ARTICLES

A QUESTION OF COHERENCE

The Proposals on EU Contract Rules on Digital Content and Online Sales

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ABSTRACT

Digitalization is revolutionizing our life. In response to its ever growing impact, the European Commission has tabled two proposals for new directives, one pertaining to contracts for the supply of digital content, the other regarding online and other distance sales of goods. This contribution analyses both proposals critically. It questions the need for having a separate regime encompassing contracts for sale of digital content in light of the possibility of adapting the existing legal framework to reflect the particularities of such agreements. It also warns against adopting more specific rules on online sales, which would further widen the gap in their treatment when compared to face-to-face agreements. The author bemoans the confusion and contradictions the new proposals would introduce to EU consumer law. The choice of a maximum harmonization approach extends this lack of coherence into Member State law. Even worse, the EU legislator interferes with areas that have so far been the exclusive domain of national civil law, such as determining adequate levels of damages or the consequences of termination. Despite the need for compromise, the author suggests that the Commission should not seek them at any cost, but stick to principles of good law-making in multi-level governance systems.

Keywords: consumer law; Digital Internal Market; digital content; EU contract law; online sales

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§1. INTRODUCTION

The European Union (EU) is searching for its place in private law. Not much has remained from its first communication on European contract law published in 2001, nor from its ambitious plan for more coherent rules on contract law suggested in the ‘action plan’ of 2003, or the quasi-European Civil Code euphemistically called the ‘Draft Common Frame of Reference (DCFR)’, and not even from the much scaled down ‘Common European Sales Law (CESL)’. A good deal of time and money has been spent already. This inevitably raises questions about tangible results. The Commission seems to be seeking, with a certain degree of impatience, for at least some area of contract law to reform. What is left on the table are two proposed directives, one on ‘certain aspects concerning contracts for the supply of digital content’ and the other on ‘certain aspects concerning contracts for the online and other distance sales of goods’.

As the titles of the drafts suggest, these two proposed Directives only cover some aspects of the agreements they deal with. They fail to encompass many points, such as the formation and the validity of the contract. They are insofar anything but fully-fledged sets of contractual rules that could be used by operators, as was the case with the CESL. The EU refuses to become a traditional civil law legislator. Instead, it goes back to what it knows best – regulating certain issues, but not all aspects of complex private relationships.

At the same time, one cannot fail to see that the EU proposals penetrate more deeply into the traditional territory of national private law than ever before. Though they are not exhaustive with regard to all topics relating to these two contract types, their rules affect areas that have hitherto been thought to be within the exclusive domain of civil law codifications. Questions addressed by the proposals include, inter alia, the notion of supply, the passing of risk, the consequences of termination, the adequacy

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9 Article 8(1) of the Online Sales Directive Proposal.
of damages\textsuperscript{11} and the right to terminate long-term contracts.\textsuperscript{12} Moreover, the two proposed Directives envisage full harmonization, leaving no freedom for the Member States to adopt stricter or more lenient provisions.\textsuperscript{13} Though this approach has already been followed by the Consumer Rights Directive,\textsuperscript{14} it has more serious consequences when applied not only to consumer protection rules, but also to ordinary rules of contract law.

This mixture of self-restraint on the one hand, with full and deep harmonization on the other, raises many questions. This article first sketches the boundaries and objectives of a new harmonized EU regime for digital content and online sales (Section 2). It will then examine the content of the proposals for its coherence with the existing EU rules on private law, or the acquis (Section 3). Furthermore, the relation between the proposed Directives and the national law of the Member States is to be examined (Section 4). The piece will end with some remarks on the efficient distribution of legislative competences in multi-level governance systems (Section 5), and a conclusion (Section 6).

\section*{\textsection 2. SEPARATE RULES ON DIGITAL CONTENT AND ONLINE SALES – WHAT FOR?}

\subsection*{A. SCOPE AND OBJECTIVES OF THE NEW RULES}

The European Commission has focused its proposals on contract rules, in line with its decade-old mantra that something must be done about their harmonization.\textsuperscript{15} For this purpose, it has picked the most interesting and modern contracts. This approach is not new, however. The proposed Online Sales Directive is effectively a newer version of the Directive on Distance Sales,\textsuperscript{16} and could have been called that if the name was not already taken. In contrast to the Distance Sales Directive, the proposed Online Sales Directive does not concern contract formation, but rather the performance of contracts. The regulation of this complex area will at least partly be moved to the EU level.

The proposal on ‘digital content’ also contains rules on the performance of the contract. In contrast to the proposal of the Online Sales Directive, its scope is not defined by a particular way of distribution, but rather by the object of the contract – being online content. The way the proposal defines its scope is very broad and cuts across

\begin{thebibliography}{16}
\bibitem{11} Article 14 of the Digital Content Directive Proposal.
\bibitem{12} Article 16 of the Digital Content Directive Proposal.
\bibitem{13} See Article 4 of the Digital Content Directive Proposal; Article 3 of the Online Sales Directive Proposal.
\end{thebibliography}
traditional categorizations of contract law.\textsuperscript{17} It covers not only audio content (basically music and audiobooks), videos, applications (apps), games and other software,\textsuperscript{18} but also extends to \textit{services} allowing the creation, processing or storage of data in digital form and the sharing or interaction with data by the users.\textsuperscript{19} Examples of the latter are cloud services and social networks. The proposal applies to them only in cases where they are remunerated. Yet crucially, remuneration may also consist in the active provision of personal or any other data by the user.\textsuperscript{20} Services such as Facebook may therefore come under the purview of the proposed Directive, except where these services utilize the user’s data solely for technical or regulatory purposes.\textsuperscript{21}

Looking superficially at the two proposed Directives, one may have the impression that they are guided by the well-known European policy of protecting consumers. This impression in particular is caused by the limitation of the proposals’ scope to contracts between business and consumers (B2C).\textsuperscript{22} Yet in reality, their main aim is quite different: they are part of a wider political strategy for the digital market adopted by the Commission.\textsuperscript{23} The underlying impetus is to contribute to faster growth of business.\textsuperscript{24} The Commission’s statement in this regard could not be clearer: ‘the purpose of these proposals is to create a business-friendly environment and make it easier for businesses, especially SMEs, to sell cross-border’.\textsuperscript{25} The consumer-related problems, such as uncertainty about their contractual rights, are mentioned only in second place.\textsuperscript{26}

