the need to take any action, but if there is some action at EU-level they would want the application of the trader's law and a modification of the Rome I Regulation. Some retail associations support full harmonisation while recommending avoiding as much as possible a sectorial approach (online/offline; tangible/intangible). The main SMEs umbrella organisation suggests that the home option and an adaptation of Rome I Regulation could boost cross border ecommerce. However, they do not exclude harmonisation and would eventually even support it if there are no problems of fragmentation. Some IT industry associations also support the home option and the adaptation of the Rome I Regulation. They consider that consumers are sufficiently protected at EU level. One of their main arguments is related to the fact that they believe that even fully harmonised rules may be applied differently in the Member States.

Businesses are practically unanimous in supporting the inclusion of *only B2C contracts*.

On *conformity* the vast majority of respondents agree on the balanced approached between objective and subjective criteria provided by Art. 2 of the Consumer Sales and Guarantees Directive.

Respondents from the business side argue practically unanimously in favour of a *hierarchy of consumer remedies* across the EU, along the lines of the current Consumer Sales and Guarantees Directive. Some of them added that the consumer should have the right to repair as the first remedy but the trader should have the right to propose a price reduction or refund instead. They all support the need for *a notification duty,* with some of them arguing that a lack of notification could impair the ability of the trader to adequately repair or replace a defective product, and for maintaining the current 6-month reversal of burden of proof period.

The majority of businesses support full harmonisation of the current 2-year *legal guarantee period,* which has worked well in practice in many Member States. In general they are not in favour of the inclusion of *rules on damages*. The majority of businesses would not want uniform EU rules on the content and form of commercial guarantees.

On *unfair contract terms* businesses are divided: while some of them would welcome fully harmonised rules, others consider the minimum harmonisation currently in place as sufficient or consider the home option a better solution. One main business association advocated for a fully harmonised blacklist and grey list of unfair terms. On grey lists the respondents are almost unanimous in not supporting their inclusion in the proposal. An IT association would be open to a harmonised grey list accompanied by guidance as to what will save such provisions in the grey list from being ultimately deemed unfair (saving parameters).

Member States: Some Member States would support EU *harmonised rules*, but are cautious about political feasibility and the differentiation between online and offline sales rules. Others would prefer a better implementation, enforcement and evaluation of existing legislation before producing new legislation. A number of Member States are strongly against any form of the application of the trader's law and a re-opening of the Rome I Regulation. Few Member States would be open to the home option or to the voluntary model contract provided that its content is agreed with the stakeholders.

With the exception of a couple of Member States that are open to including B2B contracts, all the other respondents support the inclusion of only *B2C contracts*.

On the content of the proposal, the vast majority of respondents believe the current combination of *subjective and objective conformity criteria* provided for in the Sales Directive is appropriate. One Member State would be in favour of a durability criterion.

Three Member States would support maintaining the existing rules of a six month period for the *reversal of the burden of proof,* while another would want to extend the reversal period to two years. A Member State maintains that the burden of proof should be on traders, with the exclusion of SMEs.

On *remedies* respondents are divided: while some of them are in favour of a *hierarchy of remedies*, others would support a free choice of remedies by the consumer. The majority of them agree that all contract law areas covered by the Sales and Guarantees Directive should be included.

A group of Member States would not support the inclusion of a *right to damages*. Others agree this right should be based on the trader's fault and some of those specify his liability should be objective. Some Member States would not agree to include commercial guarantees in the proposal. Five Member States would be in favour of such an inclusion.

On *time limits*, a group of Member States among those which answer to this question would support existing rules. Others believe limitations periods are a matter of national law.

A number of Member States would not be in favour of including *unfair contract terms* in the proposal, as the existing rules seem appropriate. Three Member States would be in principle open to their inclusion, provided that the list is not exhaustive and does not undermine national legislation. A Member State advocates harmonised rules.

Legal professions: The large majority of legal professions' associations which responded see a need for harmonised EU rules, two associations would support model contracts applicable to digital content and tangible goods and one association is in favour of complementing the existing minimum harmonisation regime. While half of respondents put the focus on B2C transactions, a large majority consider that the same regime could apply to both B2C and B2B, except some rules on standard terms in the latter case. For B2B one respondent also refers to the UN Convention on contracts for international sale of goods (CISG) which applies in many Member States. Half of respondents are in favour of a large scope of rules to be harmonised. A large majority are satisfied with the existing conformity criteria laid down in the Sales and Guarantees Directive. The majority approves the current 6 month period for the reversal of burden of proof. A majority is in favour of a free choice of consumer remedies, while some respondents prefer to keep a hierarchy of remedies, possibly negotiable between the parties. A majority support two different time limits for the notification of defects and the exercise of remedies. The later should be 2 years; however two respondents suggest a 1 year period for second-hand goods. A majority consider that the buyer must notify the defect within a certain period of time after discovery; one respondent proposes a 3 month period, another respondent suggests "a relatively generous notification period", another one argues that it is a matter for national law. A majority is against regulating commercial guarantees. Half of respondents are in favour of laying down "black" and "grey" lists of unfair terms on the basis of the current Directive.

The detailed responses to the public consultation will be published on the Commission website upon adoption of the Proposal.[193]

Since the publication of **the Digital Single Market Strategy** on 5 May 2015[194] press material and intensive communication activities have been undertaken to present the holistic approach adopted by the Commission to boost the Digital Single Market. The main initiatives, in particular, the current initiative on digital contracts have been presented in the European Parliament and to main stakeholders.

- **Specific consultations targeting main stakeholders**

The Stakeholder Consultation Group for consumer rules for online and Digital Purchases ("Stakeholder Consultation Group") was set up at the beginning of 2015 and is composed of 22 organisations representing a wide range of interests from consumers to SMEs, retailers, e-commerce operators, online platform, manufacturers, legal professions, marketing professional and content developers and providers. Meetings of the Group were also attended on an *ad hoc* basis by representatives from national consumer organisations, academia, European Consumer Centres and businesses. The Stakeholder Consultation Group was tasked to assist the Commission in identifying the problematic areas to tackle the contract law obstacles related to the online purchases of digital content and tangible goods and to discuss possible solutions. The group met 7 times from January to October 2015.

Main trends of the discussion

The Stakeholder Consultation Group identified amongst other the lack of harmonisation of consumer contract law rules as one of the main obstacles for the development of the Digital Single Market. Businesses, in particular SMEs, consider consumer contract law rules as an obstacle to expand their online business cross-border. Consumers underlined the existing gaps in EU consumer rights in case of faulty digital content. The Group emphasised the need to have the same rules for online and offline sales of tangible goods as traders use omni-channel distribution. On the scope of the proposal, stakeholders stressed that it should apply to cross-border and domestic transactions. A large majority of the Group members also highlighted that business-to-business contracts and business-to-consumers (B2C) contracts should not be treated in the same way and that the focus of this initiative should remain firmly on B2C.

For digital content, the Group agreed that any future initiative should include a definition of digital content which is consistent with the consumer EU "acquis", content neutral and future-proof. The new rules for digital content should provide a mixture of subjective and objective conformity criteria and remedies in case of non-conformity. While businesses highlighted that traders should have the possibility to repair or replace before giving the possibility to the consumer to withdraw from the contract, consumer representatives argued that consumers should have a free choice of remedies. Businesses saw no need to regulate damages. Consumer representatives were supportive of having clear rules concerning damages caused to the consumer's hardware and software because of the malfunctioning of the digital content. There seems to be some consensus to include free digital content provided against another counter performance than money (such as personal data) in the scope of the proposal, provided that it does not overlap with data protection rules.

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[193] The responses will be available at the following link: http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

[194] 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

For tangible goods, the current approach to assess the conformity of tangible goods as foreseen in the Directive on Consumer Sales and Guarantees was considered as being still appropriate. However, stakeholders expressed diverging opinions on the need to add conformity criteria beyond the Consumer Sales and Guarantee Directive. On the reversal of burden of proof on the consumer, business associations stick to the current 6-month period, whilst consumer representatives advocate for a minimum of 2 years. Finally stakeholders showed little support for harmonising rules on damages, prescription periods and unfair terms.

The work of the Group, the minutes of the meetings and a report on its activity, as well as its members are made public on the Commission's Registry of Expert Groups.[195]

Workshops with Member States: Three workshops with Member States were organised. At the first workshop (June 5, 2015) the discussion focussed on the general approach that should be adopted by the Commission for this new initiative and key contract law issues regarding digital content. The second workshop (July 6, 2015) was devoted to discuss issues related to the online sales of tangible goods. The third workshop (6 October, 2015) was devoted to discuss in more detailed the draft rules that Commission services are considering. The relevant issues were also discussed with national enforcement authorities at the Consumer Protection Cooperation committee meeting (April 28, 2015) and the national authorities responsible for consumer policy at the Consumer Policy Network meeting (May 5-6, 2015)

Bilateral meetings were held with some Member States. In-depth technical discussions have been held with the British and Dutch authorities on their recently adopted legislation on digital content and with the Irish Authorities which have started preparatory work for legislation on digital content. Bilateral technical meetings have also been held with the German, the Polish, the French, the Austrian, the Slovak and the Italian authorities.

The Digital Single Market Sub-Group of the **European Consumer Consultative Group (ECCG)** composed of 12 representatives of national consumer organisations has produced recommendations on how to tackle contract law obstacles related to the online purchases of digital content and tangible goods. The Group recommend in particular a revision of the Sales and Guarantee Directive as well as of the Unfair Terms Directive, insist on better enforcement of legislation and consider that there should not be two different regimes for online and offline transactions.

A specific **business consultation** was conducted from June to August 2015 in order to gather data on contract law related costs faced by business when selling abroad. Following the circulation via industry umbrella organisations of a detailed questionnaire on resources allocated by companies for compliance with consumer contract law rules, the Commission followed up with in-depth interviews. Six businesses were selected from five different Member States (Belgium, Denmark, Luxembourg, Sweden and the United Kingdom), with different business approaches towards cross-border e-commerce. Five out of the six businesses were SMEs. Some have a longstanding experience in cross-border e-commerce, some have stopped selling across borders due to the problems they faced and others are now envisaging starting to sell across borders.

- **Consumers and businesses surveys**

[195] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3295.

Consumers were directly consulted through surveys carried out by the Commission. Within the framework of the Digital Single Market Strategy[196], **two surveys** were carried out in 2015 to identify the main cross-border obstacles to the Digital single market":

- A **consumer survey** carried out in all 28 Member States. More than 23 000 respondents were asked about their online purchasing activity in each Member State and cross-border, both for tangible goods and digital content, as well as in Norway and Iceland. Consumers were also interviewed on their perceptions and behavioural motivations that drive or impede cross-border and domestic online purchasing activity on the internet197 In order to ensure the socio-demographic representativeness of respondents, a sample was drawn at random from the online population using existing online panels. Survey data was weighted post-fieldwork in order to reflect the online population per country as accurately as possible. Specifically, the age and gender distribution weighting targets were based on two types of Eurostat data: 1. the general EU population aged 18 to 74; and 2. the proportion of the general population aged 18 to 74 who had used the internet in the past 12 months. To report on EU28 total data, the sample was further weighted by the size of each Member State's online user population aged 18 to 74.

- A **business survey** carried out in 26 Member States. 8 705 respondents were asked about their online selling and purchasing activity, both domestically and cross-border, their experiences with cross-border selling and purchasing, the problems they encounter and the main reasons for not-selling cross-border online.[198]

As part of an economic study on consumer digital content products, 1 000 consumers in each of 15 Member States were asked about the type of problems they have encountered when purchasing digital content. Businesses were also directly consulted by means of a series of 20-30 business interviews conducted in each of the 15 selected Member States. Individual businesses including SMEs were asked to identify the main problems they face when selling/providing digital content to consumers, domestically and cross-border.[199]

2. Assessment of the consultation strategy/process

The consultation process reached different categories of stakeholders from all Member States. Inputs given by stakeholders were almost always in line with the objective of the consultation, with very few replies unrelated to the consultation topic. Contributors with high interest in the proposal were actively involved and gave a useful, broad perspective of the market in which they operate and their needs. Sectorial associations, whose members are mostly SMEs, also gave valuable and specific inputs through the public consultation. The number of contributions from individual consumers to the public consultation was relatively low; this could be explained by the technical nature of the topic. However, several consumer associations at European and national levels as well as public authorities in contact with consumers on a daily basis, like the national consumer centres and national ombudsmen, provided useful inputs on the difficulties consumers face when buying online.

[196] COM (2015) 192 final http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf
[197] GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, 2015
[198] Flash Eurobarometer 413 "Companies engaged in online activities" (2015) http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf
[199] Economic study on consumer digital Content products, ICF International, 2015.

Overall, stakeholders, especially businesses and consumers, expressed rather conflicting views. Therefore, the preferred policy option can necessarily not take into account all positions expressed. However, this broad spectrum of views helped to convey the comprehensiveness and the complexity of the interests at stake.

ANNEX 3 - WHO IS AFFECTED BY THE INITIATIVE AND HOW

The initiative will achieve on certain issues uniform contract law rules at EU level for the supply of digital content and will further harmonise key mandatory EU contractual rights for online sales of tangible goods.

PRACTICAL IMPLICATIONS OF THE INITIATIVE FOR BUSINESSES

The initiative only regulates the relations between businesses and consumers. It does not contain regulatory obligations for businesses relating, for example, to information, reporting, organisational or administrative requirements, and thus, does not create additional costs related thereto.

The practical implications for all businesses are the obligation to adapt their contracts to the new rules and the concrete consequences of the application of the new rules to their contracts with consumers.

OBLIGATION TO ADAPT CONTRACTS TO THE NEW RULES

As the EU rules will be fully harmonised, all businesses selling tangible goods online (currently estimated between 916,000 and 1,221,000 businesses in the EU) and/or selling digital content (currently estimated between 196,000 and 261,000 businesses in the EU)[200] will be obliged to adjust their contracts to the new rules once the instrument is implemented at national level. Businesses currently selling tangible goods only offline will not have to incur any adaptation costs.

Each business selling tangible goods online and/or digital content will have to bear one-off costs to adjust their contract to the new legislation, including costs to possibly seek legal advice, adapt terms and conditions etc. This one-off cost would amount to approximately €6,800, as largely confirmed by a recent UK study, according to which this amount is the average cost for businesses to adapt their terms and conditions to new legislation[201]. Having implemented this adjustment, businesses will not have to adapt their contract terms to the laws of other Member States, no matter how many Member States they sell to. Businesses selling tangible goods online would thus save approximately €9,000[202] for each new country of export. For instance the cost savings for exporting to 7 countries could reach €63,000.

For businesses selling digital content, these one-off adaptation costs will enable them to sell to consumers in all EU Member States, without having to face additional contract law related costs in future that they might otherwise incur due to emerging divergent national legislations.

Focus on SMEs

The current contract law related costs of 9,000 to export to each additional Member State have a stronger impact on micro and small enterprises with a smaller turnover. For instance, as shown in the table below, the decision of a micro enterprise to export to 4 Member States

200 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% (lower 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 intangible digital content) and selling online to consumers and selling goods to consumers (proxy for tangible goods online) are then applied to obtain the estimate on the current number of companies selling digital content online to consumers and companies selling tangible goods online to consumers.

201 IFF Research, Consumer Rights and Business Practices, 2013. These costs include the cost of reviewing and/or updating terms and conditions and developing new versions of relevant documentation according to modified terms and conditions.

202 See Annex 5 for detailed explanations.

would currently entail contract law-related costs of approximately €36,000 and thereby surpass 10% of the company's annual turnover.

Contract law-related costs as percent of corresponding turnover for businesses exporting to other Member States

	Average annual turnover per firm[1]	Number of MS entered (with transaction costs per MS = €9,000)				
		1 MS	2 MS	3 MS	4 MS	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

After the introduction of EU-wide fully harmonised rules, SMEs currently selling online will have to incur the costs to adjust their contracts to the new legislation. In fact, given that the vast majority of businesses are SMEs, about 98% of the one-off adaptation costs for companies selling goods online and about 99%[203] of the adaptation costs for businesses supplying digital content will be incurred by SMEs. SMEs currently selling tangible goods only offline will not have to incur any adaptation costs. As all other businesses, SMEs selling both online and offline are in practice not likely to be faced with any significant costs due to different regimes for their online and offline sales, and may choose to apply the same standards to all their sales and thus operate under a single business model[204.]

While the one-off adaptation costs have a stronger impact on SMEs, the possible economies of scale have also a stronger positive effect on them. Indeed, the initiative will particularly be beneficial to SMEs. SMEs are often confined to a small home market with high production and development costs. Foreign trade is an important way for them to benefit from the advantages of economies of scale. The most pressing problem SMEs in the EU face is finding customers.[205] This problem would be easier to cope with in the online context, since the internet enables online sales and purchases at reduced operational costs compared to offline trade. As the proposal will reduce e-commerce costs stemming from divergent contract law rules, it should help - together with other initiatives under the Digital Single Market Strategy - SMEs to achieve growth through exports and economies of scale that cannot be achieved from the domestic market alone.

That is why exempting SMEs and in particular micro-enterprises from the new legislation would deprive them of the cost saving benefits of the proposal. In addition, an exemption would decrease consumers' trust when purchasing from SMEs or micro-enterprises. It could not be justified to the consumer, as the other contractual party, why possibly – compared to a bigger supplier - less protective consumer contract law rules apply when the consumer concludes a contract with a SME. It would undermine the benefits for businesses, and in particular SMEs and micro-enterprises, of having one single set of rules applying throughout the EU. The consultations with SMEs and organisations representing SMEs, confirmed the benefit of uniform rules. In particular, the umbrella association representing SMEs at EU level highlights that diverging rules are negative for small businesses.[206]

203 Estimate based on the share of respondents to the Digital Single Market firms survey (EB 413).

204 See section 1.1 of the main report.

205 This was reported as a major difficulty by 22.4% of SMEs: http://ec.europa.eu/growth/smes/business-friendly-environment/performance-review/files/annual-report/infographics_en.pdf

206 See more details in Annex 2

CONSEQUENCES OF THE APPLICATION OF THE NEW RULES TO CONTRACTS WITH CONSUMERS

For the online sale of tangible goods, the initiative will entail a certain number of obligations for businesses in their relations with consumers[207]. However, many of these obligations are already included in national laws, to different degrees and extent, as a result of EU minimum harmonisation legislation. The impact of the obligations set in the initiative will thus depend on the extent to which current national legislation goes beyond the minimum requirements set in the current EU legislation. For example, the initiative foresees that consumers will not need to notify defects to sellers within a certain period of time. Therefore, businesses located in the 17 Member States where consumers have currently such an obligation will be more affected than those businesses located in the 11 Member States where no such obligation exists.[208]

As regards the prolongation of the period for the shift of the burden of proof from 6 months to two years, this will align the reversal of the burden of proof to the guarantee period. The alignment will simplify the remedies regime and allow consumers to exercise their right effectively for the entire length of the guarantee period. The extension is not expected to have a very significant impact on businesses, since recent data show that in practice only a minority of businesses insist on consumers proving the trader's liability within 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. [209] Therefore the reversal of the burden of proof often operates de facto throughout the entire 2-year legal guarantee period, and the proposed extension is not likely to impose very significant additional costs to businesses.

