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Statement of the European Law Institute: Unlocking the Digital Single Market - An instrument for 21st Century Europe

2nd Supplement to the Statement of the European Law Institute on
the Proposal for a Regulation on a Common European Sales Law





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The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

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Following publication of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final) on 11 October 2011, an ELI Working Group, assisted by an Advisory Committee, considered the Proposal and commented upon it. Both consisted of members of the judiciary, legal practitioners and academics, from a broad range of legal traditions. The work was greatly assisted by comments received from the ELI Council and Senate.

A first paper was approved by the ELI Council as an official Statement of the ELI on 7 September 2012. It was subsequently published on the ELI website and was received very positively. In order to react to the European Parliament's Legislative Resolution of 28 February 2014, which had taken on board many suggestions made in the 2012 ELI Statement, the Working Group resumed its work and prepared a 1st Supplement to that Statement, which was published in 2014.

In order to take account of political developments and discussions following the publication of the new Commission's Work Programme for 2015, the Working Group resumed its work and prepared this 2nd Supplement.

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The views set out in this Statement should not be taken as representing the views of those bodies, on whose behalf individual members of the working party and advisory group were also acting.

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PREAMBLE

1. In December 2014 the European Commission issued its 2015 Work Programme (COM(2014) 910 final). The Work Programme, consistently with Commission President Juncker's political guidelines¹ and focus on proportionality and subsidiarity², is intended to mark a 'new start' for the European Union and its development. The Commission intends '*to do different things and to do things differently*'³.

2. The withdrawal of the previous Commission's Proposal for a Common European Sales Law (CESL) formed part of the present Commission's new start.⁴ Rather than pursue the CESL, the present Commission intends to develop a '*modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market*'⁵.

3. The European Law Institute (ELI) welcomes the Commission's continuing commitment to enhance the European Union's digital single market. The CESL was a bold initiative in this area, and one on which the ELI took a positive stance and provided constructive comment.⁶ Given the Commission's new focus the ELI acknowledges its decision that a different type of European Instrument, focused on e-commerce and the digital market place, may now need to be developed. It is apparent that a number of different options have been, and remain, open for consideration, including:

¹ J-C Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission' (22 October 2014)

<http://ec.europa.eu/priorities/docs/pg_en.pdf>.

² Ibid at 3.

³ COM (2014) 910 final, at 2.

⁴ Ibid, Annex 2 at 12.

⁵ Ibid; and see J-C Juncker, note 1 above, at 5, 'Policy Objective 2'.

⁶ European Law Institute, 'Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law' (2012), available at

[http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf)

[2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf); '1st

Supplement to the Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law' (2014), available at:

http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/CESL_1st_Supplement.pdf.

- An instrument based on the CESL, which takes into account suggestions for improvement made by, amongst others, the European Parliament, the Council, the ELI, and which may be restricted in terms of scope to e-commerce (the ‘CESL II’ option);
- A new contract law instrument drafted specifically to meet the requirements of e-commerce. Such an instrument would require a radical simplification of current contract law models, while incorporating rules that such models do not currently contain;
- European model standard terms, the use of which would render a trader immune from potentially overriding consumer protection laws under Article 6(2) of the Rome I Regulation; and
- Further full harmonisation of (consumer) contract law, either generally or solely in terms of e-commerce. Such an instrument might possibly be combined with a move towards the country-of-origin principle and a restriction of Article 6 of the Rome I Regulation.

The Commission, on 6 May 2015, outlined its approach in its Communication, “A Digital Single Market Strategy for Europe”.⁷

4. We have a number of views on each of these options and potential approaches. Rather than consider the merits of each, in this Paper the ELI considers how, in its view, the European Institutions could develop a proposal best able to realise Commission President Juncker’s and its present aims so as to *‘fully unleash the potential of e-commerce in the digital single market’*⁸. The Paper sets out the approach, which the Working Group concluded in April 2015 and therefore prior to publication of the Commission’s Communication, without going into detail at this stage. It forms the first part of what will be a longer-term project within which the ELI will develop a detailed draft legislative proposal.

⁷ COM(2015) 192 final.

⁸ COM (2014) 910 final, Annex 2 at 12.

A Digital Contract Law Instrument for the 21st Century

I. AIM

5. A new proposal to unlock the potential of the Digital Single Market should:
 - be drafted in as clear and as straightforward a way as possible, so as to secure easy and reliable access, via contract, to the European digital market place;
 - provide a high level of customer protection;
 - place a focus on legal certainty, to maximise practical utility while minimising the need to revert to the European Court of Justice for definitive rulings on its meaning and effect;
 - ensure that, wherever possible, it operates as a 'one-stop-shop', thus obviating the need to revert to national law; and
 - provide access to a simple, low-cost, enforcement and dispute resolution mechanism.

6. Furthermore, it should be developed against the background of an in-depth examination of current trade practices to ensure it is both feasible in the immediate and longer term, and capable of properly securing necessary market growth.