This is indeed a paradigm shift. The main motivation behind the proposals is not the lack of consumer protection provisions at the national level, but rather the stimulation of the EU economy. The explanatory memoranda are full of references towards this goal. They stress that the new rules will help to fully exploit ‘the growth potential of

\textsuperscript{17} On the challenges of technological innovations such as 3D-printing for traditional forms of contracts, see R. Schulze and D. Staudenmeyer, \textit{Digital Revolution: Challenges for Contract Law in Practice} (Nomos, 2016), p. 25–26.
\textsuperscript{18} Article 2(1)(a) of the Digital Content Directive Proposal.
\textsuperscript{19} Article 2(1)(b), (c) of the Digital Content Directive Proposal.
\textsuperscript{20} See Article 3(1) of the Digital Content Directive Proposal.
\textsuperscript{22} Article 1 of the Digital Content Directive Proposal; Article 1(1) of the Online Sales Directive Proposal. Technically, Article 1 of the Digital Content Directive Proposal does not require that one party is a business, but merely speaks of ‘the supply of digital content to consumers’, without specifying the person of the supplier.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid., p. 2–3.
e-commerce’, to ‘boost the Union’s digital economy’ and to ‘stimulate overall growth’,\(^\text{27}\) as well as to ‘remain competitive on global markets’.\(^\text{28}\) In support of these claims, powerful numbers are used. It is forecasted that, as a result of the new regime, 122,000 additional businesses would sell online across borders, that intra-EU exports would increase by € 1 billion and that household consumption in the EU would increase by no less than € 18 billion.\(^\text{29}\) In other words, the consumer interests are no longer the primary goal, but subordinated to those of economic development. The Commission has turned from a consumer advocate to a normal political actor.

That is not to say that consumer interests are not safeguarded under the draft Directives. Indeed, they arguably contain the most protective rules that have ever been proposed.\(^\text{30}\) It is also true that the consumer as such has never been the only concern of the EU, but was protected primarily as a means of fostering the internal market. What is new though is that the creation of consumer trust in the internal market is being used as a means to achieve growth. This explains why the Commission has chosen the way of maximum harmonization, which will have the effect of scaling back the rights of the buyer in some Member States instead of enhancing these rights. One may therefore hesitate to call the proposals ‘consumer protective’ in the classic sense of the expression. Much more adequate would be ‘growth stimulating through internal market uniformization of consumer protection’.

\section*{B. LEARNING FROM THE UNITED STATES?}

Having uniform contract rules on digital content and on distance sales makes sense if one aims to build an internal market. Of all the contract types, this is certainly the one where the cross-border element is most palpable and salient. Distance sales are the archetypical transactions in a single market. Digital content (for example, digitalized music, videos and apps) lend themselves particularly to trade across borders.

Comparative law supports the need for uniform rules in this area. In the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSL) suggested a Uniform Computer Information Transactions Act (UCITA) as early as 2000, at a time when the internet was still in its infancy. The act included a number of rules of contract law, besides other issues such as copyright related questions. Its history is, however, not very edifying for those who believe in legal harmonization. The renowned American Law Institute (ALI) withdrew from the drafting process, citing irreconcilable differences with

\begin{footnotesize}
\begin{enumerate}
\item Recital 1 of the Digital Content Directive Proposal.
\item Recital 1 of the Online Sales Directive Proposal.
\item See in detail Section 3.B. below.
\end{enumerate}
\end{footnotesize}
the NCCUSAL about the content. The model law was eventually published without the ALI’s participation. However, it fell victim to the political fray surrounding it. Only two US states have adopted the UCITA. The majority have not followed the proposal or adopted rules ‘under consideration’. Even worse, some states have enacted so-called ‘bomb shelter’ rules, effectively barring this type of legislation from having any effect within their borders.

What had happened? The model law contained some provisions that were seen by many as unduly favouring the interests of the industry. Amongst them, there were rules in the original act that the consumer acquired only a limited license and ‘self-help’ provisions which entitled licensors to shut off or repossess the product in cases where the consumer violated the terms of the agreement.

C. AREAS LEFT OUT – INTELLECTUAL PROPERTY, DATA PROTECTION AND ONLINE PLATFORMS

Such reproaches cannot be made against the two European proposals, which contain a high level of consumer protection and can hardly be criticized for favouring industry interests. Viewing the US experience, it is also not difficult to see why the Commission has refrained from tackling the complex problems arising out of intellectual property. But do fully harmonized rules on digital content make sense if they do not address these issues? The biggest obstacles to the internal market in this area are due to limitations of copyright. If one were to ask businesses and consumers about their primary concerns with regard to the sale of digital content, both groups would probably cite the legal uncertainties in these areas and not the absence of uniform contract rules. EU citizens are living in a market in which online stores for movies, music and applications are still divided up according to Member States’ frontiers. They are not able to buy in the store of

34 Ibid., p. 463.
another country without a physical address or at least a credit card that has been issued there. It is therefore surprising that both proposals leave this issue out. They contain a duty to deliver the content free from rights of third parties, which expressly includes intellectual property rights. Yet, they do not tackle in any way the much more pressing issue of the territorial limitations of the copyrights transferred. On the contrary, the Digital Content Proposal repeatedly stresses that these questions are outside of its scope.

An equally thorny problem that has been avoided is data protection. Customers are wary of entrusting their personal data to internet businesses, and many of the latter just seek this data. Nevertheless, the two proposals do not address this huge conflict, but leave data protection out of their ambit. The issue has been left to a specialized regulation, which will harmonize the law in this area as of 2018. Though the proposed Directive on Digital Content applies to contracts under which the consumer actively provides personal or other data as a counter-performance – such as for Facebook and other social networks – it explicitly excludes situations in which a supplier collects information not provided actively by the consumer, for instance by placing cookies on the hard drive of the consumer’s computer. Arguably, the latter is the type of situation where regulation would have been most wanted. Cutting those questions out simply because they are not an issue of ‘pure’ contract law seems somewhat short-sighted.