In addition, the obligations concerning remedies will not impose costs on all businesses but only on those that supply faulty products to their customers. This advantages businesses which supply high-quality products over those which provide consumers with a poorer service.

Unlike for goods, not all Member States have mandatory contract rules for the sale of digital content. The initiative will thus overall create essentially new obligations, such as supplying digital content in line with contractual and/or statutory criteria, offering remedies for faulty digital content, informing consumers about the modification of the contract or granting the possibility for the consumer to terminate long-term contracts.[210] However, as is also the case for tangible goods, the obligations concerning remedies will only impose costs on businesses that supply faulty products to their customers.

RULES ON OFFLINE AND ONLINE SALES OF TANGIBLE GOODS

Although there is a possibility that for a transitional period the rules on online and offline sales of tangible goods may differ, this will 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 tangible goods. If such differences were to actually occur for a short transitional period, it is acknowledged that 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. 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

207 See section 6.2 and Annex 8

208 A list of possible impacts on businesses taking into account the situation in all Member States is provided in Annex 8

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

210 A list of possible impacts on businesses taking into account the situation in all Member States is provided in Annex 8

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 sell both online and offline but only domestically.

The main difference between the current national implementation laws in most (26) Member States will concern the extension of period for the reversal of burden to 2 years. The rules on the consumer's notification duty will change in 17 Member States, while those on the hierarchy of remedies will change in 6 Member States. Finally, for the length of the legal guarantee period, the current national legislation will change only in 5 Member States. In practice, the possibility that these differences will lead to a divergence of applicable regimes for online and offline domestic sales to consumers is limited, and its possible consequences could be dealt with by business practices.

In the 26[211] 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.

As far as the *consumer's duty to notify a defect* is concerned, the possible differences in 17 Member States[212] between the offline and online regimes are in reality not likely to affect actual business models, since according to recent data consumers mostly react promptly when a problem occurs with the purchased product, regardless of the rules on notification. Depending on the type of product, between 62% and 90% of problems are followed up either immediately or within one week after the problem occurs.

In 6 Member States[213] there may be a difference in the existence or not of a *hierarchy of remedies* for consumers, and in 5 other Member States[214] a difference as regards the *legal guarantee period* for offline and online sales may temporarily occur. This would in practice encourage businesses to promote their online activity, since for their online sales within the former 6 Member States businesses would first be able to offer repair or replacement of a defective product before being obliged to accept a price reduction or to reimburse the consumer, while businesses in the latter 5 Member States would be liable for defects of goods sold online for a shorter period of time (compared to their offline sales).

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 tangible goods by applying the respective higher standards, which would enable them to use a single business model and thus save any potential additional costs. For example, in the respective Member States where differences may occur, businesses could in practice choose to offer their customers the possibility of a free choice of remedies or a longer legal guarantee period also for their online sales, if they consider that in this way they could become more competitive and attract more customers. Likewise, in the respective Member States businesses could also not require consumers to notify a defect or could apply (as is

[211] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK, UK
[212] BE, CY, DK, EE, ES, FI, HR, HU, IT, LV, MT, NL, PT, RO, SE, SI, SK
[213] CY, EL, HR, LT, PT, SI
[214] FI, IE, NL, SE, UK

already often the case) the reversal of the burden of proof period for two years even for their offline sales.

PRACTICAL IMPLICATIONS OF THE INITIATIVE FOR PUBLIC ADMINISTRATIONS

Except for the obligation to transpose the Directives into national law and enforce them, there are no specific practical implications for public administrations and courts. Uniform contract law rules on faulty products in the EU will facilitate enforcement by Member States and, in particular, cross-border joint enforcement actions undertaken by the Consumer Protection Co-operation (CPC) network.

PRACTICAL IMPLICATIONS OF THE INITIATIVE FOR CONSUMERS

The initiative will not create any obligations for consumers.

For the online sale of tangible goods, the consumer protection level will be increased compared to the existing EU level of protection. This applies in particular to the extension of the reversal of the burden of proof to two years and its alignment with the legal guarantee period. Compared to their national standards, all EU consumers will benefit on this point from a higher level of consumer protection (except in the case of two Member States[215] where they will have the same level. This higher level of consumer protection will facilitate consumers exercising their rights and is expected to significantly boost consumers' trust which is particularly relevant given the distance-related character of (cross-border) online sales. In addition, not only consumers will have a wider choice of products, since they will have access to offers from traders across the EU, at competitive prices, but will also likely benefit from higher quality and more durable products, in line with European Commission's Circular Economy Package. When comparing the level of consumer protection on other points with national standards, again the result will depend on the extent to which current national legislation goes beyond the minimum requirements set in the current EU legislation. In many cases it will be higher, on some specific points it may be lower.

As mentioned above, a differentiation between the key rules on offline and online purchases is not likely to occur in practice. However, if this were to actually happen, it is not expected to have a significant impact on consumers: on the contrary, the more protective rules on the burden of proof (in 26 Member States)[216] 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 may 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 boosting consumers' confidence in buying online. However, this may be to some extent counterbalanced by other elements of the proposal which facilitate the right of consumers to terminate the contract, such as the right to terminate the contract for the online purchase of goods also for minor defects[217]. A similar impact could also be expected in the 5 Member States where a difference in the legal guarantee period may occur between offline and online purchases.

For the sale of digital content, consumers will have clear rights when they access digital content from anywhere in the EU. This will increase their confidence in buying/accessing

[215] FR and PT
[216] For the specific Member States referred to in this paragraph, see footnotes 5 - 8.
[217] This applies in particular for 5 out of those 6 Member States, namely CY, EL, HR, LT and SI, where the consumer's right to terminate for minor defects is not currently in place. In the 6th Member State (PT) this right is already established.

such products both domestically and cross-border. This will 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 problems they may experience with digital content.

ANNEX 4 – MACRO-ECONOMIC IMPACT OF REMOVING CONTRACT-LAW RELATED OBSTACLES TO THE DIGITAL SINGLE MARKET

This annex summarises the analytical work carried out by the Commission's Joint Research Centre (JRC) to estimate the macro-economic impacts that are expected to result from the removal of contract law-related barriers to cross-border e-commerce[218].

The analysis has two stages. In the first stage, data from surveys of consumers and businesses are used to estimate the impact of perceived obstacles to e-commerce on the volume of cross-border e-commerce in the EU. In the second stage, the estimated impact on the volume of cross-border e-commerce is applied to a macroeconomic model, which develops the potential macroeconomic impact of policy measures to remove the identified barriers.

Stage 1: Identifying barriers to cross-border online e-commerce

To gauge the importance of obstacles to online trade, the European Commission launched two surveys in early 2015, the first addressing the barriers faced by consumers and the second the barriers for businesses. Descriptive statistics have been drawn from the results. [219]

Consumers and retailers were asked whether their cross-border purchases and sales are affected by a list of potential obstacles. The extent of cross-border transactions by consumers and retailers was also examined. By combining these two sets of variables, estimates were obtained of the actual quantitative impact of the perceived barriers on cross-border purchases and sales. In addition, these data were used to demonstrate the expected increase in cross-border trade if the barriers mentioned in the surveys were eliminated, for instance by means of legal and regulatory changes to consumer contract law.[220]

For the purposes of this impact assessment, the data concerning specific perceived barriers have been grouped into categories that correspond to the proposed legal changes (see Table 1) for online consumers and retailers. In a second stage, the estimated quantitative impact of the groups of barriers that produced statistically significant coefficients is applied to a macro-economic model as an exogenous policy shock, and the model simulates the resulting overall economic impact.

Barriers to cross-border online purchases by consumers

A consumer's decision to buy online abroad or not is estimated by means of a logit regression[221] where the dependent variable is a dummy that takes the value 1 when the consumer data show that a respondent has purchased cross-border online within the last 12 months and 0 otherwise[222]. The independent variables include dummies for each of the 17

[218] "The macro-economic impact of e-commerce in the EU Digital Single Market", Cardona M., N. Duch-Brown, J. Francois, B. Martens, F. Yang (2015), Digital Economy Working Paper, IPTS-JRC, forthcoming

[219] "Companies engaged in online activities", Flash Eurobarometer 413 (2015); "Consumer survey identifying the main cross-border obstacles to the DSM and where they matter most" (2015), forthcoming

[220] For details see "Consumer perceptions of (Cross-Border) E-Commerce in the Digital Single Market", Cardona, M., N. Duch Brown and B. Martens (2015), Digital Economy Working Paper, forthcoming; and "Barriers to businesses' Cross-Border E-Commerce in the EU Digital Single Market", Duch-Brown, N. and B. Martens (2015), Digital Economy Working Paper, IPTS-JRC, forthcoming

[221] Statistical method used for estimating the relation between a dependant binary variable (e.g. buying cross-border) and a set of explanatory variables (e.g. the perceived barriers and concerns related to buying/selling online cross-border).

[222] See footnote 3 for detailed references.

potential barriers listed in the survey. The logit regression then calculates the impact of each of these potential barriers on the number of consumers that buy online abroad.

For the amount spent online abroad an Ordinary Least Squares (OLS)[223] regression was used, where the dependent variable is the amount spent on online purchases cross-border from other EU countries. In both regressions the dependent variable is originally regressed on each of the 17 potential barriers to online cross-border consumption. As an alternative approach, a Principal Component Analysis (PCA)[224] was applied prior to the regression on the 17 barriers. The regression was then carried out on the 5 components emerging from the PCA. Table 1 summarises and identifies the statistically significant results for the regressions by individual barrier items and by PCA items. From the consumer data, 8 of the 17 barriers were selected and pre-categorised into 3 groups that are considered to be barriers that would be eliminated by the proposal that this impact assessment supports. Statistically significant coefficients are obtained for "Conformity with the contract[225]" in the original "by-item" regression. The PCA regression finds significant results for "Consumer Rights".[226]

To introduce these estimations into the macroeconomic model, the two impacts – the change in the number of consumers that buy online abroad, and the change in the amount spent on online purchases from other EU countries – is combined in a single figure. As for the "Conformity with the contract" cluster, lifting the barrier "wrong products" would increase the number of consumers who buy cross-border by 5.3 percentage points, on top of the 50.09% who already do cross-border purchases, so an increase by 10.5% in relative terms. [227] Lifting the barrier "products not delivered" would increase the volume of cross-border purchases by 13.6% for all those who buy cross-border which would correspond to a rough estimate of 40 euros per person)[228]. The combination of these effects leads to a total increase of 25.6%[229], a very large jump in cross-border trade for a single policy measure. This is based on the implicit assumption that an additional consumer who starts doing cross-border purchases when a barrier is eliminated will spend as much cross-border as consumers who have been doing this for a longer time. A more conservative assumption would be that new cross-border consumers spend less on cross-border purchases. For example, assuming that new cross-border consumers spend 50% of the average of existing cross-border consumers,

[223] Statistical method used to estimate the relation between one dependant numerical variable (e.g. the amount of money spent online) and a set of explanatory variables (e.g. the perceived barriers to buying online cross-border).

[224] PCA is a common multivariate technique to reduce the dimensionality of a database, more specifically, the number of variables.

[225] This cluster includes the following items: "Wrong or damaged products will be delivered" and "Products will not be delivered at all".

[226] This cluster includes the following items: "Returning a product I didn't like and getting reimbursed", "Replacement or repair of a faulty product is not easy", "I do not know what my consumer rights are when buying online" and "There is a lower level of consumer protection when buying online".

[227] Accordingly this is calculated for "Consumer Rights". The marginal effects are calculated for the average population of online purchasers. Currently 50.09 of online purchasers buy cross-border, according to the marginal effect for the principal component "Consumer Rights", the percentage would increase by 1.6 to 51.7, when the barrier is removed. This corresponds to a 3.2% change in cross-border purchasers ($\Delta x/\bar{x}$).

[228] The calculation refers to the average sum of money spent by persons buying online cross-border intra EU (tangible 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 DSM and where they matter most" (2015, forthcoming). 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 – see stage 2).

[229] This combines the percentage change of the extensive margin x_e (10.5%) and of the intensive margin x_i (13.6%), $x_i\,(x_e + 100/100) + x_e$, under the assumption that the new consumers will consume as much as the existing consumers.

the increase in cross-border trade would be 18.1%. This creates two scenarios, an optimistic scenario (new buyers spend just as much as the existing ones) with a strong trade shock and a more conservative scenario (using the 50% assumption) with a lower trade shock.

Barriers to cross-border online sales by businesses

The data from the business survey were used to analyse the effects of the barriers on cross-border e-commerce between the different Member States. For that purpose, as is typically done in traditional international trade models, a two-step strategy was followed. First, the impact of the barriers on a business's decision to sell across the border was estimated. The decision is a binary variable, taking the value 1 if the business is selling online cross border and 0 otherwise. Due to the binary nature of the dependent variable, the appropriate estimation methodology is a logit or probit regression[230] model. The second step seeks to explain the impact of these perceived barriers on the volume of cross border e-commerce. Volume in this case is measured as the share of total cross-border e-commerce; hence it is a variable that can take any value in the interval [0-100]. A generalised linear regression model[231] suitable to deal with shares was used. While both regression models use the same explanatory variables, there should be differences in the coefficients between the two, because the determinants of the decision to sell online across the border and the volume of cross-border e-commerce should not necessarily be the same. In theory, e-commerce should bring trade costs down, in particular those related to transport (in terms of time), search costs, information costs, and distribution costs.

Data from the business survey included 17 different potential barriers to cross-border e-commerce that were reduced to 7 categories for the purpose of the regression analysis: cultural and linguistic barriers; suppliers' restrictions; barriers related to delivery/payments; contract law related barriers; other regulatory barriers; redress; and infrastructure/interoperability barriers. The category "contract law" is relevant for this impact assessment. It is formed by two barriers reported in the survey: "guarantees and returns are too expensive" and "you don't know the rules which have to be followed". The category variable takes the value 1 if a business declares that any of the two barriers is relevant and 0 otherwise.

The regression gives statistically significant results for the "contract law" category, both for the decision to sell online across the border and for the volume of online trade. The effective removal of contract-law related barriers would increase the number of businesses engaged in cross-border e-commerce by 5.3% percentage points, while the volume of online exports (measured in % of turnover) would increase by 3.1%. The combined effects sum up to an 8.4% increase in cross-border sales. The latter value is used as the policy shock to business barriers in the model simulation.

8 Stage 2: The economic impact of removing remaining barriers

The above results demonstrate the expected increase in cross-border trade if the perceived barriers were to be eliminated by legal and regulatory changes. However, this expected quantitative impact is only a first-round direct effect and does not give a picture of the impact on various aspects of the economy. Accordingly, in the second stage of the analysis, these changes in trade volumes were introduced in a macroeconomic Computable General

[230] See footnote 4

[231] This model is suitable for estimating the relation between a numerical dependant variable (ranging from 0 to 100) and set of explanatory variables.

Equilibrium (CGE) Model with a view to estimating the main macroeconomic impacts of the removal of contract law-related barriers to online cross-border trade. In order to do that, the volume shocks mentioned earlier are converted into a trade cost reduction equivalent, using the model sector price elasticities. The model then calculates all the effects of the trade cost decrease on prices, household consumption, and GDP in all 28 EU Member States.

The overall macro-economic results are shown in Table 3. The table distinguishes between the two scenarios with full and partial implementation of the conformity shock, as explained in the previous section[232]. As Table 3 shows, these effects are very similar across EU Member States, though the order of magnitude may vary because of differences in the sector structure of GDP, the relative importance of external trade and the degree of competition in the domestic retail sector.

The macroeconomic model

The model used is a version of the Global Trade Analysis Project (GTAP) model[233]. The model integrates the GTAP database, version 9, which provides internally consistent data on production, consumption, and international trade by country and sector. Agricultural and food processing sectors are classified according to the Central Product Classification of the United Nations Statistics Division. The other sectors are defined by reference to the International Standard Industry Classification (ISIC revision 3) as defined by the United Nations Statistics Division, which corresponds to NACE Rev. 1, the European Union's statistical classification of economic activities.

Sectors are linked through intermediate input coefficients, based on national social accounts data, as well as competition in primary factor markets. The model includes imperfect competition as well as perfect competition. Imperfect competition is introduced by assuming monopolistic competition by applying the Armington assumption, implying that two identical products produced or sold in different countries are considered as if they were two different products. Econometrically-based substitution elasticities for goods originate from a 2009 report by Ecorys for the European Commission[234]; elasticities for the services sectors come from "Services trade and policy" by J. Francois and B. Hoekman, published in the Journal of Economic Literature, volume 48, n° 3.

Additional detail on the model structure is available in "Trade liberalization in the Doha Development Round", by J. Francois, H. van Meijl and F. van Tongeren, published in Economic Policy, volume 20, issue 42, and "Clarifying Trade Costs in Maritime Transport", published by the OECD's Trade and Agriculture Directorate.

According to the more conservative partial implementation scenario, the removal of the barriers to cross-border e-commerce identified in stage 1 would push **consumer prices** down

[232] The two scenarios simulate the impact to be expected from the removal of barriers related to "Conformity with the contract" and "consumer rights" (consumer side) and to contract-law (business side). The full implementation scenario is based on the implicit assumption that as for the removal of the barriers related to "Conformity with the contract" an additional consumer who starts doing cross-border purchases when a barrier is eliminated will spend as much cross-border as consumers who have been doing this for a longer time. A more conservative assumption (partial implementation scenario) would be that new cross-border consumers spend less on cross-border purchases.

[233] See "Global Trade Analysis: Modelling and Applications", Hertel T. Ed, Cambridge University Press (2013)

[234] "Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis", prepared by K. Berden, J.F. Francois, S. Tamminen, M. Thelle, and P. Wymenga, Reference OJ 2007/S180-219493

by 0.25% at EU level with country estimates ranging between -0.05% in Lithuania and -0.35% in Spain [235].

According to the same scenario, household consumption and Gross Domestic Product are projected to increase in all Member States. **Household consumption** would increase by 0.23% in real terms in the EU, which corresponds to around 18 billion euro; the largest projected increase would be observed in Spain (+0.38%), and the lowest one in Lithuania (+0.05%). **Gross Domestic Product** is projected to increase by 0.03% in real terms in the EU28, equivalent to around €4 billion. Slovenia is projected to experience the highest increase (+0.06%) and Romania the lowest (0.0%).

Finally, **intra EU exports** would increase by 0.04% in nominal terms (around 1 billion euros), with the highest increase seen in Slovakia (0.14%) and the lowest in Lithuania and Croatia (0.00%).

Table 1: Identification of barriers to cross-border e-commerce

Category (cluster)	**Barrier label**
Conformity with the contract	Wrong or damaged products will be delivered
	Products will not be delivered at all
Consumer rights (Principal Components Analysis)	Returning a product I didn't like and getting reimbursed
	Replacement or repair of a faulty product is not easy
	I do not know what my consumer rights are when buying online
	There is a lower level of consumer protection when buying online
Contract-law related barriers	Guarantees and returns are too expensive
	You don’t know the rules which have to be followed

Source: JRC/IPTS estimates based on DSM Consumer survey and Eurobarometer 413. For details see the references in footnote 3.

[235] The projected impact of removing these barriers to cross-border e-commerce identified in stage 1 according to the full implantation of the conformity shock, are indicated in table 3.

ANNEX 5 - CALCULATION OF CONTRACT LAW RELATED COSTS FOR TRADERS ACTIVE IN CROSS-BORDER B2C ECOMMERCE

The cumulative contract law related costs incurred by EU traders engaged in cross-border B2C trade due to differences in contract law rules can be calculated on the basis of the following elements:

- Contract-law related costs incurred per company for entering the market of one Member State
- Average number of EU countries European retailers sell to
- Number of exporting EU retailers
- Percentage of exporting businesses informed about foreign law

9 Contract-law related costs per company for entering the market of one Member State

Contract law related costs are calculated based on the results of the responses gathered in the context of a SME Panel Survey.[236] Traders involved in B2C trade were asked to estimate the savings on costs for entering one Member State's market that would result from the application of uniform contract law rules across the EU. 62 traders indicated that these costs were lower than €5,000; 51 indicated these costs as being in the range of €5,000 - €10,000; 23 in the range of €10,000-€15,000; 11 in the range of €15,000-€30,000 and 11 estimated the costs to be higher than €30,000.

It should be noted that the above one-off contract law costs reported by the 2011 SME Panel Survey also reflect the current situation for businesses. The calculation of these costs only takes into account transaction costs (legal fees, research and translation of foreign legislation), excluding any IT costs (e.g. to adapt websites) assumed to be linked to a large extent to pre-contractual information requirements which were fully harmonised by the Consumer Rights Directive.

Table 1: Traders involved in B2C transactions – SME panel survey

	Number of traders involved only in B2C	Number of traders involved in both B2C and B2B	Total traders involved in B2C transactions
a. Less than EUR 5 000	**11**	**51**	**62**
b. € 5 000-10 000	**7**	**44**	**51**
c. € 10 000-15 000	**0**	**23**	**23**
d. € 15 000-30 000	**4**	**7**	**11**
e. More than €30 000	**1**	**10**	**11**
f. Don't know	**24**	**110**	**134**
Firms that gave an answer (all rows except "f")	23	135	158
Number of firms interviewed (a+b+c+d+e+f)	47	245	292

Based on these responses, the average costs associated with B2C transactions have been calculated within a low and high estimate.

[236] Results available at: http://ec.europa.eu/justice/policies/consumer/docs/report_sme_panel_survey_feb_2011_en.pdf

- According to the low estimate, the average contract law related costs for firms involved in B2C transactions amount to €8,877. The costs are estimated at the average value of reported cost ranges (i.e. €2,500, €7,500, €12,500, €22,500). For the purpose of this low estimate, as regards the last range of costs (more than 30,000), the lowest figure of 30,000 is taken into account and leads to average costs of 8,876 per firm.[237]
- According to the high estimate, the average contract law related costs for firms involved in B2C transactions amount to €10,269. The costs are again estimated at the average value (i.e. €2,500, €7,500, €12,500, €22,500) of reported cost ranges. For the calculation of this high estimate, it is assumed that the costs reported at the last range (more than 30,000) are 50,000. This leads to average costs per firm of 10,268[238].

These costs are calculated on the basis of the fourth column in Table 1, which covers all traders engaged in B2C transactions. Some of these traders however indicate that they are also involved in B2B transactions (Table 1, column 3). For this reason, the same calculation of costs (as described above) is repeated considering B2C transactions *only*. For traders involved only in B2C transactions (Table 1, column 2) these costs are within a similar range and amount to **€8,696 - €9,565**[239]. The latter range is used for the calculations in the report, as it is more conservative and may reflect better the costs for companies involved in B2C transactions.

10 Average number of EU countries European retailers sell to

Recent data[240] provides information about the number of EU countries where retailers make cross-border sales (Question D2T). The sample consists of retailers that sell goods or services directly to final consumers and employ at least 10 people. For the following calculations, results were extracted for companies that sell cross-border and belong to the Eurostat NACE category 47 "Retail Trade", so as to exclude traders that do not sell cross—border or are active in other types of commercial activity (such as transport or telecommunications sectors). Therefore, Table 2 presents the results relevant for traders currently active in B2C cross-border retail trade.

Table 2: Number of EU countries where EU companies make cross-border sales to final consumers

Number of EU countries	Number of Respondents (weighted)[241]	Share of Respondents
1.00	299	55.6
2.00	82	15.2
3.00	60	11.1
4.00	38	7.0
5.00	11	2.0

[237] (2 500 * 62 + 7 500 * 51+12 500 * 23 + 22 500 * 11 + 30 000 * 11) / 158 = 8,876.582.

[238] (2 500 * 62 + 7 500 * 51 + 12 500 * 23 + 22 500 * 11+ 50 000 * 11) /158=10,268.99.

[239] 8 695 = (2 500 * 11+7 500 * 7 + 12 500 * 0 + 22 500 * 4 + 30 000 * 1) / 23 or 9 565.22 = (2 500 * 11 + 7 500 * 7 + 12 500 * 0 + 22 500 * 4 + 50 000 * 1) / 23

[240] Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2014), p.6

[241] Data are weighted to reflect differences between the sample and the population (in terms of number of enterprises), for instance as far as the distribution of enterprises by size is concerned (to make sure that the statistics reflect the actual distribution of enterprises by size class as observed in the overall population of enterprises). Hence, these figures do not reflect the actual number of interviews on which the statistic is based upon.

6.00	10	1.9
7.00	4	0.7
8.00	1	0.1
9.00	1	0.2
10.00	3	0.5
11.00	2	0.4
13.00	3	0.5
17.00	0	0.0
18.00	1	0.1
19.00	3	0.5
21.00	1	0.2
22.00	1	0.2
25.00	3	0.5
26.00	0	0.0
27.00	18	3.3
Total	**538**	**100.0**

Source: Flash Eurobarometer 396 (2015), "Retailers' attitudes towards cross-border trade and consumer protection".

On the basis of the above survey results, it can be estimated that EU traders involved in B2C cross-border e-commerce sell on average to **3.21** Member States[242].

11 Number of exporting retailers in the EU

According to the most recent available Eurostat data, the overall number of enterprises in the EU-28 active in retail trade is 3,627,167[243]. Within the retail trade sector, the percentage of EU-28 enterprises making e-sales to other EU countries is 8.1 %. [244] Based on these figures, the number of exporting EU retailers is **293,801** (3,627,167 * 8.1%).

12 Percentage of exporting businesses informed about foreign law

Contract law related costs are the costs incurred by companies selling to consumers in other EU countries because of differences in existing contract law rules (e.g. costs for legal advice and translation of foreign laws). Realistically, however, not all exporters consult a lawyer or take other actions to become familiar with foreign laws. Flash Eurobarometer 321 (Q.1)[245] 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 Member States where they sell or wish to sell to consumers, and another 32% are not well informed. On the opposite side, 8% said they are fully informed and 39% well informed.

[242] (1X299) + (2X82) + (3X60) + (27X18) = 1,725/538 = 3.206

[243] Eurostat, Structural Business Statistics, Distributive trades by employment size class (NACE Rev. 2, G), sbs_sc_dt_r2. Data for 2012

[244] The figure refers to enterprises with at least 10 persons employed. Eurostat, Enterprises selling via internet and/or networks other than internet (NACE Rev. 2 activity), isoc_ec_eseln2, Data for 2013

[245] Flash Eurobarometer 321 "European contract law in consumer transactions" (2011), p.17

Taking a conservative approach, this analysis will only take into account the 47% (8% + 39%) of retailers who said they are either fully or well informed of the foreign contract law provisions, since it is reasonable to assume that those who are not well or not at all informed have not incurred the costs of familiarising themselves with foreign law. Hence, only those **47%** of B2C exporters are included in the computation of contract law related costs.

13 Overall contract law related costs for EU businesses engaged in B2C e-commerce

Based on the above elements, the following formula can be applied to provide an estimate of the cumulative costs incurred by businesses active in B2C e-commerce:

(Contract-law related costs per company for entering the market of one Member State * Average number of EU countries European retailers sell to) * (Number of exporting retailers in the EU * Percentage of exporting businesses informed about foreign law)

- According to the low estimate, the cumulative contract law related costs incurred by traders currently involved in B2C cross-border trade who are informed about the contract law rules of the EU countries where they sell amounts to **€3.85 billion**[246]. This calculation is based on the lower value of costs per trader (i.e. €8,696).

- According to the high estimate, the cumulative contract law related costs incurred by traders currently involved in B2C cross-border trade who are informed about the contract law rules of the EU countries where they sell amount to **€4.24 billion**[247]. The calculation is based on the higher value of costs per company (i.e. €9,565)

Table 3: Overall contract law related costs for EU businesses engaged in B2C e-commerce

Sector	Number of Firms	Percentage of exporting firms	Number of Exporters	Low estimate	High estimate
Retail trade	**3,627,167**	**8.1%**	**293,801**	**3.85 billion**	**4.24 billion**

Therefore, the **overall contract law related costs** for EU business currently involved in B2C cross-border transactions range between **€3.85 billion** and **€4.24 billion.**

[246] (8,696 * 3.21)* (293,801 * 47%) = 3,854,567,817.42.
[247] (9,565 * 3.21) * (293,801 * 47%) = 4,239,758,644.62.

Table 2: Macro-economic simulation scenarios

Change in:	Category (cluster)	Barrier label	Effect*		
			Extensive margin	Intensive margin	Combined effect
Consumer demand	Conformity with the contract	Wrong or damaged products will be delivered Products will not be delivered at all	5.3	13.6	25.6 18.1**
	Consumer rights (PCA***)	Returning a product I didn't like and getting reimbursed Replacement or repair of a faulty product is not easy I do not know what my consumer rights are when buying online There is a lower level of consumer protection when buying online	1.6		3.2
Business supply	Contract-law related barriers	Guarantees and returns are too expensive You don't know the rules which have to be followed	5.3	3.1	8.4

* Expected % increase in cross-border online trade when barriers are removed, except for underlined figures which refer to percentage points.

** Combined effect under a scenario where each new online cross-border consumer spends on average half as much as an existing cross-border consumer.

*** The component is based primarily on the first two items ("Returning a product", and "Replacement or repair")

Source: JRC/IPTS estimates based on responses to the DSM Consumer survey and Eurobarometer 413. For details see Cardona et al. (2015) and Duch-Brown and Martens (2015).

Table 3: Summary of main macroeconomic impacts of removing demand and supply-side barriers to cross-border e-commerce

	GDP		Household consumption		Consumer prices	
	Full[248]	Partial[19]	Full[19]	Partial[19]	Full[19]	Partial[19]
	Percentage change compared to "no policy change"					
Austria	0,05	0,04	0,34	0,27	-0,29	-0,23
Belgium	0,03	0,02	0,21	0,17	-0,17	-0,14
Bulgaria	0,01	0,01	0,14	0,11	-0,13	-0,10
Croatia	0,02	0,01	0,09	0,08	-0,08	-0,06
Cyprus	0,02	0,01	0,19	0,16	-0,16	-0,13
Czech Republic	0,01	0,01	0,12	0,10	-0,10	-0,08
Denmark	0,02	0,02	0,21	0,17	-0,18	-0,15
Estonia	0,02	0,01	0,15	0,12	-0,13	-0,10
Finland	0,02	0,02	0,21	0,17	-0,19	-0,15
France	0,03	0,02	0,22	0,17	-0,19	-0,15
Germany	0,04	0,03	0,25	0,20	-0,21	-0,17
Greece	0,05	0,04	0,23	0,18	-0,19	-0,15
Hungary	0,03	0,02	0,17	0,14	-0,14	-0,11
Ireland	0,02	0,02	0,32	0,26	-0,29	-0,23
Italy	0,03	0,03	0,34	0,28	-0,31	-0,25
Latvia	0,02	0,01	0,14	0,11	-0,12	-0,10
Lithuania	0,01	0,01	0,07	0,05	-0,06	-0,05
Luxembourg	0,02	0,02	0,20	0,16	-0,18	-0,14
Malta	0,06	0,05	0,16	0,13	-0,11	-0,09
Netherlands	0,02	0,02	0,30	0,24	-0,27	-0,22
Poland	0,02	0,01	0,15	0,12	-0,13	-0,10
Portugal	0,04	0,03	0,28	0,22	-0,24	-0,19
Romania	0,00	0,00	0,07	0,06	-0,07	-0,05
Slovakia	0,02	0,01	0,14	0,11	-0,12	-0,10
Slovenia	0,08	0,06	0,26	0,21	-0,19	-0,15
Spain	0,06	0,05	0,48	0,38	-0,43	-0,35
Sweden	0,02	0,01	0,13	0,11	-0,12	-0,09
United Kingdom	0,06	0,05	0,40	0,32	-0,35	-0,28
EU28	0,04	0,03	0,29	0,23	-0,25	-0,25

[248] "Full" scenario : each new online cross-border consumer spends on average as much as an existing cross-border consumer; "partial" scenario: each new online cross-border consumer spends on average half as much as an existing cross-border consumer

Table 4. Impacts on Household Consumption (% change) of removing demand and supply-side barriers to cross-border e-commerce

	Demand-side			Supply-side	Total	
	Conformity (full effect)	Conformity (partial effect)	Consumer rights	Contract Law	Total (full effect)	Total (partial effect)
Austria	0,23	0,16	0,03	0,08	0,34	0,27
Belgium	0,15	0,10	0,02	0,05	0,21	0,17
Cyprus	0,13	0,09	0,02	0,04	0,19	0,16
Czech Republic	0,08	0,06	0,01	0,03	0,12	0,10
Denmark	0,14	0,10	0,02	0,05	0,21	0,17
Estonia	0,10	0,07	0,01	0,03	0,15	0,12
Finland	0,14	0,10	0,02	0,05	0,21	0,17
France	0,15	0,10	0,02	0,05	0,22	0,17
Germany	0,17	0,12	0,02	0,06	0,25	0,20
Greece	0,16	0,11	0,02	0,05	0,23	0,18
Hungary	0,12	0,08	0,02	0,04	0,17	0,14
Ireland	0,22	0,16	0,03	0,07	0,32	0,26
Italy	0,24	0,17	0,03	0,08	0,34	0,28
Latvia	0,09	0,07	0,01	0,03	0,14	0,11
Lithuania	0,04	0,03	0,01	0,01	0,07	0,05
Luxembourg	0,14	0,10	0,02	0,04	0,20	0,16
Malta	0,11	0,08	0,01	0,04	0,16	0,13
Netherlands	0,20	0,14	0,03	0,07	0,30	0,24
Poland	0,10	0,07	0,01	0,03	0,15	0,12
Portugal	0,19	0,14	0,02	0,06	0,28	0,22
Slovakia	0,10	0,07	0,01	0,03	0,14	0,11
Slovenia	0,18	0,13	0,02	0,06	0,26	0,21

Spain	0,33	0,23	0,04	0,11	0,48	0,38
Sweden	0,09	0,06	0,01	0,03	0,13	0,11
United Kingdom	0,27	0,19	0,03	0,09	0,40	0,32
Bulgaria	0,10	0,07	0,01	0,03	0,14	0,11
Romania	0,05	0,03	0,01	0,02	0,07	0,06
Croatia	0,06	0,05	0,01	0,02	0,09	0,08
EU28	0,20	0,14	0,03	0,07	0,29	0,23

Note: results under the assumption of retail sector technology shock.
Source: results from the simulation using the CGE model.

Table 5: Impacts on Real national income, welfare based (% change) of removing demand and supply-side barriers to cross-border e-commerce

	Demand-side			Supply-side	Total	
	Conformity (full effect)	Conformity (partial effect)	Consumer rights	Contract Law	Total (full effect)	Total (partial effect)
Austria	0,16	0,11	0,02	0,05	0,23	0,19
Belgium	0,11	0,08	0,01	0,04	0,15	0,12
Cyprus	0,12	0,09	0,02	0,04	0,18	0,14
Czech Republic	0,05	0,04	0,01	0,02	0,08	0,06
Denmark	0,09	0,06	0,01	0,03	0,13	0,11
Estonia	0,07	0,05	0,01	0,02	0,10	0,08
Finland	0,10	0,07	0,01	0,03	0,15	0,12
France	0,11	0,08	0,01	0,04	0,16	0,12
Germany	0,12	0,08	0,02	0,04	0,17	0,14
Greece	0,15	0,11	0,02	0,05	0,22	0,18
Hungary	0,10	0,07	0,01	0,03	0,14	0,11
Ireland	0,11	0,08	0,01	0,04	0,16	0,12
Italy	0,19	0,13	0,02	0,06	0,27	0,22

Latvia	0,08	0,06	0,01	0,03	0,12	0,09
Lithuania	0,04	0,03	0,00	0,01	0,05	0,04
Luxembourg	0,09	0,06	0,01	0,03	0,13	0,11
Malta	0,12	0,09	0,02	0,04	0,18	0,14
Netherlands	0,11	0,08	0,01	0,04	0,16	0,13
Poland	0,08	0,05	0,01	0,03	0,11	0,09
Portugal	0,16	0,11	0,02	0,05	0,23	0,18
Slovakia	0,07	0,05	0,01	0,02	0,10	0,08
Slovenia	0,14	0,10	0,02	0,05	0,21	0,17
Spain	0,25	0,17	0,03	0,08	0,36	0,29
Sweden	0,05	0,04	0,01	0,02	0,08	0,06
United Kingdom	0,21	0,15	0,03	0,07	0,31	0,25
Bulgaria	0,08	0,05	0,01	0,03	0,11	0,09
Romania	0,04	0,03	0,01	0,01	0,06	0,05
Croatia	0,05	0,03	0,01	0,02	0,07	0,06
EU-28	0,14	0,10	0,02	0,05	0,21	0,17

Note: results under the assumption of retail sector technology shock.
Source: results from the simulation using the CGE model.