Finally, the proposals completely leave out the phenomenon of the ‘sharing economy’. Online platforms on which goods and services provided by third parties are traded, such as Uber, Amazon Marketplace or Airbnb raise difficult questions regarding information duties, contractual performance and liability. They require specific answers that deviate from preconceived notions in private law. This thorny problem calls for legal reform of a much higher standard than the more conventional areas of sales and distance contracts. Yet despite their omnipresence in the digital economy and the unclear legal regime surrounding them, the problem of such online platforms has not at all been addressed in the new proposals.

38 See the last sentence of Recital 12, Recital 21 and p. 4 of the Digital Content Directive Proposal.
39 See the express exclusion Article 3(8) and Recital 22 of the Digital Content Directive Proposal. Data protection is also not dealt with by the Online Sales Directive Proposal.
40 Regulation (EU) 2016/679 of the European Parliament and of the council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), [2016] OJ L 119/1.
41 Article 3(1) of the Digital Content Directive Proposal.
42 See Article 3(4) and Recital 14 of Digital Content Directive Proposal.
43 On these problems, see e.g. C. Busch et al., ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’, 5 Journal of European Consumer and Market Law (2016).
§3.  THE COHERENCE OF THE TWO PROPOSALS AND THE ACQUIS

The new proposals are not placed in completely unchartered territory. They will apply in an area that is already very heavily regulated. This may lead to frictions and contradictions with those rules that have already been adopted. The following section will analyse the novelties that the proposals introduce, and questions how they could be squared with the existing acquis, which is a question of coherence. It is particularly urgent to address this issue of coherence from the perspective of the Member States. Where new rules are introduced in this regard, they create an urgent necessity for legal reform at the national level. This may prove difficult because it would mean that a new and separate contract regime must be introduced for digital content and online sales. But do the proposals break with the acquis and create truly new regimes? In particular, do they differ to such a degree from the pre-existing rules that they warrant a separate transposition?

A.  MODELLING AROUND THE EDGES

At first sight, the differences between the new proposals and the acquis are anything but significant. Indeed, the two proposed Directives build on the existing consumer rules as enshrined in the Consumer Sales Directive, which they turn into a maximum harmonization instrument for digital content and online sales. Since their main effect is to exclude any national provisions providing for consumer protection that exceeds the level set by the Consumer Sales Directive, their substance is not very different from the existing EU consumer law. They merely add some new points here and there.

To illustrate, the proposed Digital Content Directive clarifies that digital content must possess functionality, interoperability and other performance features such as accessibility, continuity and security, and that the most recent version available has to be supplied. But it does not require an exuberance of legal ingenuity to draw the same conclusion from the Consumer Sales Directive’s requirement that the goods must ’show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect’. Similarly, the provision according to which the faulty integration of the digital content by the supplier or the shortcomings

46 Article 6(1)(a), (4) of the Digital Content Directive Proposal.
47 Article 2(2)(d) of the Consumer Sales Directive. In a similar vein, Faust argues that the traditional definition of (non-)conformity with the contract also fits digital content, see F. Faust, ’Digitale Wirtschaft – Analoges Recht: Braucht das BGB ein Update?’, Neue Juristische Wochenschrift – Beilage (2016), p. 29, 30.
of an integration instruction amount to a non-performance\textsuperscript{48} simply paraphrases the Consumer Sales Directive's rules.\textsuperscript{49} Issues such as these could have been solved by a reasonable interpretation of the existing rules.

Other ‘innovations’ contained in the proposals are the rules on the effect of termination. The proposed Directive on Digital Content sets out that after such termination, the supplier shall reimburse the price, refrain from using data collected from the consumer, and provide technical means to the latter to retrieve them, while the consumer is obliged to refrain from using the digital content.\textsuperscript{50} This is certainly helpful and is not to be found in the existing EU rules, which do not deal with the effects of termination. However, one could have trusted national legislators or courts to achieve the same solution. Issues such as these did not call for the adoption of special rules. Insofar the proposals seem to be driven less by an urgent requirement of the digital area as by the Commission’s need to put some flesh to its proposals.

B. INNOVATIONS AND THEIR PURPOSE

Nevertheless, there are provisions that deviate from the acquis in a rather meaningful manner. Quite remarkable for instance is the provision prohibiting Member States from providing a time limit for the exercise of consumer rights with regard to faulty digital content.\textsuperscript{51} This rule effectively introduces a never-ending remedy for the buyer of digital content.\textsuperscript{52} The Commission justifies this rule by the fact that digital content is not subject to wear and tear.\textsuperscript{53} While this is true, it may be close to impossible for a supplier to prove that digital content was in conformity with the rules more than 5, 10 or 20 years after its sale. Also, one may ask the question about the practical interest of such a right in an area that is as fast moving as that of media and software.

Another novelty that raises eyebrows is the right to terminate long-term contracts. The Commission suggests that the consumer shall be entitled to terminate the contract for supply of digital content at any time after the expiration of a period of 12 months.\textsuperscript{54} Such a far-reaching right has previously not been part of the acquis. The same is true for the consumer’s right to terminate contracts on digital content immediately in case of a failure to supply,\textsuperscript{55} the elimination of the buyer’s duty to notify the seller of any lack of

\footnotesize{\textsuperscript{48} Article 7 of the Digital Content Directive Proposal.  
\textsuperscript{49} Article 2(5) of the Consumer Sales Directive.  
\textsuperscript{50} Article 13(2)(a)-(d) of the Digital Content Directive Proposal.  
\textsuperscript{51} Recital 43 of the Digital Content Directive Proposal.  
\textsuperscript{52} The Consumer Sales Directive has provided for a time limit not shorter than two years, see Article 5(1) thereof.  
\textsuperscript{53} Recital 43 of the Digital Content Directive Proposal.  
\textsuperscript{54} Article 16(1) of the Digital Content Directive Proposal.  
\textsuperscript{55} Article 11 of the Digital Content Directive Proposal.}
conformity\textsuperscript{56} and the extension of the right to terminate the contract to situations where the lack of conformity of the good is minor.\textsuperscript{57}

All of these new rules depart from the existing consumer law rules, in some cases quite considerably. They create legal fragmentation in EU law. There may be good reasons for them. One may certainly cite the increase in consumer protection that comes with these innovations. The question, however, is why these improvements should be limited to digital content and distance sales. Are the same rules not appropriate for other contracts as well? What explains, for instance, that a newspaper subscription can be terminated after 12 months by the consumer when it concerns an online edition, but not when the same agreement is made with regard to the paper version? To take another example, why is the consumer who bought the goods on the internet not required to notify the seller about a lack of conformity? And why can he, but not the face-to-face buyer, return these goods for a minor defect?

There is no logical answer to these questions, because there is nothing inherent in digital content and distance sales that would justify this different treatment.\textsuperscript{58} Certainly, the deviations cannot be explained by a particular disadvantage of the consumer that follows from the technical medium used, the distance to the seller or the nature of the transaction.\textsuperscript{59} They are merely due to the fact that the Commission, for political and economic reasons, has decided to prioritize these modern contract forms over others. This endangers the coherence of consumer law. It risks becoming a hodgepodge of different rules that have been decided at different points in time for various reasons, without any internal consistency or rationale.

C. A SPLIT CONTRACT LAW REGIME

If the two proposals are adopted, we will have two new consumer contract law regimes in addition to the Consumer Sales Directive. Inevitably, they will make the edifice of European law more complex. This runs directly against the Commission’s strategy to consolidate EU law, which has been tried and was (partially) successfully implemented with the Consumer Rights Directive, a ‘horizontal directive’ that replaced two others.\textsuperscript{60} If the two proposals are to become a reality, they would result in a triple-faceted consumer contract law in Europe. On the one side, there would be contracts on digital

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\textsuperscript{56} Recital 9 of the Digital Content Directive Proposal – such an obligation could be foreseen by national law under Article 5(2) of the Consumer Sales Directive.
\textsuperscript{57} Recital 29 of the Online Sales Directive Proposal.
\textsuperscript{59} These are typical reasons for which the consumer acquis provides special duties like information duties or rights of withdrawal, see Article II.-3:103 DCFR.
\textsuperscript{60} The two directives that have been replaced are the Directive 97/7/EC in respect of consumer distance contracts and Directive 85/577/EEC in respect of ‘doorstep selling’.
content, which would be covered by the Digital Content Directive. On the other hand, there would be distance sales contracts, to which the Directive on Online Sales applies. And finally, there would be those contracts that are concluded face-to-face in shops, which would be governed by the Consumer Sales Directive.

Such a triple regime is not without complexity. If faithfully implemented by national legislation, it will create costs for both consumers and businesses. Consumers will have to learn that their rights depend on whether they buy online or on the high street. This may go down to mind-numbing details, such as the question of who bears the risk of a deterioration or whether the buyer must compensate the seller for the use of bought goods in case of termination. Businesses would be forced to use different contractual terms for face-to-face and distance sales. This may particularly disadvantage so-called ‘omni-channel distributors’.61 These are traders who offer their products and services both in physical stores and online. Under the new proposals, they will not be able to use the same terms and conditions when selling online as well as via more traditional channels.62 No longer will it suffice to inform online consumers about their right to terminate the contract, which does not apply to transactions in shops. Instead, businesses will have to prepare two separate sets of standard terms, one for face-to-face transactions and one for online sales. This is necessary, inter alia, because the remedies available to the consumer in case of a faulty product are quite different in the two scenarios. The need for double contract terms will increase legal costs, which may pose a problem for start-up companies. Unsurprisingly, business organizations have recommended avoiding, as much as possible, a sectoral approach which could lead to diverging rules for online and offline sales and for tangible goods and digital content.63

Even for lawyers, delineating between the three regimes will be anything but a benign task.64 Take for instance digital content that is sold over the internet. In such a case, both the proposal on Digital Content and the proposal on Online Sales could apply. In theory, they are neatly separated because the proposed Online Sales Directive merely applies to ‘goods’, which are defined as ‘tangible movable items’.65 This excludes digital content that is delivered in intangible form as a download. However, it is often the case that digital content is delivered on a tangible medium, such as a CD or DVD. In an attempt to avoid a collision with the proposed Digital Content Directive, the proposed Online Sales Directive specifically exempts cases where ‘the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer’.66 The

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61 Compare Digital Content Directive Proposal, p. 3.
65 Article 2(d) of the Online Sales Directive Proposal.
66 Article 1(3) of the Online Sales Directive Proposal.
same clause is suggested for the proposed amendments to the Consumer Sales Directive, in an effort to exclude these cases from its scope as well and submit them to the proposed Directive on Digital Content. 67 But what if the durable medium is not used ‘exclusively’ as a carrier for the supply of the digital content? One may think, for instance, of a language course that is accompanied by a workbook, a video CD that includes a booklet or a USB key that contains software but can be used for other purposes as well. It is anything but clear which of the three regimes would apply in such cases.

Next to an increase in information and transaction costs, different regimes for online sales and face-to-face contracts will also have very palpable effects on competition. If the consumer enjoys more protection when buying online, this will increase the competitive pressure on the high street. In today’s world, astute customers compare offers on the internet with those they find in shops, sometimes in real time using their smartphones. They have no qualms with taking a free ride on the advice of the shopkeeper and then buying the same product online for no other reason than it being marginally cheaper. Even where the price is exactly the same, they often prefer to buy on the internet because they have the right to return the product within the period of withdrawal. Should consumers learn that their contractual rights in distance sales have further improved over face-to-face transactions, they will have even more incentives to go online. This might effectively drain the high street, with all the unwanted social effects: empty city centres, shops closing down, jobless sales staff and so on. One should therefore think twice before improving the attractiveness of online sales over that of face-to-face sales.

At the same time, the increase in consumer protection rights will lead to a significant rise in the costs for certain internet businesses. For instance, they may have to pay dearly for the longer period that applies to the reversal of the burden of proof 68 or the possibility of the consumer to terminate the contract even in case of a minor defect. 69 It is uncertain whether those costs are compensated by the increase in attractiveness of online sales due to the new regime and the resulting surge in demand for them. Whatever the truth is, one can be sure that the proposed Directives change the balance of market shares between online and face-to-face sales. They are thus interfering with the result that free competition would have established.