Table 6: Impacts on GDP, quantity index (% change) of removing demand and supply-side barriers to cross-border e-commerce

	Demand-side			Supply-side	Total	
	Conformity (full effect)	Conformity (partial effect)	Consumer rights	Contract Law	Total (full effect)	Total (partial effect)
Austria	0,03	0,02	0,00	0,01	0,05	0,04
Belgium	0,02	0,01	0,00	0,01	0,03	0,02
Cyprus	0,01	0,01	0,00	0,00	0,02	0,01
Czech Republic	0,01	0,00	0,00	0,00	0,01	0,01

Denmark	0,02	0,01	0,00	0,01	0,02	0,02
Estonia	0,01	0,01	0,00	0,00	0,02	0,01
Finland	0,01	0,01	0,00	0,00	0,02	0,02
France	0,02	0,01	0,00	0,01	0,03	0,02
Germany	0,03	0,02	0,00	0,01	0,04	0,03
Greece	0,03	0,02	0,00	0,01	0,05	0,04
Hungary	0,02	0,01	0,00	0,01	0,03	0,02
Ireland	0,02	0,01	0,00	0,01	0,02	0,02
Italy	0,02	0,02	0,00	0,01	0,03	0,03
Latvia	0,01	0,01	0,00	0,00	0,02	0,01
Lithuania	0,01	0,01	0,00	0,00	0,01	0,01
Luxembourg	0,01	0,01	0,00	0,00	0,02	0,02
Malta	0,04	0,03	0,01	0,01	0,06	0,05
Netherlands	0,02	0,01	0,00	0,01	0,02	0,02
Poland	0,01	0,01	0,00	0,00	0,02	0,01
Portugal	0,02	0,02	0,00	0,01	0,04	0,03
Slovakia	0,01	0,01	0,00	0,00	0,02	0,01
Slovenia	0,05	0,04	0,01	0,02	0,08	0,06
Spain	0,04	0,03	0,01	0,01	0,06	0,05
Sweden	0,01	0,01	0,00	0,00	0,02	0,01
United Kingdom	0,04	0,03	0,01	0,01	0,06	0,05
Bulgaria	0,01	0,01	0,00	0,00	0,01	0,01
Romania	0,00	0,00	0,00	0,00	0,00	0,00
Croatia	0,01	0,01	0,00	0,00	0,02	0,01
EU28	0,03	0,02	0,00	0,01	0,04	0,03

Note: results under the assumption of retail sector technology shock.
Source: results from the simulation using the CGE model.

Table 7: Impacts on Value of exports (% change) of removing demand and supply-side barriers to cross-border e-commerce

	Demand-side			Supply-side	Total	
	Conformity (full effect)	Conformity (partial effect)	Consumer rights	Contract Law	Total (full effect)	Total (partial effect)
Austria	0,03	0,02	0,00	0,01	0,05	0,04
Belgium	0,01	0,01	0,00	0,00	0,01	0,01
Cyprus	0,05	0,03	0,01	0,02	0,07	0,06
Czech Republic	0,01	0,01	0,00	0,00	0,02	0,02
Denmark	0,02	0,01	0,00	0,01	0,03	0,02
Estonia	0,01	0,00	0,00	0,00	0,01	0,01
Finland	0,04	0,03	0,01	0,01	0,06	0,05
France	0,05	0,04	0,01	0,02	0,08	0,06
Germany	0,03	0,02	0,00	0,01	0,05	0,04
Greece	0,03	0,02	0,00	0,01	0,05	0,04
Hungary	0,01	0,01	0,00	0,00	0,02	0,01
Ireland	0,04	0,03	0,01	0,01	0,06	0,05
Italy	0,02	0,01	0,00	0,01	0,03	0,02
Latvia	0,03	0,02	0,00	0,01	0,04	0,03
Lithuania	0,00	0,00	0,00	0,00	0,01	0,00
Luxembourg	0,04	0,03	0,01	0,01	0,06	0,05
Malta	0,02	0,02	0,00	0,01	0,03	0,03
Netherlands	0,03	0,02	0,00	0,01	0,04	0,03
Poland	0,06	0,04	0,01	0,02	0,08	0,07
Portugal	0,05	0,03	0,01	0,02	0,07	0,05
Slovakia	0,12	0,08	0,01	0,04	0,17	0,14
Slovenia	0,08	0,06	0,01	0,03	0,12	0,10

Spain	0,02	0,02	0,00	0,01	0,04	0,03
Sweden	0,10	0,07	0,01	0,03	0,14	0,11
United Kingdom	0,01	0,00	0,00	0,00	0,01	0,01
Bulgaria	0,02	0,02	0,00	0,01	0,03	0,03
Romania	0,03	0,02	0,00	0,01	0,04	0,03
Croatia	0,00	0,00	0,00	0,00	0,01	0,00
EU28	0,03	0,02	0,00	0,01	0,05	0,04

Note: results under the assumption of retail sector technology shock.
Source: results from the simulation using the CGE model.

Table 8: Impacts on Consumer prices (% change) of removing demand and supply-side barriers to cross-border e-commerce

	Demand-side			Supply-side	Total	
	Conformity (full effect)	Conformity (partial effect)	Consumer rights	Contract Law	Total (full effect)	Total (partial effect)
Austria	-0,20	-0,14	-0,03	-0,07	-0,29	-0,23
Belgium	-0,12	-0,08	-0,01	-0,04	-0,17	-0,14
Cyprus	-0,11	-0,08	-0,01	-0,04	-0,16	-0,13
Czech Republic	-0,07	-0,05	-0,01	-0,02	-0,10	-0,08
Denmark	-0,12	-0,09	-0,02	-0,04	-0,18	-0,15
Estonia	-0,09	-0,06	-0,01	-0,03	-0,13	-0,10
Finland	-0,13	-0,09	-0,02	-0,04	-0,19	-0,15
France	-0,13	-0,09	-0,02	-0,04	-0,19	-0,15
Germany	-0,15	-0,10	-0,02	-0,05	-0,21	-0,17
Greece	-0,13	-0,09	-0,02	-0,04	-0,19	-0,15
Hungary	-0,09	-0,07	-0,01	-0,03	-0,14	-0,11
Ireland	-0,20	-0,14	-0,03	-0,07	-0,29	-0,23
Italy	-0,21	-0,15	-0,03	-0,07	-0,31	-0,25

Latvia	-0,08	-0,06	-0,01	-0,03	-0,12	-0,10
Lithuania	-0,04	-0,03	-0,01	-0,01	-0,06	-0,05
Luxembourg	-0,12	-0,09	-0,02	-0,04	-0,18	-0,14
Malta	-0,07	-0,05	-0,01	-0,02	-0,11	-0,09
Netherlands	-0,18	-0,13	-0,02	-0,06	-0,27	-0,22
Poland	-0,09	-0,06	-0,01	-0,03	-0,13	-0,10
Portugal	-0,17	-0,12	-0,02	-0,06	-0,24	-0,19
Slovakia	-0,08	-0,06	-0,01	-0,03	-0,12	-0,10
Slovenia	-0,13	-0,09	-0,02	-0,04	-0,19	-0,15
Spain	-0,30	-0,21	-0,04	-0,10	-0,43	-0,35
Sweden	-0,08	-0,06	-0,01	-0,03	-0,12	-0,09
United Kingdom	-0,24	-0,17	-0,03	-0,08	-0,35	-0,28
Bulgaria	-0,09	-0,06	-0,01	-0,03	-0,13	-0,10
Romania	-0,05	-0,03	-0,01	-0,02	-0,07	-0,05
Croatia	-0,06	-0,04	-0,01	-0,02	-0,08	-0,06
EU28	-0,17	-0,17	-0,02	-0,06	-0,25	-0,25

Note: results under the assumption of retail sector technology shock.
Source: results from the simulation using the CGE model.

ANNEX 6 – Consumer Detriment: Headline Results and Methodology

○ Headline results

This section summarises the headline results of the Economic Study on Consumer Digital Content Products[249] on problems related to "quality", "access" and "terms and conditions"[250] that consumers encounter with four types of digital content (music, games, anti-virus and cloud storage) across the EU and the resulting consumer detriment. The results are based on the consumer survey carried out in 15 sample EU countries and were extrapolated to non-sample countries to arrive at EU-28 aggregates.[251]

▪ Number of consumers experiencing problems

With the exception of music purchased on a tangible medium (such as a disc), nearly 1 in 3 online users of digital content have experienced at least one problem with the content or services they used during the 12-month period preceding the survey. It is therefore estimated that at least 70 million consumers across the EU have experienced one or the other problem with just the four types of digital content covered by the study.

Table 1: Percentage and number of consumers experiencing problems

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
% of users experiencing problems	**36%**	**13%**	**39%**	**28%**	**28%**	**34%**	**34%**
Number of digital content users experiencing problems							
Sample MS	52,680,000	12,599,000	61,127,000	15,543,000	43,209,000	14,773,000	34,979,000
Non-sample MS	9,240,902	2,210,063	10,722,639	2,726,487	7,579,540	2,591,417	6,135,868
EU-28	**61,920,902**	**14,809,063**	**71,849,639**	**18,269,487**	**50,788,540**	**17,364,417**	**41,114,868**

▪ Gross financial detriment

The gross financial detriment resulting from the most significant problem encountered by consumers with the four types of digital content covered by the survey is estimated at approximately €3.4 billion for the online population in the EU28. Estimated gross financial detriment across the four product categories ranges between €617 million (music) and €963 million (games). As explained in section 1.4.2 below, a conservative approach was followed for the calculation of consumer detriment, taking into account only the most significant out of the two most recent problems reported by consumers, and only with the four types of digital content covered by the survey. The actual value of gross financial detriment would be much higher if all problems experienced by EU-28 consumers were taken into account.

249 ICF, Economic Study on Consumer Digital Content Products, 2015 (to be published). Hereinafter "the Study".

250 Problems relating to data protection and security, information and transparency, geo-blocking etc. are not included in the scope of the study

251 For details on the methodology see Section 1.2

Table 2: Estimated financial loss per problem per user and gross financial detriment, euros

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Average financial loss per problem per user	**6.61**	**13.99**	**7.59**	**20.26**	**12.63**	**18.51**	**20.71**
Number of digital content users experiencing problems							
Sample MS	348,268,154	176,210,945	463,679,191	314,944,051	545,935,257	273,440,195	724,553,760
Non-sample MS	61,091,721	30,910,175	81,336,636	55,246,147	95,765,653	47,965,719	127,098,151
EU-28	**409,359,875**	**207,121,120**	**545,015,827**	**370,190,198**	**641,700,910**	**321,405,914**	**851,651,911**

Issues relating to terms and conditions account for 36 to 40 per cent of the estimated gross financial detriment; 31 to 36 per cent of the detriment stems from access related problems, while quality issues account for 28 to 33 per cent of the detriment.

▪ Net financial detriment

The following table provides estimates of net financial detriment, i.e. after any financial remedies received. Net financial detriment is estimated to be almost €3 billion across the four content categories. There is little difference between gross and non-financial detriment, showing that limited financial remedies were received by consumers who encountered problems with any of the four types of digital content covered by the study.[252]

Finally, it should be noted that these figures do not include any estimates of value of the non-financial remedies received by consumers (such as an apology, explanation or resolution of problem – as these remedies do not have any financial implications for consumers), nor do they include any monetary estimates of the non-financial impacts (e.g. stress) encountered as a result of the problems experienced.

Table 3: Estimated net financial detriment, euros

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Sample MS	325,775,674	145,307,465	446,358,527	268,996,211	517,536,918	256,668,625	660,766,769
Non-sample MS	57,146,186	25,489,218	78,298,319	47,186,172	90,784,137	45,023,722	115,908,907
EU-28	**382,921,860**	**170,796,683**	**524,656,846**	**316,182,383**	**608,321,055**	**301,692,347**	**776,675,676**

▪ Non-financial detriment

The table below provides monetary estimates of the value of the time spent by consumers trying to resolve the problems encountered. The monetary value of non-financial detriment is

252 Given the small sample sizes for value of remedies received by survey respondents, these figures are highly tentative

significant, and is estimated at €5.7 billion for EU-28 consumers of the four types of digital content covered by the study[253].

Table 4: Estimated non- financial detriment (BASED ON DISCOUNTED TIME VALUE OF LEISURE), euros

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Sample MS	780,889,686	316,983,860	1,013,622,883	420,594,218	912,924,272	519,414,907	750,550,837
Non-sample MS	163,389,800	63,630,701	219,796,459	105,455,047	202,081,575	90,190,114	150,661,450
EU-28	**944,279,487**	**380,614,561**	**1,233,419,342**	**526,049,265**	**1,115,005,848**	**609,605,021**	**901,212,287**

The above calculation is based on the assumption that working time has a greater economic value than leisure time. The European Commission's recent discussions with experts on consumer detriment suggest that discounting of wage costs does not reflect the true value that consumers place on their leisure time. According to these experts, people usually value leisure higher than working time. To account for this, non-financial detriment was also calculated without discounting leisure time – these results are presented in Table 5. Non-financial detriment using this approach is estimated at €8.2 billion.

Table 5: Estimated non- financial detriment (LEISURE TIME IS VALUED SAME AS WORKING TIME), euros

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Sample MS	1,115,556,695	452,834,086	1,448,032,689	600,848,883	1,304,177,532	742,021,295	1,072,215,481
Non-sample MS	233,414,001	90,901,002	313,994,942	150,650,068	288,687,965	128,843,021	215,230,642
EU-28	**1,348,970,695**	**543,735,088**	**1,762,027,631**	**751,498,950**	**1,592,865,496**	**870,864,316**	**1,287,446,124**

- **Total monetised detriment (financial + non-financial)**

The combined value of the financial detriment resulting from the most recent problem with the four types of digital content covered by the study and the value of the time spent trying to resolve problems encountered during the last 12 months is estimated to be in the range of €9 to 11 billion for EU-28. As pointed out above, the calculation of financial detriment does not take into account the losses associated for all problems encountered by consumers during the last 12 months and has therefore been under-estimated. On the other hand, non-financial detriment has been over-estimated to the extent that people don't value leisure time as highly as assumed by the study.

253 These figures however, need to be used cautiously for the following reasons: (i) natural tendency among consumers to over-estimate time spent on resolving problem; (ii) part of it is already included in gross financial detriment (e.g. lost earnings) and finally (iii) some of the people who lose time due to problems with digital content will not be in full time employment (e.g. students, unemployed, part-time) and may have a lower time valuation for leisure.

Table 6: Estimated total detriment (i.e. financial and non-financial detriment), euros - BASED ON DISCOUNTED TIME VALUE OF LEISURE

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Sample MS	1,106,665,360	462,291,325	1,459,981,409	689,590,429	1,430,461,191	776,083,532	1,411,317,605
Non-sample MS	220,535,986	89,119,919	298,094,778	152,641,219	292,865,712	135,213,836	266,570,357
EU-28	**1,327,201,347**	**551,411,244**	**1,758,076,188**	**842,231,648**	**1,723,326,903**	**911,297,368**	**1,677,887,962**

Table 7: Estimated total detriment (i.e. financial and non-financial detriment), euros - LEISURE TIME IS VALUED SAME AS WORKING TIME

	Music		Games		Anti-virus		Storage
	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium	Tangible medium	Intangible medium
Sample MS	1,441,332,368	598,141,551	1,894,391,216	869,845,093	1,821,714,450	998,689,920	1,732,982,250
Non-sample	290,560,187	116,390,219	392,293,261	197,836,240	379,472,102	173,866,742	331,139,550
EU-28	**1,731,892,555**	**714,531,770**	**2,286,684,477**	**1,067,681,333**	**2,201,186,552**	**1,172,556,662**	**2,064,121,800**

▪ Psychological detriment

Aside from financial detriment and loss of time, a significant share of digital content users report experiencing psychological detriment as indicated below.

Table 8: Percentage of digital content users experiencing various forms of psychological detriment as a result of a problem

	% of digital content users who have experienced stress			
Member State	Music	Games	Anti-virus	Storage
Austria	20%	20%	23%	25%
Bulgaria	15%	12%	17%	18%
Czech Republic	16%	11%	20%	18%
Germany	30%	28%	39%	26%
Denmark	5%	11%	16%	12%
Spain	35%	32%	38%	32%
France	24%	23%	31%	28%
Ireland	17%	19%	25%	21%
Italy	22%	22%	28%	26%
Latvia	27%	21%	29%	24%
Netherlands	14%	14%	18%	18%
Poland	37%	39%	40%	44%
Sweden	15%	17%	19%	22%
Slovenia	13%	13%	17%	16%
United Kingdom	16%	17%	30%	33%
	% of digital content users who have experienced anger			

	% of digital content users who have experienced worry			
Member State	Music	Games	Anti-virus	Storage
Austria	12%	13%	22%	28%
Bulgaria	15%	15%	17%	23%
Czech Republic	20%	14%	28%	21%
Germany	18%	16%	31%	32%
Denmark	8%	10%	18%	37%
Spain	31%	29%	41%	44%
France	23%	20%	30%	37%
Ireland	17%	17%	25%	38%
Italy	16%	20%	31%	33%
Latvia	29%	26%	38%	53%
Netherlands	15%	11%	14%	25%
Poland	31%	35%	41%	55%
Sweden	7%	14%	19%	34%
Slovenia	15%	14%	24%	18%
United Kingdom	12%	12%	28%	35%
	% of digital content users who have experienced frustration			

Member State	Music	Games	Anti-virus	Storage
Austria	24%	32%	31%	18%
Bulgaria	22%	24%	25%	22%
Czech Republic	35%	29%	32%	40%
Germany	27%	34%	34%	33%
Denmark	15%	17%	20%	17%
Spain	46%	43%	52%	40%
France	39%	39%	32%	32%
Ireland	27%	28%	30%	26%
Italy	34%	35%	36%	37%
Latvia	42%	38%	42%	42%
Netherlands	20%	21%	16%	15%
Poland	46%	47%	42%	50%
Sweden	19%	23%	23%	21%
Slovenia	34%	32%	30%	27%
United Kingdom	19%	23%	26%	26%

Member State	Music	Games	Anti-virus	Storage
Austria	32%	34%	36%	28%
Bulgaria	29%	25%	25%	23%
Czech Republic	20%	14%	21%	21%
Germany	35%	40%	45%	32%
Denmark	41%	40%	40%	37%
Spain	46%	43%	48%	44%
France	52%	45%	38%	37%
Ireland	35%	39%	40%	38%
Italy	29%	29%	30%	33%
Latvia	55%	52%	52%	53%
Netherlands	28%	31%	24%	25%
Poland	54%	52%	53%	55%
Sweden	33%	32%	32%	34%
Slovenia	23%	17%	23%	18%
United Kingdom	37%	37%	32%	35%

○ Methodology

This section details the methodology used in the Economic Study on Consumer Digital Content Products[254] for quantifying the scale of personal consumer detriment experienced by consumers of four types of digital content (music, games, anti-virus and cloud storage) across the EU, arising specifically from problems relating to "quality", "access" and "terms and conditions".[255]

Consumer detriment or harm arises when market outcomes fall short of their potential, resulting in welfare losses (financial, health, etc.) for consumers. A 2007 study on consumer detriment[256], widely recognised as an important contribution to the development of the concept of consumer detriment, establishes two distinct forms of detriment:

- Personal detriment: negative outcomes for individual consumers, relative to reasonable expectations;
- Structural detriment: the loss of consumer welfare (measured by consumer surplus)[257] due to market failure or regulatory failure.

▪ Overall approach

The Study used a survey-based approach to assess the nature and scale[258] of detriment experienced by consumers. The following sub-sections provide further information on survey design and implementation (section 1.1) and indicators of consumer detriment that have been quantified using the survey results (section 1.2).

254 ICF, Economic Study on Consumer Digital Content Products, 2015 (to be published). Hereinafter "the Study".

255 Problems relating to data protection and security, information and transparency, geo-blocking etc. are not included in the scope of the study

256 Europe Economics (2007) An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it.

257 Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences. In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. Consumers' surplus is a measure of consumer welfare and is defined as the excess of social valuation of product over the price actually paid. See https://stats.oecd.org/glossary/detail.asp?ID=3176

258 Measured both in terms of incidence of detriment and quantified/ monetised estimates of detriment

- **Survey design and implementation**

An online survey[259] was conducted by Ipsos MediaCT in 15 sample countries (see Table 9) to collect data on:

- *Usage and spending patterns of consumers*– types of digital content accessed (on tangible/ intangible medium, online/ offline, paid/ free content) and average spend per product category;

- *Prevalence of problems* - the extent to which consumers had encountered specific problems relating to "quality", "access" and "terms and conditions" (measured in terms of the percentage of consumers experiencing a particular problem).

For the two most recent problems reported by consumers, the survey included questions on:

- *Action taken by the respondent to resolve the problem(s)* e.g. whether the respondent had exercised the right of withdrawal, sought replacement, sought compensation for harm caused, made a complaint etc.;

- *Result of the action taken* - whether or not they have received any remedies from the supplier of the digital service; the type of remedies received (i.e. financial or non-financial); and the value of remedies (i.e. where financial remedies were received).

- *Impact of the problem(s)* - financial and non-financial detriment resulting from recent problem(s), as reported by consumers. Due to budgetary constraints, the average questionnaire length was limited to 20 minutes and the survey focused on the most critical questions necessary for quantifying consumer detriment.

Questionnaire design

Alongside literature on good practices in questionnaire design, a range of existing studies were taken into consideration in the design of the survey questionnaire:

- DSM consumer survey;

- The 2011 Europe Economics study[260];

- The 2014 consumer detriment survey commissioned by the Competition and Consumer Protection Commission of Ireland[261];

- UK's Consumer focus survey on consumer detriment[262];

- OFT study on Consumer detriment: Assessing the frequency and impact of consumer problems with goods and service[263].

259 Fieldwork took place in June and July 2015
260 Europe Economics (2011) Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers
261 http://corporate.nca.ie/eng/Research_Zone/Consumer-Detriment-Survey-2014-Report.pdf
262 http://www.consumerfocus.org.uk/files/2012/10/TNS-for-Consumer-Focus-Consumer-Detriments-2012.pdf
263 http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft992.pdf

Sample sizes and composition

A total of 15,001 interviews were completed across 15 sample countries amongst online panel members who access the internet at least weekly. A sample size of 1,000 was used in each country as it provides robust results with relatively low levels of margin of error.

Table 9: Overview of sample size per country

Country	Panel source	Sample size	Number of survey completes
UK	Ipsos	1000 x age 18-65 y/o	1,000
France	Ipsos	1000 x age 18-65 y/o	1,000
Germany	Ipsos	1000 x age 18-65 y/o	1,000
Italy	Ipsos	1000 x age 18-65 y/o	1,000
Spain	Ipsos	1000 x age 18-65 y/o	1,000
Netherlands	Ipsos & Research Now	1000 x age 18-65 y/o	1,000
Poland	Ipsos	1000 x age 18-59 y/o	1,000
Czech Republic	Cint	1000 x age 18-55 y/o	999
Sweden	Ipsos & Userneeds	1000 x age 18-65 y/o	1,000
Denmark	Userneeds	1000 x age 18-65 y/o	1,002
Ireland	Research Now	1000 x age 18-65 y/o	1,000
Bulgaria	Cint	1000 x age 18-55 y/o	1,000
Latvia	Cint	1000 x age 18-55 y/o	1,000
Slovenia	Mindtake	1000 x age 18-55 y/o	1,000
Austria	Bilendi	1000 x age 18-65 y/o	1,000
			15,001

NB: Minimum age of 18 was chosen to reflect that a person needs to be 18 in order to own a credit card to make online purchases of digital content

Table 10: Margins at 95% confidence level on 1,000 sample size

% giving 'x' survey response (e.g. accessing a particular product/format)	Margins
5% or 95%	+/- 1.4%
10% or 90%	+/- 1.9%
20% or 80%	+/- 2.5%
30% or 70%	+/- 2.8%
40% or 60%	+/- 3.0%
50%	+/- 3.1%

For each country, sample quotas were applied in terms of age within gender and region to provide the correct composition of completed interviews.

The survey was carried out using Ipsos panels, or where appropriate using approved panel partners (as indicated in Table 9). Ipsos' online access panel consists of a global network of millions of people who have agreed to be contacted by Ipsos for research. The access panel is

recruited and maintained to the highest quality possible,[264] ensuring a representative panel in every market and strict monitoring of survey completes for each project that is administered through it. For example, respondents with a tendency to speed through a survey just to receive an incentive are identified and removed from the sample to ensure that every respondent has given due care and consideration to their answers.

Weighting

Survey results were weighted for interlocked age and gender to be representative of the online population of adults aged 18 – 65 in each sample country. An example of the UK weighting is provided below for illustrative purposes.

Table 11: Example of weighting - UK

Male	Weighting	Female	Weighting
18-24	8.1%	18-24	8.1%
25-34	11.6%	25-34	11.6%
35-44	11.6%	35-44	11.6%
45-54	10.4%	45-54	10.4%
55-65	8.3%	55-65	8.3%
Total	50.0%	Total	50.0%

Indicators of consumer detriment

In line with the Commission's Impact Assessment guidelines[265], the following indicators of personal detriment were estimated using the data generated by the Survey and Eurostat statistics on population, internet usage and wages:

Financial detriment

Gross financial detriment (monetised indicator): financial losses suffered by consumers as a result of the problems experienced with digital content. These include:

- Cost of the original product or service, if it was unusable or was not delivered;
- Cost of any telephone calls, postage or stationery incurred by the consumer to seek remedies for the unusable or non-delivered content;
- Travel costs;
- Legal costs;
- Costs of getting any other type of expert advice or assistance;
- Cost incurred as a result of any advance or over-payment that had not been reimbursed;
- Costs of repairing or resolving the problem at consumers' own expense, e.g. cost of repairs;
- Costs of buying a replacement/substitute product or alternative service at own expense;
- Costs of any knock-on/consequential damages e.g. damage to the consumer's computer/ mobile phone or other device, loss of documents or audio-visual content stored on a device or cloud server, loss of emails etc.;

264 Ipsos leads the industry in quality standards and guidelines, with the UK business being the first agency to be accredited to ISO 20252 – the international market research specific standard. And this standard and requirements are being rolled out across the wider Ipsos business. Ipsos operates in accordance with all industry standards and guidelines including those published and recommended by Esomar, the ARF, Efamro, MRA, MRS and Casro; and complies with relevant ISO.

265 European Commission Handbook to assess consumer detriment. Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/handbook_consumer-detriment.pdf

- Costs associated with the reduced functioning of the goods concerned as a result of the problem e.g. poor audio-visual quality of digital content or services, unexpected interruptions (e.g. crashes, unannounced maintenance) preventing consumers from fully using/accessing the digital content or service;
- Cost of any inconvenience such as lost earnings by consumer not being able to work while taking time out to resolve the problem;
- Any other costs not included above.

Net financial detriment (monetised indicator): gross detriment adjusted for any remedies/ compensation received by consumers in the form of

- Replacement;
- Substitute- an alternative product or service;
- A full refund;
- A partial refund;
- Monetary compensation;
- Compensation in the form of a credit note or in vouchers.

Non-financial detriment

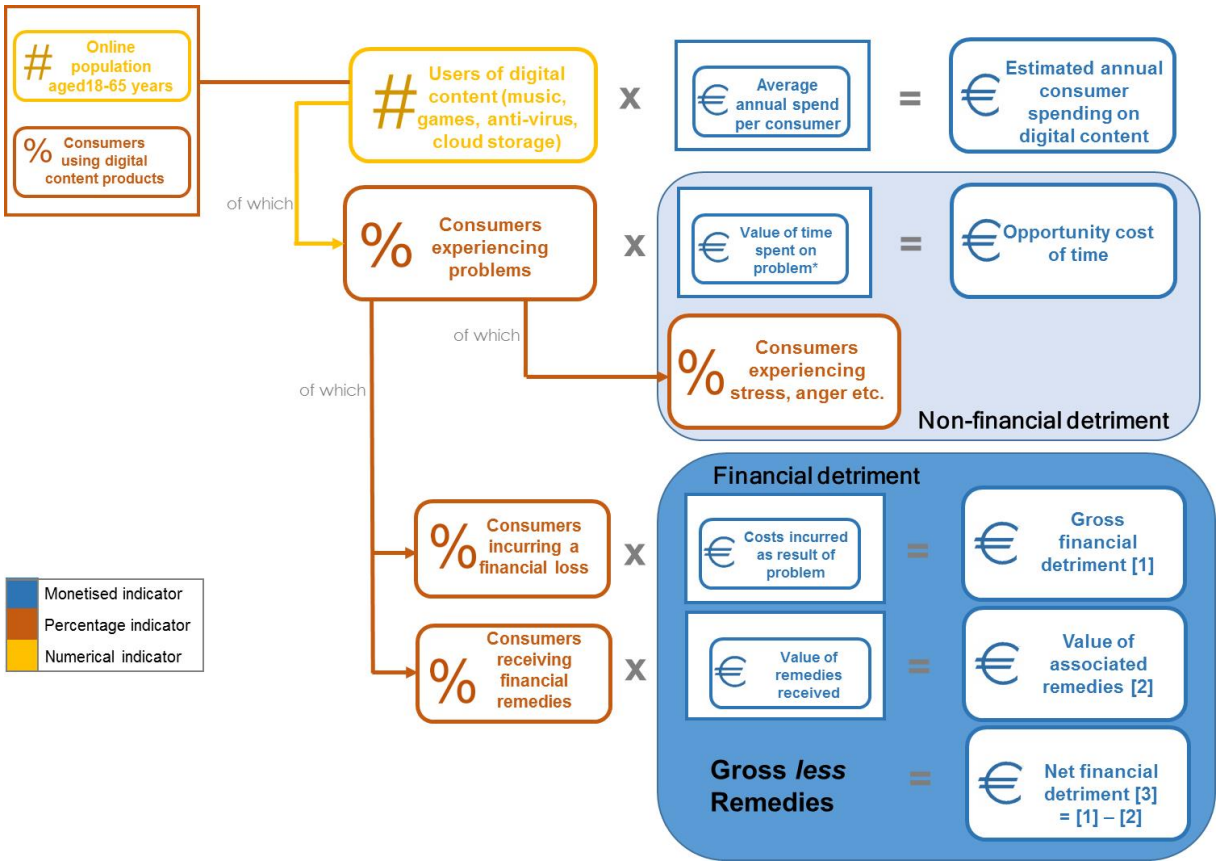
Non-financial detriment refers to the "negative non-financial impacts which consumers may experience, including loss of time and psychological detriment". The following indicators of non-financial detriment have been estimated:

- *Opportunity cost of lost time (monetised indicator):* monetary value of the (leisure) time spent by consumers in resolving problems. While it can be assumed that many of the consumers will try to resolve problems in their leisure time, there might however, be some double-counting between this indicator and the loss of earnings reported by consumer (who time out of work to resolve the problem).

- *Share of consumers experiencing psychological detriment* such as feelings of anger, frustration, stress etc.

The overall approach to measuring (personal) consumer detriment is summarised in Figure 1 below. The specific calculations and data sources used are outlined in section 1.3.

Figure 1: Methodological approach to measuring consumer detriment



○ Data sources and calculations

The table below sets out the specific data sources and calculations underpinning the analysis. For each Member State (MS) covered in the sample, the aggregate number of users of digital content [music/ games/ anti-virus/ storage] was calculated as follows:

Number of users of digital content = population {Eurostat} x population aged 18-65 who regularly access the internet {Eurostat} x proportion of consumers using digital content {survey}

The survey results were used to calculate the following indicators for each MS included in the sample and the sample as a whole:

- percentage of users of digital content experiencing at least one problem during the last 12 months;
- the average financial loss per person per problem;
- the average net financial loss per person per problem (i.e. the average loss adjusted for any financial redress/ compensation received);
- the average time spent by users in resolving the most recent problem encountered.

The samples averages were extrapolated across non-sample MS to derive aggregate estimates for EU-28.

Table 12: Sources and calculations of each indicator

	Indicator		Sub-indicators	Source	Extrapolation
1	Number of users of digital content	(a)	Population aged 18-65 (year: 2014)	Eurostat	Average usage rate (sample countries) X Online population aged 18-65 (non-sample countries)
		(b)	MULTIPLY proportion of population aged 16-65 who regularly access the internet i.e. once a week	Eurostat	
		(c)	MULTIPLY percentage of survey respondents using digital content	Ipsos survey, Q3 [0014 of output data]	
2	Average spend per consumer, euros	(a)	Total spend reported by survey respondents DIVIDED BY those respondents who paid for any digital content in past 12 months	Ipsos survey, Q5 [0064 of output data]	Not applicable
3	Total consumer spend on digital content , euros	(a)	Average spend per consumer	Calculated: Indicator 2a	Average spend per consumer (sample countries) X Number of users of digital content (non-sample countries)
			MULTIPLY number of users of digital content	Calculated: Indicator 1	
4	Number of consumers experiencing problems	(a)	Number of users of digital content	Calculated: Indicator 1	% of digital content users experiencing problems (sample countries) X Number of users of digital content (non-sample countries)
			MULTIPLY percentage of survey respondents reportedly experiencing a problem	Ipsos survey, Q6	
5	Gross financial detriment reported by consumers for the most recent problem experienced, euros		Number of consumers reporting problems	Calculated: Indicator 4	% of digital content users incurring financial losses as a result of problems (sample countries) X Number of consumers experiencing problems (non-sample countries)
		(a)	MULTIPLY percentage of survey respondents incurring costs as a result of their most recent problem	Ipsos survey, Q17	
		(b)	MULTIPLY average costs incurred as a result of their most recent problem (by problem type and costs)	Ipsos survey, Q17b	
6	Number of consumers experiencing		Number of consumers reporting experiencing a problem	Calculated: Indicator 4	Share of those

	Indicator		Sub-indicators	Source	Extrapolation
	problems who received financial remedies for their most recent problem	(a)	MULTIPLY percentage of survey respondents reporting a problem who received a remedy of financial value for their most recent problem *NB: remedies of financial value include replacement, alternative or remuneration*	Ipsos survey: Q19	reporting problems receiving financial remedies (sample countries) X Number of consumers experiencing problems (non-sample countries)
7	Average value of financial remedies received by consumers for most recent problem, euros	(a)	Total value of financial remedies received by survey respondents	Ipsos survey: Q20	Not applicable
			DIVIDED BY number of respondents who reported receiving remedies	Ipsos survey: Q19	
8	Financial remedies received for most recent problem, euros *CAVEAT: Due to very small sample sizes, data on value of remedies received by consumers should be treated with caution*	(a)	Number of consumers experiencing problems who received financial remedies for their most recent problem (by product & MS, by type of remedy)	Calculated: Indicator 6	Average value of financial remedies received by consumers for most recent problem (sample countries) X Number of consumers receiving financial remedies (non-sample countries)
			Average value of financial remedies received by consumers for most recent problem	Calculated: Indicator 7	
9	Net financial detriment for most recent problem, euros	(a)	Gross financial detriment reported by consumers	Calculated: Indicator 5	Not applicable
			LESS Financial remedies received for most recent problem	Calculated: Indicator 8	
10	Non-financial detriment for most recent problem: opportunity cost of	(a)	Time spent trying to resolve problem	Ipsos survey, Q18	Average time spent resolving problem (sample

	Indicator		Sub-indicators	Source	Extrapolation
	lost time, euros *CAVEAT: Some of the people who lose time due to problems with digital content services may not be in work (e.g. unemployed, younger adults still in education) and may have a lower time valuation, while those in high paid jobs will have a higher time valuation*	(b)	MULTIPLY sub-indicator 9.a. by cost of leisure time (labour costs)	Annual labour cost data per MS (Eurostat), discounted (by 0.3)[266]	countries) X Cost of leisure time (non-sample countries) X Number of consumers experiencing problems (non-sample countries)
11	Non-financial detriment for most recent problem: psychological detriment, Number of consumers	(a)	Number of consumers experiencing problems MULTIPLY percentage of survey respondents reporting psychological detriment (of those experiencing problems)	Calculated: Indicator 4 Ipsos survey, Q21	% consumers experiencing psychological detriment X Number of users of digital content (non-sample countries)

[266] See methodology for valuation of time savings: http://www.its.leeds.ac.uk/projects/WBToolkit/Note10.htm

○ Limitations and caveats

▪ Consumer survey

It is important to be cognisant of the inherent limitations of a survey-based approach, most notably:

- A survey can only measure detriment that is known to and recalled by the respondent:

  - It does not capture detriment that has yet to come to light (or may never come to light) to the respondent (for example, any detriment from unauthorised use of personal data by provider of digital content, which may only become evident to the consumer at a much later stage). As such, a survey based approach measures revealed or stated detriment but it does not measure unrevealed detriment.