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67 See Article 1(2)(b) of the Consumer Sales Directive according to the amendment suggested by Article 20(1) of the Digital Content Directive Proposal.
68 Under the Consumer Sales Directive, a lack of conformity with the contract which becomes apparent in the first six months after the sale was presumed to have existed at the time of the contract, see Article 5(3) thereof. Article 8(3) of the Online Sales Directive Proposal extends this period to two years.
69 The Consumer Sales Directive excludes the right of termination if the lack of conformity with the contract is minor, see Article 3(6) thereof. The new proposal on online sales does not contain such a restriction, see Article 13 of the Online Sales Directive Proposal.
D. THE COMMISSION’S HIDDEN AGENDA

The Commission plays down the risks of fragmented contract rules. It argues that ‘a fragmentation between the rules on online and face-to-face sales is not likely to occur or would probably not have a significant impact’,\(^{70}\) without providing any reasons for its optimistic view. Furthermore, and somewhat contradictory to the prior claim that they are unlikely to occur, the Commission alleges that such costs would occur ‘only for a short transitional period’.\(^{71}\)

What does the Commission mean? First, it may be trying to suggest that the businesses can extend the more favourable conditions for distance sales to face-to-face transactions and those of digital content, such as online periodicals, to printed versions as well. This would effectively save distributors from preparing two separate contract regimes. It would also allow the high street to stay more competitive with regard to online businesses. Yet such a strategy would have the disadvantage that it would result in an additional burden for the offline business. It may also result in a partial cut to consumer rights because some legal systems go further in their general protection of the consumer than provided for in the two fully harmonizing proposed Directives on Digital Content and Online Sales. To adapt the same rules also for offline transactions may therefore be prohibited under national law.

Another possibility is that the Commission nurtures the hope that its rules on digital content and online sales will eventually be adopted by Member States as the general standard for all contracts.\(^{72}\) Such a development would indeed overcome the differences between online sales and face-to-face contracts and between the sale of digital content and corporeal goods. But it would clearly be a case of unacceptable legislating through the backdoor. Providing that the Member States fall into the trap, they could later become subject to buyer’s remorse. With some justification, they could complain about the ‘Brussels overreach’. It would also make the legality of the two proposals look doubtful, not to mention that such proposals would compromise the principles of enumeration, subsidiarity and proportionality.

At least at one point the Commission is surprisingly honest about its real intentions. In the proposal for an Online Sales Directive, it refers to its ongoing examinations in the context of the Regulatory Fitness and Performance Programme (REFIT) and announces that its possible conclusions – which will be available in the second half of 2016 – might point to the need for an initiative on face-to-face purchases of goods, which may eventually be fed into the proposed Online Sales Directive.\(^{73}\) The Commission therefore actually admits that more legislation is lurking below the surface, which will also affect

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\(^{70}\) Online Sales Directive Proposal, p. 12.

\(^{71}\) Ibid.

\(^{72}\) In favour of such a transposition, B. Zöchling-Jud, in C. Wendehorst and B. Zöchling-Jud (eds.), *Ein neues Vertragsrecht für den digitalen Binnenmarkt*, p. 12.

\(^{73}\) Online Sales Directive Proposal, p. 3.
traditional sales contracts. This would be welcome to the extent that it would avoid a rift between online and face-to-face sales. But it also means that the true ambition and impact of the proposals will be much larger than is currently suggested. It is furthermore hard to understand why the Commission adopts new proposals aimed at amending the existing EU consumer law before the relevant data are available.

§4. THE RELATION TO THE NATIONAL LAW OF MEMBER STATES

A. THE MAXIMUM HARMONIZATION CHARACTER

The biggest impact of the new proposals lies in its relation to the national laws of the Member States. The two proposed Directives are conceived as instruments of maximum harmonization. They therefore leave no room for more lenient or stricter laws at the Member State level. This is remarkable for two reasons. The first one is the proposals’ effect of solidifying the acquis and setting it in stone. They are both based on the Consumer Sales Directive, which they will effectively turn into the law of the land in the EU. This role had been withheld from the Consumer Sales Directive at the time of the adoption of the Consumer Rights Directive. But it will now nevertheless assume the role of a prescriptive set of rules in two key areas: for digital content and online sales. The full harmonization of consumer sales law is thus back, albeit in a different shape and form. This in turn raises questions. Member States might ask why they are allowed to fully protect their citizens in a face-to-face transaction with a local provider but not with regard to an agreement with an online business that sits potentially thousands of kilometres away.

Second, the fully harmonizing proposals are remarkable insofar as they also address additional issues that have not been dealt with in the Consumer Sales Directive, such as the consequences of termination (restitution) and the right to damages. This will make the application of national law much more complex. Under the effet utile principle, national legislative rules transposing directives into the law of the Member States must be interpreted in light of the European rules they are designed to transpose. Before applying any rule of national law, judges and lawyers would have to find out whether the provision is derived from a piece of European legislation or is traced back to an autonomous decision by the domestic legislator.

In the first case, Member States would have to adopt a very different method of interpretation, taking into account not only EU primary and secondary law but also

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all decisions handed down by the Court of Justice of the European Union (CJEU). It is true that the same methodology is already now to be followed, yet there is a crucial difference: up until today, it was more or less easy to identify those rules with a European origin because they all had the same goal – consumer protection. This is no longer the case. The Commission now selects certain types of contracts which it thinks could drive growth, and then harmonizes rules relating to them. Lawyers can therefore never be sure of the precise scope of harmonization and it will become much more difficult for them to discern where the EU has been involved. The difficulties will be compounded where Member States combine the transposition with their ordinary contract law, such as in Germany. These Member States will need to resort even more frequently to a split interpretation of national law: where digital content and distance sales are at stake, a European interpretation is required, whereas in all other cases a domestic understanding can be followed.

Third, as a result of the proposals, Member States will gradually lose their grip on questions which were once thought to be within the domain of national civil law, such as the consequences of termination and damages. Even where they do not extend the rules of digital content and distance sales beyond their scope, there may be spill over effects on other rules. The law of restitution and damages, to take these two examples, are not specialist areas that could be neatly separated, such as for example the right of withdrawal or other areas with which the EU has dealt with so far. Instead, typically they are thoroughly intertwined with general rules and doctrine of contract law and the law of obligations. Any European rules in these areas are therefore likely to influence, over time, general principles of Member State’s contract or even general civil law. Since this influence is very subtle, the interplay with national law will be complex. There will be an insoluble entanglement between European and national rules. It may also have unintended side effects because the application in other areas has not been foreseen.