  - A survey is based entirely upon respondent's recall of particular problems during the last 12 months, the costs associated with these problems, remedies received and the number of hours spent attempting to deal with the problem(s).

- A survey relies solely on respondent's perceptions and views – just because a consumer reports a problem with quality, does not necessarily mean that the product was defective. Especially, in the context of digital content, quality and access issues (e.g. service interruptions, inability to download, poor audio-visual quality) can arise due to internet connectivity/ infrastructure and consumers may not always be able to accurately identify the real issue or cause of the problem (whether the problem was with the quality and access of digital content or with the internet service). Some of the problems relating to the quality of digital content and services may arise from unreasonable expectations on the part of consumers due to technological complexity of some digital services. If consumers do not fully understand the technology they are using, what they may consider as a problem may in fact be related to a technical limitation or certain operational feature of the product. The survey questions were carefully worded to help consumers accurately identify and report issues with the quality of the digital content they consumed; nonetheless, the possibility of some response bias cannot be totally excluded.

Aside from the above general limitations of a survey based approach, the following specific caveats should be noted in relation to the consumer survey carried out in the context of the present study:

- The question on the value of financial losses resulting from problems was only asked to a subset of the sample population – i.e. those who had experienced a problem and who had indicated having incurred financial losses as a result of the problem. This resulted in small samples within cost estimates of problems - roughly between 2 to 11 per cent of the overall sample, as an average across Member States. There is therefore, the potential for small sample bias, whereby individual cases of high or low cost tend to skew the average costs upwards or downwards. Ranges were not used to avoid adding a further layer of complexity to the analysis.

- Similarly, the sample sizes for the question on value of remedies received is small. Further, in a large majority of cases, problems that resulted in financial loss were not the same problems that led to compensation. Thus, compensation was much more likely to have been provided where non-financial types of detriment were incurred.

- **Estimation and extrapolation**

Approach followed by the Study

The results of this exercise should be treated with caution given the uncertainty involved in extrapolating the data obtained from survey sample to the national level and then estimating the level of detriment in non-sample MS.

Moreover, it should be noted that the estimates of consumer detriment are based on online population in the 18-65 age band[267]. As such, the study under-estimates consumer detriment as it excludes the detriment suffered by (a) consumers who do not use the internet (and may be consuming digital content on tangible medium that has been purchased offline); and (b) consumers under the age of 18 and over the age of 65.

Overall, a conservative approach has been used in the estimation of consumer detriment to provide defendable results. The study estimates detriment experienced by consumers as a result of most recent problems (and not all problems experienced during the last 12 months). Respondents were first asked to identify the full range of specific problems experienced with each product/format. They were then asked detailed questions regarding remedies and impacts of two most recent problems. Consumer detriment was estimated on the basis of the two most recent problems reported by consumers.

Alternative approaches rejected to avoid over-estimation of consumer detriment

Other survey-based studies have estimated the personal detriment experienced by consumers over a 12 month period by taking into account all problems experienced by consumers within this period, as follows: *'Gross financial detriment = Average financial loss per problem per consumer X Aggregate number of problems',* where *'Aggregate number of problems = Average number of problems per person per year X Number of consumers experiencing problems*'. This approach would have led to a significant over-estimation of consumer detriment, for the following reasons:

- It is likely that consumers will only recall the more significant problems they have experienced when reporting financial losses resulting from the most recent problem. Therefore, using these data to calculate the average financial loss per problem per consumer and then applying this figure to the aggregate number of problems would overstate the value of gross detriment

- In answering a question on the total number of problems experienced during the last 12 months, there is a risk that respondents might count multiple occurrences of exactly the same problem (e.g. their music streaming service buffered on 20 different occasions) or simply not be able to recall.

267 This age-band was chosen for consistency with the survey sample

ANNEX 7 –EU RULES ON APPLICABLE LAW AND JURISDICTION IN THE DIGITAL SINGLE MARKET

Transactions in the Digital Single Market inherently transcend territorial borders. Consumers increasingly shop online. When disputes arise, questions of applicable law and jurisdiction arise: Which law applies to determine the parties' rights and obligations? Which court is competent to hear the case?

The Brussels I (revised) Regulation[268] and the Rome I Regulation[269] which provide rules to determine the competent jurisdiction and applicable law apply to the internet. These Regulations are flexible enough to offer suitable solutions. In fact, these instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative process. Some rules have even been specifically tailored to internet transactions, e.g. those on consumer contracts. These rules aim at protecting consumers in the Digital Single Market. Furthermore, the EU private international law framework has been interpreted in the context of the Digital Single Market in various judgments of the Court of Justice. Together with new contract rules for the purchase of digital content and tangible goods online, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market.

This annex presents the existing consumer contract rules on applicable law and jurisdiction. It sets out further the conditions that trigger the special protection afforded to the consumer, as interpreted by the Court of Justice of the European Union and by selected national case law.

1. EU Rules on Applicable Law and Jurisdiction

The EU rules on applicable law and jurisdiction in consumer contracts can be found in Articles 6 of the Rome I Regulation and Articles 17 to 19 of the Brussels I (revised) Regulation.

1.1. Applicable Law

The Rome I Regulation allows the parties to a consumer contract to choose the law which will govern any questions relating to the contract. It is common practice in consumer[270] contracts that traders include in their standard terms and conditions a choice of law clause which refers to the law of the State where they or one of their branches is established.

However, where no choice of law was made by the parties, in certain situations the consumer will, according to Article 6 (1), benefit from the application of the law of the country where he/she has his habitual residence. The conditions for the application of those rules are the following:

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[268] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF, referred to in this text as 'Brussels I (revised) Regulation'.

[269] 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/ALL/?uri=CELEX:32008R0593, referred to in this text as 'Rome I Regulation'.

[269] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF

[270] In accordance with Article 6(1) of the Rome I Regulation, consumers are natural persons who conclude a contract for a purpose which can be regarded as being outside their trade or profession.

- The trader:
    - is pursuing his commercial activities in the country where the consumer has his habitual residence, or
    - by any means, directs such activities to that country or several countries including that country
- the contract falls within the scope of the activities mentioned above;

If another law than the consumer's law has been chosen by the parties as the applicable law according to Article 6(2), certain specific rules of the law of the country where the consumer has his habitual residence will apply, provided that:

- those specific contract law rules under the law of the country where the consumer resides are more favourable to the consumer than the contract law rules under the applicable law chosen by the parties;
- those contract law rules specifically aim at protecting consumers and cannot be derogated from by agreement.

Art. 6 Rome I applies irrespectively of whether or not the trader is established in the EU.

1.2. Jurisdiction

The Brussels I (revised) Regulation applies to determine the civil jurisdiction of the courts in the EU. The protection awarded to consumers in matters of jurisdiction is comparable to that ensured in matters of applicable law. This special protection applies when the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities (Art. 17(1)).

Subject to the conditions set out above, consumers may bring proceedings either in the courts of the Member State of the other party (e.g. the trader) or in the courts of the place where they are domiciled. Proceedings against a consumer may be brought only in the courts of the Member State in which the consumer is domiciled (Art. 18).

Under Article 19 of the Brussels I (revised) Regulation, a choice of jurisdiction in consumer contracts is only valid if it has been agreed after a dispute has arisen, if it offers the consumer more choices where to bring proceedings, or where parties were domiciled in the same State at the time of the conclusion of the contract. This means that choice of forum clauses in standard terms and conditions of digital contracts concluded under the conditions set out above can be disregarded if they attribute jurisdiction only to the courts of the forum of the trader.

Until recently, the consumer protection rules of the Brussels I (revised) Regulation applied only to defendants domiciled in an EU Member State. Where defendants were domiciled outside the EU, national courts applied their own national laws to determine whether they have jurisdiction. However, the revised Brussels I (revised) Regulation which has been applicable since 10 January 2015, now ensures that consumers are able to bring proceedings in the courts of the Member State of their domicile/habitual residence in accordance with the uniform jurisdiction rules of the Regulation, regardless of whether or not the other party has its domicile or is established in a Member State.

2. The notion of "Directing Activities"

The above rules show that consumers are well protected under EU private international law with regard to jurisdiction and applicable law since choice of forum and applicable law clauses can, under certain conditions, be disregarded if they are to the disadvantage of consumers. As a result thereof, consumers have access to the courts in the EU which can ensure the enforcement of mandatory EU or national law.

The special protection for consumers of both the Brussels I (revised) Regulation and of the Rome I Regulation applies if the trader "directed his activities" at the Member State of the consumer within the meaning of Articles 17(1)(c) of the Brussels I (revised) Regulation and 6(1) of the Rome I Regulation. In that regard, recital 24 of Rome I refers to a consistency in interpretation of the substantive scope between the rules in Brussels I (revised) and in Rome I.

Aiming at a smooth application of this provision in the online context, the Council of the European Union and the Commission, in a joint statement adopted at the time of adoption of the Brussels I (revised) Regulation, specifically mentioned that the language of a website or the currency provided do not in itself constitute sufficient relevant factors in the determination of 'directing activities'.[271] Neither will the mere fact that a consumer simply had knowledge of the service or goods provided by a website accessible in his country suffice to trigger the protection of Brussels I (revised) or Rome I Regulations.

Interpretation by the Court of Justice of the European Union

Questions have arisen regarding the application of the concept of "directing activities. Several judgments rendered by the Court of Justice of the European Union have clarified the concept thus providing guidance for its application.

The Court of Justice has given guidance on how to interpret the notion of 'directing activities' towards a certain Member State. In its landmark judgment *Pammer/Alpenhof*[272] the Court had to decide whether the accessibility of an internet site is sufficient to assume that the trader has directed his activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of the Brussels I (revised) Regulation.

The Court ruled that the mere accessibility of an internet site in a given Member States is not sufficient to establish that the trader directed his activities there. On the contrary, to establish this it must be ascertained in the light of the websites and the trader's overall activity that before the conclusion of any contract with the consumer, the trader was envisaging doing business with consumers domiciled in one or more Member States, including Member States of the consumer's domicile.

The Court developed a list of criteria which can be used as indication of such intention.

- the international nature of the activity,
- mention of itineraries from other Member States for going to the place where the trader is established,

[271] Joint Declaration of Commission and Council concerning Articles 15 and 73 of Regulation (EC) No 44/2001, http://data.consilium.europa.eu/doc/document/ST-14139-2000-INIT/en/pdf, cited in recital 24 of the Rome I Regulation.

[272] *Pammer and Hotel Alpenhof*, Joined Cases C-585/08 and C-144/09, EU:C:2010:740.

- use of a language or a currency other than the language or currency generally used in the Member State of the trader with the possibility of making and confirming the reservation in that other language,

- mention of telephone numbers with an international code,

- outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States,

- use of a top-level domain name other than that of the Member State in which the trader is established, and

- mention of an international clientele composed of customers domiciled in various Member States.

However, the following elements do not constitute evidence of such intention:

- the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled, or

- an email address and other contact details, or

- the use of a language or a currency which are the language and/or currency generally used in the Member State of the trader.

Subsequent judgments have also clarified two important points on the application of Article 17. In *Mühlleitner*[273] the Court ruled that it is not necessary for the contract to be concluded at a distance, but that this can be taken into account when looking at all the relevant factors necessary for the establishment of whether a trader directs activities towards a certain Member State.

In *Emrek*, the Court ruled that Article 15(1)(c) of the Brussels I (revised) Regulation does not require a causal link between an internet site and the conclusion of the contract. However, such a causal link constitutes evidence of the connection between the contract and a commercial or professional activity directed to the Member State of the consumer's domicile.[274]

Interpretation by selected national courts

A case from Ireland of 2014 shows a clear application of the *Pammer/Alpenhof* criteria. The case concerned a website of a Belgian hospital, which was in English and included an Irish telephone number to contact the hospital, a testimonial from an Irish patient and quoted prices in Pound Sterling and Euro. The court considered that this information were sufficient to hold that the Belgian hospital directed its activities towards Ireland.[275] In another Irish judgment of 2013 the court did not affirm an 'activity directed' towards Ireland in the case of

[273] *Mühlleitner*, Case C-190/11, EU:C:2012:542.
[274] *Emrek*, Case C-218/12, EU:C:2013:666 .
[275] McDonald v AZ Sint Elizabeth Hospital and another [2014] IEHC 88.

the website of a Polish hospital, where the only linking factor was the '.uk' domain name and the use of the English language.[276]

In a Dutch case from 2014 the court came to the conclusion that a Scandinavian investment bank directed its activities towards the Netherlands via their Luxemburg branch, based on the following factors: the website specifically mentioned that outside the Nordic region it also offered international private banking services via its branch in Luxemburg, thus showing the intention to conduct business with other countries than Luxemburg; the website was in English and had a '.com' domain name and the bank also had manifested the intention to conduct business with the particular client in the Netherlands by sending the written confirmation of the contract to an address in the Netherlands.[277] In a case one year earlier the court also came to the conclusion that a Belgian hospital was directing its activities towards the Netherlands where it provided for a first consultation and aftercare in the Netherlands, with the main procedure taking place in Belgium.[278]

A Belgian court decided that a Swiss/German company offering a certain medical device directed its activities towards Belgium because of the following factors: the use of a '.com' domain name, the contact details of the sales representative in Belgium, a Belgian flag on the website, the international nature of the activity (sales within the whole EU), directions from airports throughout the EU to the business' venues.[279]

In 2013 a French court of appeal found that a Spanish company was not directing its activities towards France for the sale of a particular item, even though it was directing its activities towards France when it came to the sale of other items available on the website. It based its decision on the fact that for this particular item the French language was not used (only Spanish and English were used) whereas for the other items on the website the French language was used. This combined with the fact that the website had an '.es' domain name and the Euro was used as a currency, made the court come to this conclusion.[280]

ANNEX 8 – PREFERRED POLICY OPTION: DETAILED ASSESSMENT

ONLINE SALE OF TANGIBLE GOODS

As described in Section 6 of the impact assessment report, the following rules will be harmonised across the EU. The following sections explain why these choices were made, identifying their legal implications for Member States, as well as the main impacts on business and consumers.

[276] Harkin v Towpik [2013] IEHC 351.
[277] Court of First Instance, Amsterdam, 25 June 2014, HA ZA 13-607.
[278] Court of First Instance, Midden-Nederland, 7 August 2013, HA RK 13-155. In an earlier case, prior to the *Pammer/Alpenhof* judgment, the court came to the conclusion that a Belgian garage owner did not direct its activities towards the Netherlands, as the mere fact that the garage owner paid a visit to check a car in the Netherlands (on invitation of the person domiciled in the Netherlands) is not sufficient to establish that there was any activity directed towards the Netherlands, District Court Tilburg, 3 September 2008, 484280 cv 08-2812.
[279] Court of Appeal, Brussels (9th Chamber), Nouvag v M.J., 30 January 2014, 2013/AR/1336.
[280] Court of Appeal, Paris, 12/11100, 15 November 2013.

Section 1 - Areas of law covered by the preferred policy option

1. Remedies

The Consumer Sales and Guarantees Directive currently provides for a particular order in which remedies can be exercised: a consumer is first entitled to request repair or replacement of faulty goods, and as a second step price reduction or termination of the contract. Member States' national laws differ as to the implementation of these minimum harmonisation rules. To provide legal certainty to both businesses and consumers and significantly facilitate cross-border transactions, the proposal will fully harmonise the order in which remedies can be exercised, in line with the current provisions of the Consumer Sales and Guarantees Directive. This has already 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.

	Legal comparison	Impact on Businesses	Impact on Consumers	Stakeholders' positions
Hierarchy of remedies	• AT, BE, BG CZ, DE, DK, EE, ES, FI, FR, HU, IT, LV, LU, MT, NL, PL, RO, SK, SE: No change in the level of consumer protection, nor any additional legislative burden to adapt current legislation. • EL, CY, HR, LT PT, SI: The level of consumer protection would decrease. • UK: The short-term right to reject of 30 days will have to be abolished if a hierarchy of remedies is established across the EU. This would be partially counterbalanced by the right of withdrawal from the contract for any reason foreseen in the Consumer Rights Directive, for a period of 14 days after delivery. • IE: the situation and consequences will be the same as in UK as regards the current long-term right to reject.	• Businesses would sell more confidently cross-border knowing that they will have to comply with the same set of rules as regards the order of remedies available to consumers in the EU. • Businesses would face less refund (and less price reduction) requests, i.e. less costs, in those Member States (including their domestic markets) where there is currently no hierarchy of remedies.	• Overall, consumer confidence may increase through a uniform level of consumer protection. • However, in the Member States where there is currently no hierarchy of remedies, consumers' confidence is likely to decrease at first, due to the reduction in the level of protection. • Stimulating consumers to first ask for the repair of products will contribute to greater durability of goods and therefore to a more sustainable consumption. • According to recent consumer data[281], 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.	• Stakeholders' Consultation Group and Public consultation: Businesses argued in favour of fully harmonised rules establishing a hierarchy of consumer remedies across the EU, along the lines of the current Consumer Sales and Guarantees Directive. On the contrary, consumer organisations broadly support a free choice of remedies. Data collected by a recent study[282] show that the majority of enforcers and ADR bodies did not consider the hierarchy of remedies to be an issue for consumers.

[281] "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015, to be published).
[282] See footnote 1.

No hierarchy of remedies	• AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HU, IT, LV, LU, MT, NL, PL, RO, SK, SE: The level of consumer protection in these Member States will increase, and Member States will have to adapt their current legislation. • EL, CY, HR, LT, PT, SI: No change in the level of consumer protection, nor any additional legislative burden to adapt current legislation • IE, UK: The need for the current short-term right to reject may disappear, if termination of the contract becomes immediately available to consumers.	• On the one hand, businesses would sell more confidently cross-border knowing that they will have to comply with the same set of rules as regards the order of remedies available to consumers in the EU. • On the other hand, businesses from most Member States would face additional costs for refunds and price reduction. This would undermine the achievement of the overall policy objective to decrease costs for businesses selling cross-border. Among those businesses, SMEs would be disproportionately affected, since they would be less likely to afford an increased demand for refund/price reduction. • Overall, more businesses could be discouraged from selling cross-border than encouraged to do so. SMEs in particular might be more reluctant to sell to other Member States, as consumers abroad would be more likely to request a direct refund instead of waiting for a replacement or a possibly lengthy repair.	• Consumers would be more confident to buy cross-border, knowing they will have the same rights across the EU. In the Member States where a hierarchy of remedies is currently in place, consumers' confidence is likely to increase. • There may be upward pressure on consumer prices, since some businesses may pass the increased refund costs to consumers.	