B. OVERCOMING LEGAL FRAGMENTATION?

The justification behind the maximum harmonizing character of the two proposals is clear, as the Commission never tires to repeat: full harmonization is necessary in order to remove contract law-related barriers to cross-border trade. The Commission specifically complains about the fragmentation of the national law of the Member States in the area of digital content and online sales, which needs to be resolved as quickly as possible. In its view, only fully harmonized rules would give businesses legal certainty and the possibility to avoid unnecessary trading costs caused by differing national

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77 Digital Content Directive Proposal, p. 3.
laws.\textsuperscript{78} It would provide them with a stable contract law environment when selling to other Member States.\textsuperscript{79} They could largely rely on their own law as the main rules would be the same throughout the EU.\textsuperscript{80}

Although these goals seem laudable, it is remarkable how the Commission’s proposals themselves compromise them.\textsuperscript{81} In fact, in case they were adopted, they would not allow a business to adopt the same set of contractual rules for all their dealings with customers in the EU. That is due to two reasons: first, the proposals do not deal with all aspects of digital content and online sales exhaustively, but leave considerable gaps. In particular, the all-important questions of contract formation, validity and legality will continue to be subject to national law.\textsuperscript{82} The contractual qualification will also remain in the hands of the Member States, although their divergence is curiously one of the major arguments used in order to demonstrate the need for a unified regime.\textsuperscript{83} As long as these questions are dealt with differently by national law, it is inconceivable for a business to reduce its transaction costs by using the same standard terms in each Member State.

Second, concerning the aspects they are designed to regulate, the two proposals do not exclude legislation by the Member States. Not only do they highlight that national contract laws should not be affected by the proposed Directives in areas not regulated by them,\textsuperscript{84} they repeatedly refer to national law to provide more details. For instance, the proposals stress that Member States remain free to rely on their own national prescription or limitation periods.\textsuperscript{85} They also call on national legislatures to lay down the detailed conditions for the exercise of the right to damages.\textsuperscript{86} That means that even within the restricted ‘certain aspects’ that the proposals cover, they do not create uniform rules across the Union. Instead, they result in sets of European and national rules that might look a little differently from one country to the next.

Retaining some role for domestic legislation must certainly be understood as a concession towards Member States, as the Commission might fear that Member States may perceive the EU as taking over the area of civil law. The Commission even stresses that the legal form of a directive has been chosen precisely to leave freedom to the

\textsuperscript{78} Digital Content Directive Proposal, p. 2.

\textsuperscript{79} Recital 6 of the Digital Content Directive Proposal; see also Recital 9 of the Online Sales Directive Proposal.

\textsuperscript{80} Digital Content Directive Proposal, p. 9.


\textsuperscript{82} Recital 10 of the Digital Content Directive Proposal.

\textsuperscript{83} Recital 10 and p. 6 of the Digital Content Directive Proposal. For the complaint about the different qualification as a source of legal fragmentation, see Digital Content Directive Proposal, p. 5.

\textsuperscript{84} Recital 14 of the Online Sales Directive Proposal.


\textsuperscript{86} Recital 44 and Article 14(2) of the Digital Content Directive Proposal.
Member States to adapt the implementation to their national law, and that a regulation would have the consequence of too much interference with national laws. Yet, leaving gaps and relegating certain issues to the Member States somewhat defeats the purpose of the two proposals, which is to unify the law in the area of digital content and distance sales. Enterprises will clearly not be able to operate with one set of contract rules in the EU in these two key areas.

C. THE CJEU – AN UNFIT TROJAN HORSE

At the same time, the interference with Member State law may go much further than the innocuously looking provisions of the proposed Directives suggest. Despite the fact that they lay down only general aspects, one must not forget that it ultimately will be the CJEU that will interpret them. In this regard, even those provisions that seem at first sight very shallow may prove to open the door to EU intrusion into civil law. Take for example the very short and concise rule of Article 14(1) of the proposed Digital Content Directive regarding damages. At first glance, it merely states the obvious: ‘the supplier shall be liable for any economic damage to the digital environment of the consumer caused by … a defect of the digital content’ and these ‘damages should put the consumer as nearly as possible into the position [he would have been in] if the digital content had been duly supplied’. However, there are also broad notions that are used in the provision, which desperately call for an interpretation: ‘damage’; ‘economic’; ‘caused’ and ‘position’ in case of due supply. One just needs to think about the voluminous bodies of doctrinal and judicial sources at the national level that try to define concepts like these to become aware of the enormous opportunities for legal interpretation. In reality, they do not even attempt to settle matters, but are throwing windows open through which the CJEU can reconstruct basic notions of civil law that have hitherto been in the almost exclusive province of Member States.

It is hard to imagine that the Commission was unaware of this ‘license to make civil law’, which its proposals would grant the CJEU. It is much more likely that this will give the CJEU the opportunity not only to close the gaping holes in its proposals but also to trigger more harmonization in other areas. In this context, it is helpful to remember the importance assigned to the CJEU’s ruling concerning the notion of ‘damage’ in the Package Travel Directive as also encompassing non-economic loss. Although this interpretation concerned a text with a very narrow scope of application, it was considered fundamental to the development of European private law and was extrapolated and applied to all sorts of obligations. Against this background, one may start to imagine

89 Case C-168/00 Leitner v. TUI Deutschland GmbH & Co. KG, EU:C:2002:163.
90 For instance, it was suggested to codify the decision as part of a common frame of reference for European civil law, see Art III.-3:701(3) 1 DCFR. On the genesis of this provision, see C. von Bar, E.
the impact a decision on the notions of damage or causality in the proposed Digital Content Directive would have. The potential repercussions for other areas, including those under the exclusive purview of Member States, may be tremendous.