2. Notification obligation by the consumer

The Consumer Sales and Guarantees Directive leaves it up to the Member States to determine whether a consumer must inform the seller of the lack of conformity within a specified period of time, not shorter than two months from the moment of discovery. 18 Member States have introduced a notification duty, while 10 have not made use of this provision. The consequence of not respecting this notification obligation is that consumers will lose their rights. The issue of whether there is a notification duty or not is important for traders who wish to sell abroad, since they would need to know whether prior timely notification would be a pre-condition for consumers to claim their remedies.

The proposal will fully harmonise that consumers will not need to notify a defect within a certain period of time. This will facilitate cross-border trade in the EU, as the existing optional possibility for Member States to create such an obligation has adverse effects for the internal market and consumer protection. Moreover, data shows that there is no need to provide for a specific notification deadline as 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.[283]

	Legal comparison	Impact on Businesses	Impact on Consumers	Stakeholders
Notification duty	• In the 17 Member States where there is currently a notification duty (BE, CY, EE, ES, FI, HR, HU, IT, LV, MT, PT, RO, SI, DK, NL, SE, SK), there will be no significant change in the level of consumer protection. Slight differences could occur on account of the length of the notification period.	• A uniform notification duty across the EU would provide businesses with legal certainty, as they would expect consumers from all Member States to notify them of any lack of conformity within the specified period. • Businesses may incur additional operation costs to handle notifications from consumers across the EU. • Businesses may be able to reject some consumers' remedies, on account of non-notification or delayed notification, and thus incur fewer costs for providing remedies. • Some businesses might not take advantage of the opportunity to reject consumer remedies on these grounds, since this might have a negative effect on their reputation. This would be particularly relevant when dealing with consumers in MS where there is currently no notification duty.	• Overall consumer confidence might increase through a uniform better understanding of consumer protection rules. • In Member States where there is currently no notification duty, consumers' confidence would significantly decrease, due to the reduction in the level of protection. • Consumers, especially in Member States where there is currently no notification duty, might be deprived in practice of their rights due to insufficient information or lack of experience concerning the new duty and its modalities.	• Stakeholders' Consultation Group and public consultation: Businesses argued strongly in favour of a notification duty for the consumer, and preferably a short one. Most business associations argued that a lack of notification could impair the ability of the trader to adequately repair or replace a defective product. Consumers' organisations generally rejected the inclusion of a notification duty, arguing that consumers would be likely to be unjustly deprived of their remedies. They also added that this would not significantly change the current practice, since consumers are always interested in notifying the trader of any defect as early as possible.
	• In the 11 Member States where there is currently no notification obligation (AT, BG, CZ, DE, EL, FR, IE, LT, LU, PL, UK), the level of consumer protection would decrease. Legislative changes would be required.			
No notification duty	• In the 17 Member States where there is currently a notification duty, the level of consumer protection will increase. Legislative changes would be required.	• The effect of EU harmonisation specifying that the lack of notification does not affect consumers' right to exercise their remedies will provide businesses with legal certainty, as this would be applicable throughout the EU and businesses would save the costs of knowing national legislations and possibly adapting contracts. • Businesses would not be able to reject remedies on account of lack of or delayed notification. Costs for providing remedies may thus increase for businesses selling to Member States where there is currently a notification duty.	• Consumers in 18 Member States would be better protected and become more confident when buying domestically and cross-border, since they will not have to respect any notification obligations in order to enjoy their rights. • Overall consumer confidence would increase, as consumers would be able to rely on their rights across the EU regardless of notification duties and relevant modalities.	
	• No change in the level of consumer protection and no legislative changes required in the 11 Member States where there is currently no notification duty.			

3. Burden of proof

According to the Consumer Sales and Guarantees Directive, consumers can only ask for a remedy for non-conformity if such lack of conformity existed when the good was delivered. For a minimum period of 6 months, any lack of conformity invoked by the consumer is deemed to have existed at the time of delivery, unless the trader proves the opposite. While in 25 Member States the burden of proof is reversed in favour of the consumer for 6 months,

[283] See footnote 1.

3 Member States have extended this period (Poland to one year, France[284] and Portugal to two years).

The proposal will fully harmonise the period of time during which the burden of proof is reversed in favour of the consumer, setting the length of this period at two years. This will align the reversal of the burden of proof to the guarantee period. A roughly equal percentage of consumers had experienced a problem with a product within the first six months, between 6 and 12 months or between one and two years after purchasing the product.[285] The alignment will simplify the remedies regime and allow consumers to exercise their right effectively for the entire length of the guarantee period.

	Legal comparison	Impact on businesses	Impact on consumers	Stakeholders' positions
Reversal of burden of proof for 6 months	• No change in the level of consumer protection and no additional legislative changes required for AT, BE, BG CZ, CY, DE, HR, IE, DK, EE, EL, ES, FI, HU, IT, LV, LT, LU, MT, NL, RO, SE, SI, SK, UK.	• Legal certainty for businesses would increase. Businesses would sell more confidently cross-border knowing that they will have to comply with a single set of rules across the EU as to the period within which they will have to prove that there was no lack of conformity at the time of delivery. • Businesses might save additional costs of providing remedies, since for defects appearing after 6 months the consumer might fail to prove that the defect existed already at the time of delivery.	• Consumers in most (25) Member States would continue to enjoy the current level of protection. • In the remaining 3 Member States, consumers' confidence will decrease due to the reduction of protection level.	• Stakeholders' Consultation Group and Public Consultation: Consumers' organisations advocate for a period longer than the minimum standard provided in the Consumers Sales and Guarantees Directive (for example, 2-year), since a 6-month period could prevent consumers from exercising their rights. Almost all business organisations are in favour of maintaining the current 6-month reversal of burden of proof period.
	• The level of consumer protection would decrease in FR, PL, PT, and these Member States would have to adapt their current legislation.			
Reversal of burden of proof for a longer period (2 years)	• The level of consumer protection will increase in AT, BE, CZ, DE, DK, EE, ES, FI, FR, HU, IT, LV, LU, MT, NL, PL, RO, SK, SE, and these Member States would have to adapt their current legislation.	• Legal certainty for businesses would increase. Businesses would sell more confidently cross-border knowing that they will have to comply with a single set of rules across the EU as to the period within which they will have to prove that there was no lack of conformity at the time of delivery. • In 26 out of Member States, businesses would have to incur for a longer period the costs of proving that there was no lack of conformity	• Consumers in 26 Member States would be better protected and would be able to request a remedy without having to prove the existence of a defect for a longer period.[287] This would further increase their confidence in buying both domestically and cross-border. • Consumer prices could increase, since businesses may pass the additional costs to	
	• By adopting the currently higher standard of 2 years, the level of protection would increase in PL and remain the same in FR and PT.			

[284] 2 years as of 18 March 2016; currently 6 months.
[285] See footnote 1.
[287] This would also contribute to simplifying the exercise of remedies by consumers, in line with Case C-497/13.

	• By adopting the mid-way solution of 1 year, the level of protection would decrease for FR and PT and remain the same for PL.	at the time of delivery, thus increasing their operation costs. • However, only a minority of traders insist on consumers proving the trader's liability within 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. This means that in the current guarantee system the reversed 'burden of proof' period does not make a significant difference in practice and it is often operating de facto as long as the entire 2-year legal guarantee period[286]. 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, compared to the current situation.	consumers, however consumers may also gain economically as they will more easily be able to exercise their rights. Overall, it could also lead to better quality and more durable products available for consumers. • The uniform level of consumer protection which is higher than what is provided in the Consumer Sales and Guarantees Directive will strengthen all EU consumers' confidence in buying online. This is particularly the case for cross-border online purchases where consumers' enhanced ability to fully exercise their right to a legal guarantee will mitigate the distance-related risks (no in-person contact with seller, no "touch and feel" of the product, shipping) inherent to these transactions.	

4. Legal guarantee period

The Consumer Sales and Guarantees Directive provides consumers with a legal guarantee for a period of 2 years. The seller is liable for any lack of conformity that existed at the time of delivery and becomes apparent during the legal guarantee period. While 23 Member States have made use of the 2-year period, in 1 Member State the period is 3 years, in 2 Member States it is unlimited and in 2 other Member States there is no specific legal guarantee period but the consumer rights are only limited by the prescription period (i.e., the period within which the consumer can exercise his rights). Fully harmonising those rules across the EU would provide legal certainty to both businesses and consumers and significantly facilitate cross-border transactions.

The proposal will fully harmonise the length of the legal guarantee period at two (2) years. This corresponds to the current period of the Consumer Sales and Guarantees Directive, which has been implemented by the large majority of Member States. In addition, this is supported by very recent data (see below), which suggest that this period is appropriate as consumers consider a two-year period as reasonable.

[286] See footnote 1

	Legal comparison	Impact on businesses	Impact on consumers	Stakeholders' positions
2-year legal guarantee period	• No change in the level of consumer protection and no additional legislative changes required for AT, BE, BG CZ, CY, DE, DK, EE, EL, ES, FR, HR, HU, IT, LV, LT, LU, MT, PL, PT, RO, SI, SK. • The level of consumer protection would decrease in FI NL, SE. • It would also decrease to a lesser extent in IE and UK, since consumers' rights would be extinguished after 2 years (whereas they are currently not extinguished, but subject to the seller's legal right to refuse to provide the requested remedy on the grounds of prescription). • These 5 Member States would have to adapt their current legislation.	• Businesses would sell more confidently cross-border knowing that the period within which they can be held liable for a lack of conformity is 2 years throughout the EU. • Businesses selling in FI, NL, SE, IE and UK are likely to face less costs for providing remedies to consumers, since they would avoid providing remedies after the 2-year period has elapsed.	• Overall, consumer confidence in cross-border purchases may increase through a uniform level of consumer protection in the EU. • In Member States with a currently longer guarantee period, consumers' confidence is likely to decrease at first, due to the reduction in the level of protection. • The relative majority of consumers (between 34%-43%)[288] consider that a 2-year legal guarantee period is more reasonable for white, brown and grey goods[289]. • Consumers will not be deprived of the opportunity to exercise their rights: half of EU consumers who did not invoke their rights because the legal guarantee had expired thought that the legal guarantee period was 12 months.[290]	• Stakeholders' Consultation Group and public consultation: Stakeholders showed little support for an approach harmonising prescription periods instead of guarantee periods. As to the length of the guarantee period, positions were rather divergent. Legal practitioners preferred the approach of CESL with a short and long prescription periods of 3 and 10 years respectively. Industry representatives opposed that option as too complicated. The vast majority of business associations support full harmonisation of the current 2-year legal guarantee period, since it has worked very well in practice. Consumer organisations, on the other hand, support a longer legal guarantee period of 6 years, especially for durable goods, and oppose any harmonisation of prescription periods.

[288] See footnote 1. 20-22% of respondents considered 3 years and 10-21% 5 years to be a reasonable legal guarantee period for the same types of goods. 8-14% said a 1-year period would be reasonable.

[289] 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.

[290] See footnote 1.

Legal guarantee period longer than 2 years	• The level of consumer protection would increase in AT, BE, BG CZ, CY, DE, FR, HR, DK, EE, EL, ES, HU, IT, LV, LT, LU, MT, PL, PT, RO, SI, SK. These Member States would have to adapt their legislation. • By adopting the currently higher standard of an unlimited guarantee period, the level of protection would remain the same in FI and NL and would increase in SE, IE and UK. • By adopting the mid-way solution of 3 years, the level of protection would remain the same in SE and decrease in FI and NL. • Independently of the length of the guarantee period, in IE and UK legislation will have to be adapted in order to introduce a legal guarantee period.	• Businesses selling in the 22 Member States with a current legal guarantee period of 2 years would face additional costs for providing remedies during an extended period. This would undermine the achievement of the overall policy objective to decrease costs for businesses selling cross-border. • SMEs would be disproportionately affected, since they would be less likely to afford increased costs for remedies.	• Consumers would be more confident to buy cross-border, since their rights would be the same across the EU. • In the 22 Member States with a current legal guarantee period of 2 years, consumers' confidence is likely to increase. • Consumer prices are likely to increase, since businesses may pass to consumers the increased costs of providing remedies.	

Section 2 - Areas of law not covered by the preferred policy option

1. Consumers' right to damages

The Consumer Sales Directive stipulates the remedies available to the consumer in the event of non-conformity of the purchased goods, but leaves provisions on the consumer's right to receive compensation for the losses caused due to such lack of conformity to national laws. Member States' national legislations have already provisions governing the consumer's right to damages. No internal market barrier exists with this respect as Article 6 (2) of the Rome I Regulation does not apply.

The proposal will not include a right to damages Member States' contract laws already have such a right in case of faulty tangible goods and interference in such established well-functioning regimes is not necessary. The table below summarises how the rejected approach to include fully harmonised rules on the right to damages would have affected Member States, consumers and businesses.

	Legal analysis	Impact on businesses	Impact on consumers	Stakeholders' positions
Harmonisation of right to damages	• In all Member States, national rules governing the consumer's right to damages are in place. Even when these rules are of a mandatory nature, they are linked to general rules of national contract laws as regards the concept of damages and the types of losses covered. Therefore, these rules often do not fall under the scope of article 6 (2) of the Rome I Regulation[291], and consequently do not constitute additional requirements that traders have to comply with when selling to consumers in other Member States.	• Fully harmonising the rules on the consumer's right to damages in the event of non-conformity of the purchased goods would enhance legal certainty. Businesses would know to which extent and under which conditions they would be liable across the EU for losses suffered by consumers. • Covering non-economic losses could entail a high level of uncertainty for businesses, since it might be difficult for traders to foresee and quantify potential losses.	• Fully harmonised rules on the right to damages could increase consumers' confidence in buying cross-border. • Problems reported by consumers with cross-border purchases are not related to the right to damages.	• Stakeholders' Consultation Group and Public Consultation: Almost all stakeholders (businesses and consumers) did not support the inclusion of rules on damages in the proposal.

2. Rules on Unfair Contract Terms

The Unfair Contract Terms Directive protects consumers by providing a general clause prohibiting unfair standard contract terms. It includes an indicative, non-exhaustive list of 17 clauses which may be regarded as unfair. Unfair contract terms are not binding on the consumer. Some Member States have gone beyond these minimum standards, providing a list of clauses that are always considered as unfair (black list)[292] or a combination of a black list and a list of clauses that are presumed unfair (grey list).[293]

Furthermore, according to the Directive the unfairness control does not cover clauses negotiated individually between the trader and the consumer, the definition of the main subject matter of the contract or the adequacy of the price and counter-performance. However, in some Member States[294] individually negotiated contractual terms are also subject to unfairness control, while in others[295] the unfairness control is extended to the main subject matter of the contract or to the adequacy of the price and counter-performance. The added value of fully harmonising the rules on unfair terms is uncertain because no uniform application is possible due to the application of the general clause by national courts which, except in the cases of ECJ decisions will not lead to a uniform interpretation of the general "unfairness" clause. Moreover, the Unfair Contract Terms Directive will be evaluated in a comprehensive manner REFIT Fitness check process which will take place in 2016. Therefore, the proposal will not change the current rules on unfair contract terms, since there is currently a lack of sufficient evidence to justify full harmonisation.

The table below summarises how the rejected approach to include fully harmonised rules on unfair contract terms would have affected Member States, consumers and businesses.

[291] See Annex 7.
[292] Belgium, Bulgaria, Czech Republic, Estonia, ,Greece, Lithuania, Luxembourg, Malta, Portugal, Slovakia and Spain.
[293] Austria, France, Germany, Hungary, Italy, and the Netherlands.
[294] Austria, Czech Republic, Finland, France, Luxemburg, Malta, Spain and Sweden.
[295] Finland, Luxemburg, Malta, Portugal, Slovenia, Sweden.

	Legal analysis	Impact on businesses	Impact on consumers	Stakeholders' positions
Fully harmonised rules on unfair contract terms	• The overall level of consumer protection in Member States would not change significantly. By introducing a fully harmonised rule on the unfairness control, the application of the harmonised rule would still depend on the interpretation by national courts. • If the fully harmonised unfair contract terms regime would include a black or grey list, all those Member States which have such or do not have at all black or grey lists of unfair terms would have to adapt their law, either by introducing such lists or changing them.	• Introducing fully harmonised rules on unfair contract terms would provide further legal clarity. Businesses would be able to sell to consumers cross-border without having to monitor whether their contract terms and conditions could be considered unfair under different national legislations. This could enable businesses to sell more confidently cross-border.	• Overall, consumer confidence in cross-border purchases may increase through a uniform level of protection against unfair contract terms in the EU. • The level of consumer protection would however be decreased in those Member States where the unfairness control standards are currently higher than the fully harmonised standards. This could affect consumers' confidence in online purchases both domestically and cross-border.	• Stakeholders' Consultation Group and Public Consultation: Some businesses would welcome full harmonisation on this aspect; however, leaving the unfair terms outside the scope would not be considered as a major problem either. A black-list was considered useful although its length should remain limited. Both SMEs and consumer representatives were against including rules on unfair terms in the proposal. In particular, the main pan-European consumers' organisation argued that full harmonisation should not apply to this principle–based field of law. It would be preferable to wait for the results of the REFIT exercise on the Directive 1993/13 to decide if any further measures are needed in this respect.

SUPPLY OF DIGITAL CONTENT

Section 6.2 of the main IA report sets out the contract law rules for digital content that will be harmonised in the proposal. The following sections explain why these choices were made, identifying their legal implications for Member States as well as the main impacts on businesses and consumers.

1. Scope

(a) Types of digital content to be covered

Digital content can be provided on a tangible medium, downloaded by consumers on their devices or otherwise accessed, for instance web-streamed. This proposal will apply to digital content irrespective of the mode of supply. This approach is consistent with the Consumer Rights Directive which also covers digital content that is supplied on a tangible medium, downloaded or accessed online. For the purposes of this instrument, digital content covers a large variety of products and services, from music, video, audio, applications and games to software and cloud storage. The table below presents the main impacts of this policy choice:

	Impact on businesses	Impact on consumers	Stakeholders' positions
Extended scope covering all types of digital content	• An extended scope increases compliance costs for businesses. However, it reinforces the positive impacts of full harmonisation – i.e. the decrease in legal uncertainty and legal costs stemming from diverging rules in Member States. • Current market trends blur distinctions between separate categories of digital content (e.g. storage features offered by social platforms). A limited scope would risk creating artificial boundaries between converging digital content and corresponding business models. • A limited scope would not be technologically neutral and sufficiently future proof, as it might exclude future types of digital content from the scope.	• Fully harmonised rules covering all types of digital content would increase consumers' confidence when buying or accessing any kind of digital content from anywhere in the EU. This is particularly relevant since consumers currently enjoy the convergence of separate categories of digital content and do expect their interests to be adequately protected in this context. • Consumers' problems with digital content are more or less at the same level across different types of digital content. According to a recent consumer survey, around one third of consumers faced problems with "goods-like" content such as music and games as well as with "service-like" content such as cloud storage[296].	• Stakeholders' Consultation Group and public consultation A vast majority of stakeholders (including, businesses, SMEs and consumers) called for a technology- and future-proof, broad definition of digital content. In particular, they argued that having a narrow definition would fragment the market and not be in line with the evolution of a market where the interplay between different types of services is more and more frequent. However, representatives of businesses active in the trading of digital content expressed the need to differentiate between categories of digital content; e.g. between a movie which has been downloaded compared to a cloud contract or software-based products which evolve throughout time. Some even asked that the proposal shall not cover digital services such as storage or sharing services, as well as services processing data and user generated content.