The general and unclear notions in the two proposals are thus leaks through which CJEU interpretations may creep into national legal systems. Their primary purpose is apparently not to open a space for different implementation by the Member States but to allow for deeper judicial harmonization. They give the CJEU the opportunity to venture into areas of private law from which hitherto it has been excluded. It is not clear whether the Member States, which have so far been very reluctant to allow the EU to rule on core contract law, will accept such an extension of the CJEU’s jurisdiction. But assuming that they do, one can doubt whether the CJEU is able to deliver. The CJEU is not institutionally equipped to deal with highly complex matters of civil law. Its justices, who are already overwhelmed by their current workload, mostly have a background in public law. It may have some unfortunate consequences were they to decide on very specific problems of contract law which have tremendous and almost unforeseeable repercussions for Member State rules. As a minimum, one would therefore have to ask for a reform of the CJEU, for example the addition of a chamber dedicated entirely to contract law, before the proposals can be accepted.

§5. ON THE DISTRIBUTION OF LEGISLATIVE COMPETENCES IN MULTILEVEL GOVERNANCE SYSTEMS

A. PRINCIPLES OF GOOD LAW-MAKING

The foregoing doubts about the introduction of fully harmonizing Directives in the area of digital content and online sales raise a broader question: how should competences be distributed with regard to private law? To answer this question, it is helpful to remember the description of the EU as a system of multilevel governance. Each of the levels is responsible for fulfilling a certain function. The tasks between those levels have to be distributed efficiently. Different principles help in deciding who should do what. There is first the principle of subsidiarity, which guarantees that the higher level acts only if and when a task cannot be equally well achieved on the lower level. The principle

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92 Article 5(3) TEU.
is often understood as a safeguard for the sovereignty of the Member States, yet this ignores its much older history in big organizations like the Catholic Church.\footnote{The origins of the principle are extensively discussed, see for example W. Moersch, \textit{Leistungsfähigkeit und Grenzen des Subsidiaritätsprinzips} (Duncker & Humblot, 2001), p. 25–39; P. Brault, G. Renaudineau and F. Sicard, \textit{Le principe de subsidiarité} (La documentation Française, 2005), p. 9–23; P. Christian and M. Graff, 'Binnenmarktauftrag und Subsidiaritätsprinzip', 159 \textit{Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht} (1995), p. 49–50; R. Schütze, 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?', 68 \textit{Cambridge Law Journal} (2009), p. 525, 525–526; G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', 43 \textit{Common Market Law Review} (2006), p. 63, 77–78; V. Constantinesco, 'Who is Afraid of Subsidiarity?', 11 \textit{Yearbook of European Law} (1991). The classic text on the subject in the Catholic tradition is the Papal Encyclical \textit{Quadragesimo Anno} of 1931.} It can also be conceived as a guideline for good governance, which attributes tasks to the best-suited levels of administration. The next principle is the principle of conferral, which ensures that the European bodies only take care of those tasks that have been expressly been assigned to them.\footnote{Article 5(2) TEU. On the principle of conferral, see P. Craig and G. de Búrca, \textit{EU Law – Text, Cases and Materials} (6th edition, OUP, 2015), p. 74–75.} This principle safeguards legal certainty in the distribution of competences and prevents duplicative and contradictory legislation. Lastly, there is the principle of proportionality, which guarantees that the higher level does not go beyond what is necessary in order to fulfil its objectives.\footnote{Article 5(4) TEU.} It basically protects the lower levels against an overreach by the higher ones, which could compromise the work and efficiency of the lower levels.

All of these principles have been dealt with by the explanatory reports of the two proposals. They have cited numbers of reasons why the two proposed Directives are covered by a legal basis – thus complying with the principle of conferral, and are also in line with the requirements of subsidiarity and proportionality.\footnote{See Digital Content Directive Proposal, p. 5–6; Online Sales Directive Proposal, p. 5–7.} Yet there may be more to legislating in the civil law area than just complying with those three principles. The Commission seems to agree, because it explicitly explores another question, namely the consistency of its proposals with existing policy provisions in the area of digital content and online sales as well as in other areas.\footnote{Digital Content Directive Proposal, p. 3–4; Online Sales Directive Proposal, p. 3–5.} It comes to the conclusion that all proposals are in line with the acquis. But as has been illustrated above, the introduction of maximum harmonization in ordinary sales law presents a major policy shift of the EU. The main objective is no longer the protection of the consumer, but rather the creation of an internal market with a bustling industry. The question is: can this objective be achieved by the proposed Directives that, on the one hand, go very far in that they are fully harmonizing but, on the other hand, leave important gaps for the Member States to fill? Does this not lead to a complex mixture of EU law and national rules, which precisely compromises the goal of the acts?
B. JUSTIFYING THE CHOSEN APPROACH

The Commission justifies the choice of a directive as the appropriate instrument by stating that it gives the Member States freedom to adapt the implementation to their national law.\(^9^8\) Yet this position is in open contradiction to its claim that common standards in the field are quickly needed to overcome legal fragmentation at the Member State level.\(^9^9\) The second argument the Commission makes is that a regulation would have required a much more detailed and comprehensive regime than a directive in order to allow its effects to be directly applicable, and that this would have resulted in much more interference with the national law of the Member States.\(^1^0^0\) This may be true, but it strongly points to the better efficiency of the lower level: if digital content and distance sales require a detailed and comprehensive regime – and there can be little doubt about that – and the EU cannot deliver such a regime, as the Commission claims, then it puts the whole purpose of the proposals into doubt. From this perspective, it seems like the whole area should remain in the Member States’ hands.

Finally, the Commission argues that a regulation could ‘jeopardise the future-proof character of the instrument’ since it would not allow Member States to adapt the implementation of the fully harmonized rules to a ‘technologically and commercially fast-moving market’ like that of digital content.\(^1^0^1\) This argument has something to it, but it is at the same time an open admission that the EU is not capable of the necessary quick adaption and that only the Member States can achieve it. If that is indeed the case, it remains inexplicable why the matter is not left at the national level.

C. THE POLITICAL ECONOMY

It may be more realistic to assume that these arguments hide another political reason that has not been spelled out. It is very likely that the Commission would have preferred a more detailed and comprehensive contract regime, but has refrained from suggesting it for fear this would jeopardize the acceptance by the Council. The Commission is under pressure to avoid another setback like the Common European Sales Law, which had to be scrapped because of an insurmountable resistance by the Member States who were concerned about losing control over their civil law. The limitation of the proposals to digital content and distance sales can be seen as a concession to those concerns. It seems that the split between the two proposed Directives is itself a tactical consideration designed to ensure that at least one of them passes should the other be rejected by the Council. Maybe the achievements of a professional lifetime of some of the Commission’s staff is at stake.