(b) Digital content paid for with money or with data

Digital content may be supplied either against a price or against (personal and other) data provided by consumers as a counter performance. Suppliers can gather consumers' data in a number of ways, for example by requiring the consumer to fill-in an online questionnaire or by building up an e-profile of a consumer. Consumers recognise that the great majority of contracts for the supply of digital content involve collection of data of an economic value, which can be monetised by the suppliers. This is confirmed by recent studies, according to

[296] Economic Study on Consumer Digital Content Products, 2015 (to be published).

which consumers are more and more aware that their data are collected and used by service providers.[297] Moreover, 81% of EU consumers think that their data have a value.[298]
The proposal will cover digital content offered against the payment of a price (in money) as well as, under certain conditions, another counter-performance of an economic value, mainly consumer data.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Extended scope covering digital content supplied against a counter-	• The scope covering not only digital content paid with money introduces higher compliance costs across the digital industry. • Such a scope would create a level playing field for businesses: businesses offering digital content against payment of a price – which would need to obey consumer protection standards – would not be disadvantaged compared to their direct competitors offering digital content against data who would not have the same restrictions. • Covering only digital content paid for with money would discriminate between different business models – it would provide an unjustified incentive for businesses to move towards offering digital content against data.	• A large share of consumers access digital content offered against their data: around 30% for antivirus and navigation software or cloud storage services, 77% for streamed events and more than 50% for movies, film, TV content, e-books or games. Ensuring an adequate level of protection to those consumers would increase overall consumers' confidence. • A significant share of consumers face problems with "free" digital content. In Austria for example, 39% of users who accessed music online "for free" reported a problem (the respective share of users paying for music online was 42%). Likewise, in the Czech republic 42% of users of "free" online games reported a problem (compared to 53% reporting problems with paid online games). • The extended scope is consistent with the existing personal data protection framework, which recognises the high importance and value of personal data. • The market for consumers' data is growing fast and business models based on monetising data become predominant – a narrow scope would not ensure a high level of and future-proof consumer protection.	• Stakeholders' Consultation Group and public consultation: Consumer organisations, legal practitioners and the pan-European SME association suggested that given the evolution of business models in the digital sphere, digital content is increasingly provided against users' data or other counter performance so the proposal must take this market evolution into consideration to be future proof. However, business organisations (including businesses active in the field of digital content development) are against such an extension and advised against overlaps with data protection rules. Other business organisations argued that the focus should not be on whether the data had been actively provided but rather on how this data is used by the businesses.

2. Conformity of digital content with the contract

Conformity criteria determine when the digital content meets contractual and statutory requirements. The consumer can invoke his rights vis-à-vis the content supplier only if the digital content does not meet those criteria. Conformity criteria for digital content must reflect the dynamic and evolving characteristics of digital content which follows technical developments. Consumers should have a clear-cut understanding of what they can expect from digital content, and suppliers should be encouraged to promote innovative solutions.
Therefore, the proposal envisages a mixture of contractual and statutory criteria. In the first place, the contract should determine what the consumer can expect from a digital content. Where the contract is silent or unclear about particular features, the statutory criteria should kick-in referring to normal use, existing standards and industry good practices.

[297] See Study on "The commercial use of consumer data - Report on the UK Competition and Market Authority's call for information", p. 98-100.
[298] See "Symantec, State of Privacy Report", p. 11, 2015.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Conformity with the contract	• The priority given to contractual criteria ensures the flexibility needed for businesses to innovate and to develop new content. • The description of the content in the contract will not entail any additional cost for businesses, since this is part of the already compulsory pre-contractual information according to the Consumer Rights Directive. • EU wide harmonised criteria contribute to significant decrease in compliance and legal costs as business would not need to find out and comply with each Member State's law which classifies contracts for the supply of digital content differently.	• While contractual criteria ensure flexibility needed for innovation to flourish, the envisaged statutory criteria constitute a safety net for consumers. By referring to normal use, international standards and public statements of the supplier, statutory criteria ensure high level of consumer protection and should contribute to increasing consumer confidence. • Clear-cut information in the contract on issues such as availability of updates will ensure that consumers know upfront if further payments might be required. • Increased clarity of consumers' rights can be achieved by stipulating that conformity shall be assessed against the most recent versions of the digital content.	• Stakeholders' Consultation Group and Public consultation: Almost all stakeholders (including businesses and consumers) consider that a mixture of contractual and statutory conformity criteria are appropriate to provide sufficient flexibility with regard to future forms of supplying digital content. In their view, this reflects the approach adopted in the Sales and Guarantees Directive which has proven to be efficient

3. Remedies for the failure to supply the digital content

The consumer should have an appropriate remedy in the event the ordered digital content is not supplied. Considering the nature of digital content, in the majority of situations, consumers expect the content to be supplied immediately upon ordering. Consequently, the proposal envisages that when the supplier fails to supply the content, the consumer should have an immediate right to terminate the contract and claim his money (or any other counter performance) back. The solution is comparable with the consumer's right to terminate the contract upon the seller's failure to deliver tangible goods (under Article 18 paragraph 2 of the Consumer Rights Directive) while accommodating specificities of the digital world.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Remedies for the failure to supply	• Business might be faced with an increase in numbers of refunds due to the failure of supply and associated operational costs of dealing with consumer complaints related to the failure of supply. The increase might be considerable in comparison with some current market practices according to which suppliers only offer consumer discounts on future supplies (instead of refunds).	• A clear-cut increase in consumer protection by a straightforward right in the case of failure of supply (e.g. no more need to accept discounts on future supplies as the only remedy). • Upon termination, the consumer can get back his money (and any other counter-performance) as well as any content the consumer generated[299].	Stakeholders' Consultation Group and Public consultation: Consumer and business stakeholders generally support consistency of the remedies available to consumers of digital content with those applicable to tangible goods.

4. Remedies for the supply of non-conforming digital content

Similar to tangible goods, the consumer of digital content should have a set of rights vis-à-vis the supplier when the digital content does not conform to the contract. Taking into account the current market practices and the diverging costs associated with different possible remedies, in the first place the supplier should be obliged to remove any malfunction of the digital content (e.g. by releasing an update or replacing faulty content). Only where the non-conformity is not addressed properly the consumer should have a right

[299] More details in "Consequences of termination of the contract" below.

to price reduction or to terminate the contract. Still, the right to termination should be limited to malfunctions of main features of the digital content.
The proposal will establish a fully harmonised hierarchy of remedies for digital content, mirroring the respective rules on tangible goods, while reflecting specificities of digital content.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Remedies for the supply of non-conforming digital content	• Businesses would face significantly less costs for refunds if price reduction and termination are only allowed as second-tier remedies. • Bringing the digital content to conformity triggers marginal costs per consumer for businesses. • Providing the right to terminate only when non-conformity relates to the main features of the digital content would save further costs to suppliers.	• Consumers' confidence would be increased through a clear-cut order of remedies – including a clear catalogue of circumstances when the consumer can ask for price reduction/termination • The hierarchy of remedies reflects consumers' expectations; given the large amount of digital content that consumers access without paying a price in money, consumers are likely to have less interest in claiming a price reduction or money back than in having the digital content function properly.	• Stakeholders' Consultation Group: businesses and public consultation: Business organisations unanimously underlined that suppliers of digital content should have the choice to bring the goods into conformity before giving the possibility to the consumer to terminate the contract. However, for some businesses involved in the trading of digital content, consumers should only be entitled to terminate the contract against reimbursement of the full price. They should not be given the right to bring the digital content to conformity, as this may be very expensive. Others do not consider remedies for lack of conformity appropriate at all for digital content. Consumers' organisations argue that consumers should be given the possibility to terminate the contract in the first instance.

5. Burden of proof

Due to the technical nature of digital content, consumers are hardly in a position to ascertain if a problem with a digital content is caused by a fault in the digital content (i.e. for which the supplier is responsible) or by another, unrelated malfunction of consumer's hardware or software (which the supplier is not responsible for). It is more efficient for the supplier to determine the source of the problem, provided that consumers cooperate by giving the supplier access to their hardware and software.

Therefore, the proposal envisages that in relation to faulty digital content the burden of proof will be reversed and be borne by the supplier. The reversal is not limited in time as (unlike tangible goods) digital content is not subject to wear-and-tear. However the supplier should be discharged from this reversed burden when the consumer's hardware or software does not meet the technical requirements set by the supplier at the time when the contract was concluded.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Reversal of the burden of proof	• The reversal of the burden of proof increases the number of consumers' complaints that businesses will need to accept and the associated costs of inspections etc. An increased competitive/cost-benefit pressure to accept all complaints without investigating the matter is also likely. • Such negative impacts are mitigated by the consumers' duty to cooperate and their obligation to comply with	• Effective reversal of the burden of proof will significantly help consumers to successfully claim their rights towards suppliers. • The reversed burden reflects the mismatch between technical knowledge of an average consumer and a supplier of digital content. • Reversal of the burden means no costs for the consumer for 3rd party technical expertise. • More complaints are likely to be solved positively for	• Stakeholders' Consultation Group and public consultation: 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. Industry is divided: for some business associations, a main SMEs umbrella association and IT associations, non-conformity should in principle be proven by the consumer; other associations could

	technical requirements determined by the supplier.	consumers	support a reversal of the burden of proof for a period ranging from two to six months.

6. Legal guarantee period

In relation to digital content, a legal guarantee similar to the current 2 year guarantee applicable for goods under the Consumer Sales and Guarantees Directive does not need to be envisaged. Consumer rights would be limited by national prescription periods. Considering that digital content is often offered continuously over a period of time (like services rather than as a one-off product), a guarantee period starting from the moment of supply is not appropriate. Moreover, unlike tangible goods, a defect in one copy normally means that all copies of the digital content will have the same problem (for example all users of a certain anti-virus software). Consequently, limiting consumers' right by a guarantee period would not be appropriate. The proposal will therefore not lay down a guarantee period for digital content and will prevent Member States from laying down such a period.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Guarantee periods	• The length of the guarantee period translates directly into business costs for dealing with non-conforming digital content (especially if combined with an unlimited-in-time reversal of the burden of proof). Those costs are mitigated by minimal marginal costs per consumer for bringing the digital content to conformity. • Digital content often has a short "shelf life" (i.e. is quickly replaced by new versions) – consequently, a long guarantee period would entail costs for business to service different versions/releases of the same content.	• Consumer confidence in digital content market depends on consumers being certain about their ability to invoke their rights if something goes wrong. Longer periods allow consumers more time to seek remedies. • Consumers recognise that digital content (predominantly) has rather short "shelf lives". Therefore consumers are not likely to exercise their rights for outdated content.	• Stakeholders' Consultation Group: no specific comments • Public Consultation: Businesses organisations (including those active in the digital content market), are almost unanimous in supporting the introduction of a reasonable time limit, without specifying its length. Consumers' organisations advocate for a long or indefinite period, but might also support the introduction of a reasonable time limit, not shorter than the one for goods (2 years).

7. Modification of the contract

Suppliers may offer digital content to consumers for a certain period of time (e.g. yearly access to music library or monthly access to cloud storage). In those cases, suppliers often reserve the right to alter some elements of the supplied digital content within the duration of the contract. Where such alterations relate to key performance features of the digital content supplied (e.g. functionality or interoperability), the supplier's right to alter the digital content needs to be balanced by the consumer's right to discontinue the contract and recover the money (and any other counter-performance) corresponding to the unconsumed content.
The proposal will therefore establish a right for consumers to terminate a contract for the supply of digital content if the supplier significantly alters the nature of the digital content.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Modification	• Flexibility for businesses when digital content is offered over a period of time will be ensured. Minor changes to the digital content can be introduced without legal consequences, provided they are envisaged in the contract. The consumer is allowed to terminate the	• Allowing a certain degree of flexibility for businesses to adapt the supplied content will benefit consumers too, since they will be able to benefit from market evolutions. • If the consumer considers that the proposed alterations to the digital content significantly change the content compared to the one initially	• Stakeholders' Consultation Group: no specific comments • Public Consultation: The vast majority of businesses organisations support the possibility for traders to make modifications to the contract to adapt to the evolution of technology and the market. The

	contract only for substantial amendments. This solution is in line with current good practices. • While the proposed solution may generate certain compliance costs, those are proportionate to the possibility given to businesses to change the main features of the digital content.	supplied, the right to terminate the contract offers an appropriate remedy. In those situations consumers would not need to incur any costs (apart from paying for the content already consumed). • Upon termination, the consumer can get back the money paid and any other counter performance, as well as any user-generated content[300].	majority of stakeholders (including consumers and many businesses associations) support that this possibility should be foreseen in the contract and that the consumers should be informed about the modification and should be able to terminate the contract upon modification.

8. Long terms contracts

Digital content is often offered to consumers on a subscription-like basis, binding the consumer to long term contracts (e.g. yearly access to music library or bi-yearly access to cloud storage). In order to prevent unjustified lock-in effects, the consumer should be allowed to terminate a long term contract after a period of one year. Recent data[301] show that one in five users experienced difficulties with an online service, the top issue being the difficulty to terminate the subscription.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Long terms contracts	• The right of the consumer to terminate long term contracts contributes to consumers' mobility and an improved competition – no lock-in effects. This is especially important for SMEs and new entrants to the market. Businesses may need to adapt their business models accordingly, and may face additional costs for dealing with consumers' requests.	• A right to terminate combined with data portability allows consumers to switch suppliers thereby improving their confidence in the market. • This solution follows the model of other developed markets where a right to switch between suppliers/providers has already been recognised.	• Stakeholders' Consultation Group: Several business organisations pointed to the potential negative impact of an early right to terminate a long-term contract on their business models. • Public Consultation: According to the vast majority of respondents, users should have the right to terminate long term contracts, provided that this possibility is included in the contract and that the termination is notified to the trader in advance. The digital technology industry association seems reluctant towards the right to terminate a contract where certain benefits, like discounts or additional features, have been provided to the consumer.. The main consumers' association argued that consumers 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. They also link the exercise of this right to the consumer's right to retrieve his data.

9. Consequences of termination of the contract

When the consumer is entitled to terminate the contract for the supply of digital content[302], it is important to determine the consequences of such a termination. Upon termination the supplier should smoothly return to the consumer the price (or refrain from using any other counter performance – i.e. data) which the consumer paid for the unconsumed content.

Moreover, in order to ensure effectiveness of the consumer's right to terminate, the supplier should allow the consumer to retrieve his data. This should be free of charge and without inconvenience for the consumer. The possibility for consumers to retrieve their data is a precondition for the effective exercise of the right to terminate the contract and to be able to

[300] More details in "Consequences of termination of the contract" below.

[301] Preliminary results from a study to inform future enforcement work of the Consumer Protection Cooperation Regulation; based on a EU wide sample of 23,393 people (to be published).

[302] See sections on Long term contracts, Modification of contracts and Remedies for non-conforming digital content for those limited conditions where the consumer is entitled to terminate the contract.

switch providers. In parallel, the consumer should refrain from further use of the digital content and the supplier may prevent the consumer from doing so.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Consequences of the termination of the contract	• The right to terminate creates the risk that some consumers might be able to continue to use the content after termination. However clear-cut restrictions on the use should mitigate the risk. Furthermore businesses might use proportionate technical measures to prevent its further use after termination. • Potentially high costs and legal uncertainty related to the obligation to discontinue the use of consumer's data upon termination (especially if the data has already been monetised by the business) are counter-balanced by increased consumers' mobility and practical abolition of lock-in effects. This is especially important for SMEs and new entrants to the digital market. • Consistency with the personal data protection framework: no additional compliance costs.	• The right to retrieve all data used or generated when enjoying the digital content is critical for consumer's confidence in relation to digital content. • The proposed solution generates certain obligations for consumers to delete digital content after termination of the contract.	• Stakeholders' Consultation Group: Suppliers pointed to difficulties in ensuring the digital content is deleted/not used anymore by consumers. They thus mentioned the possible use of technical protection measures to prevent the continued use. However consumer representatives opposed the use of technical protection measures for downloaded content. • Public Consultation: Consumer organisations support such a right, arguing further that consumers should be able to retrieve their data free of charge and within a reasonable period of time. This should be done 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.

10. Right to damages

A right to damages completes other remedies[303] the consumer has vis-à-vis the supplier of a faulty digital content. Where damage has been caused to other digital content and hardware of the consumer, it allows the consumer to cover losses caused by the non-conforming digital content in a way which puts the consumer as close as possible to the position in which he would have been if the digital content had been duly supplied and had conformed to the contract. The proposal will establish a right to damages for consumers whose hardware, software, and/or other digital content has been damaged by the digital content furnished by the supplier.

	Impact on businesses	Impact on consumers	Stakeholders' positions
Right to damages	• Liability for damages creates high risks and potential costs for business for handling consumers' requests for damages and litigation in case of disputes. • Considering the multi-tenancy character of digital content, a relatively minor incident could give rise to a small individual loss for consumers, but could cause heavy overall costs for a company. This would be particularly burdensome for SMEs. A harmonisation of the right to damages restricted to those losses where damage has been caused to other digital content and hardware of the consumer would mitigate	• The right to damages is crucial for consumers' confidence in accessing digital content, because it protects them against losses caused to their other digital content or hardware.	• Stakeholders' Consultation Group and public consultation: Business organisations warned against consumers who could misuse the damages rule for enrichment purposes. They also underlined financial risks for suppliers serving large numbers of customers. Consumer representatives were supportive of having clear rules concerning damages caused to the consumer's hardware and software because of the

[303] For more on the other remedies please see "Remedies for the supply of non-conforming digital content" above.

	this negative cost effect. • A right to non-economic damages would introduce high level of uncertainty about the type of non-economic losses that consumers could claim. It might be difficult for a supplier to foresee and quantify potential losses.		malfunctioning of the digital content.