\(^1^0^0\) Digital Content Directive Proposal, p. 6; Online Sales Directive Proposal, p. 8.
\(^1^0^1\) Digital Content Directive Proposal, p. 6.
Such strategic considerations are not rare, but inherent to the law-making process. The literature on the political economy and the theory of public choice in particular are full of examples. But when strategic thinking dominates, it compromises the working of the legislative process. One of the main weaknesses of the Brussels law-making machine is the fact that the content of proposals is often influenced more by strategic considerations than by the need to solve practical problems. The two proposals are paradigm examples. Their design and content is not to be explained by real life needs. Consumers did not complain about the sale of digital content or distance sales in particular, nor did business have any problem with it. The business that would benefit most from a single EU regime are not European SMEs, but the likes of Amazon, iTunes and Netflix.

Further, online sales of any kind are booming despite the applicability of national consumer law. The real intent of the Commission must be looked for elsewhere: it is its old goal to get some grip on the civil law of the Member States and the intention to bring at least some of the work it has done in the previous years to a fruitful outcome. It would be no small humiliation if the EU were not to adopt anything in the area of contract law, especially after all the ambitious and expensive exercises it has run in the area of contract law for the last one and a half decades. Its motto seems to be ‘something has to be done about contract law, no matter what!’

It is this attitude that causes the endless and complex compromises that are often the result of negotiations in Brussels. It is also the source of frustration of many lawyers and citizens alike. By being aware of the problems, the Commission has developed an agenda under the captivating title ‘Better regulation for better results’, which is accompanied by a ‘Regulatory Fitness and Performance Programme (REFIT)’. These ideas are certainly worth pursuing. However, it seems they have not been rigidly applied to the two proposals on digital content and distance sales.

D. THE WAY FORWARD?

There are different routes that can be taken from here. The first option to consider is doing nothing and leaving the situation as it is. There are several arguments to be made for such an approach. For once, the case for harmonizing the rules on digital content and online sales has not been clearly made. The differences in national legislation seem not to have stopped in any way the replacement of analogue by digital content, nor has

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102 See e.g. J.M. Buchanan, *The Limits of Liberty* (The University of Chicago, 1975).
the tremendous rise of distance sales been subdued by legal fragmentation. Moreover, the idea that the EU might become a second Silicon Valley due to the harmonization of contract law has always seemed quite fanciful. The biggest beneficiaries of harmonized rules in the short term will be – mostly American – internet giants, to the detriment of more local shops.

On the other hand, it cannot be denied that a possible source of the US strength is the fact that American companies can sell on a bigger and better integrated home market. The Commission’s idea that there is an urgent need for uniform contract rules therefore carries some weight. Yet it should avoid increasing the complexity of European consumer law by introducing the two proposed Directives. The least that could be done is to integrate the current proposals into the Consumer Sales Directive. Even better would be the fusion of this Directive and the Consumer Rights Directive into a single horizontal directive, with special rules for digital content and online sales. This would provide a fully harmonized playing field. It would however not prevent distortions of competition between online sellers and physical shops, and it would also not eliminate the complex relation with national contract law.

A more efficient way to introduce them is by a single act containing all the necessary rules from the contracts formation to the performance of the respective obligations. Such an act would therefore resemble the scuppered CESL. It could however have a different format than an optional instrument that the parties can select. One alternative layout could be to adopt a voluntary contract model. The Commission correctly discards this idea with the argument that such a text would not overcome the different mandatory rules of the Member States.105

Another option would be to introduce a model law, similar to the UCITA in the US.106 The advantage of such a model law would be that it not only overcomes mandatory rules to the extent that it is followed by the Member States, but that it also gives the latter freedom to adopt it. The drawback however is that such a model is unlikely to overcome the fragmentation in the EU. If only some of the Member States are following it, then complexity will not be completely eliminated.

The best option, or the least bad of all others, for harmonization is therefore to adopt a Regulation on contract law. Its scope could well be limited to cross-border sales or to a certain type of product, such as digital content. It should however be a comprehensive regime, covering all questions from the formation of the contract to its performance and the remedies for non-performance. The introduction of such a Regulation is the only way to achieve uniform standards across the Member States. It would allow businesses to rely on the same set of rules throughout the EU. The coherent interpretation and application would be guaranteed by the CJEU through the preliminary reference procedure.

106 See Section 2.B. above.
However, in order to face the wave of submissions, the CJEU would have to be thoroughly overhauled. It would need a separate chamber entirely dedicated to issues of civil law.

§6. CONCLUSION

With the two proposals on digital content and on online sales, the Commission is shifting gears from CESL. No longer does it strive for complete EU rules in the area of sales law. Instead, it now intends to introduce maximum harmonization, but limited to some areas of contract law. With digital content and online sales, it has picked two areas which are modern, of economic interest, and in which the cross-border element is very visible.

While the idea of achieving a uniform standard in this area is worthy of praise, the proposals suffer from various deficiencies. First, they leave out the main obstacles for a digital internal market, namely intellectual property law, data protection, and the legal uncertainty surrounding platforms. Second, they contain many rules that could have been derived from the acquis by a simple interpretation, such as those about the non-conformity with the contract in case of a failed installation by the provider. Third, where they contain innovations, it is hard to justify why they should be limited to the area regulated, such as the right to terminate a contract about digital content after 12 months.

However, the biggest drawback of the proposals is the lack of coherence. It causes a lot of friction and contradictions both at the level of EU law itself as well as in the relationship between EU and Member State law. This is not without cost. In particular, the proposals have the potential to distort competition, for example by privileging online sales over face-to-face transactions. They could also lead to a complex intermingling between the national and the EU level. Competences will not be clearly assigned, and the origin of a rule as well as the need for its autonomous interpretation will be much more difficult to decipher. The Commission should therefore state its intentions much more clearly, and then suggest comprehensive acts that deal with all matters that are necessary.