II. SCOPE

7. The new proposal will need to be clear in its substantive and personal scope. In respect of both, it would be beneficial to take a much simpler approach to scope, even simpler than that advocated by the ELI in its suggested revisions to the CESL.

(i) Substantive Scope

8. The term 'digital single market' is a broad one. Any new proposal will need to define its substantive scope with precision. There is, particularly, a need to clarify which of the following a new proposal is to cover:
 - the digital sale of digital content, i.e. the marketing and provision, by electronic means, of digital content to be used by the buyer for an indefinite period;
 - the digital marketing of digital services, including streaming and cloud;
 - the digital sale of tangible goods;
 - the digital marketing of non-digital related services, or services in general.

9. While a narrow, but fairly balanced, focus, such as one that limited the substantive scope to the digital sale of digital content, would enhance any new proposal's simplicity, it would have the following significant drawbacks:
 - i. A narrow scope would limit the proposal's ability to unlock the digital market place, undermining its utility;
 - ii. It would pose practical problems, in particular if parties could easily, by accident, get outside the scope of the proposal by way of some 'non-digital' elements that are insignificant in the context; if, for instance, any telephone communication or other contact between an employee of the e-shop and the customer were to take the contract out of scope, this would create the unnecessary and entirely avoidable risk of leaving both parties dealing subject to national law, or, at the least, being unsure as to the applicable legal regime;
 - iii. It would also produce the detrimental result that traders would still have to trade under two different legal regimes, the relevant national regime and that of the new proposal. Either possibility would necessarily undermine the utility of any new regime and fail to reduce transaction costs;
 - iv. Furthermore, limiting the proposal, for instance, to the sale of digital content would potentially undermine the long-term utility of any new instrument; any new instrument must be future proof. It would pose the same potential problem as outlined above in respect of telephone communications, i.e. if a digital product

were supplied with either a digital or non-digital service (whether the service was related or not), or with some streamed or cloud content, this should not take the contract out of scope;

- v. The immediate problems would however be compounded by additional immediate and longer-term problems. Assuming, that the proposal were to be given a narrow scope such as to exclude services, the cloud or streaming, it would limit the proposal's immediate utility: a significant and developing market would fall outside it. The proposal would thus fail to open up a significant aspect of the digital market; and
- vi. A narrow scope would also reduce the proposal's ability to respond to market developments. It would result in it not being capable of application, without legislative amendment, to novel developments, which in respect of the relevant market are an inherent feature.

10. While accepting that it will inevitably produce a greater degree of new thinking and a new approach to sales and contract law, which will require detailed, technical work to overcome, in the ELI's view the new proposal should have as broad a substantive scope as feasible. Its centre of gravity should be the Internet and e-commerce. It should encompass all the elements identified in paragraph 8, above, subject to the provision that, for instance, the provision of skilled services by the regulated professions should remain outside the scope. It should not encompass other forms of distance selling, although it should specify that the presence of non-digital elements of the agreement, or pre-contractual relations between the parties, should not take it outside scope. Such an approach will, in ELI's view, maximise the benefits to be derived from any new proposal, whilst – importantly – ensuring that it is capable of effective 'future-proofing'.

(ii) User

11. One of the main drawbacks of the CESL was the approach it took to the question whether it should be applicable to B2B, B2C and/or C2C. This issue was further complicated by questions as to whether differential approaches should apply depending on the nature of a B2B contract i.e., one as between two Small or Medium-sized

Enterprises (SMEs), one as between an SME and a Large Enterprise (LE), or one as between two LEs.⁹

12. The ELI considers that a focus on the nature of the contract parties is sub-optimal, and will inevitably lead to unnecessary complexity, which will in turn undermine its utility. It also considers it impractical. Any system, like the CESL, that is based on a trader having to ascertain with whom it is trading will be difficult to operate effectively and give rise to unnecessary costs.
13. Rather than take a user-specific approach the ELI considers that any new proposal should be contract-specific and should only apply to non-individually negotiated, standard form, mass communication digital contracts. In this context it would be helpful to explore the provision of draft standard terms approved by an appropriate body i.e., the Commission. The new proposal should not however apply to contracts concluded exclusively by exchange of individually drafted electronic mail or equivalent forms of communication. In this respect the ELI refers to recommendations made in the 1st Supplement to its Statement on the CESL¹⁰:

“A look at instruments specifically tailored to meet the needs of online trade, in contrast, suggest that the predominant dividing line in online trade is really a different one. Article 10(4) of Directive 2000/31/EC on electronic commerce indicates that the dividing line is between mass communication contracts on the one hand and contracts concluded by individual communication on the other. In electronic mass communication, traders as customers are in a similar situation to consumers [...] In the light of this, the ELI Working Party recommends [...] to take better account of the difference between mass communication and individual communications. At the same time there should be a definition of mass communication contracts [...] along the lines of: ‘mass communication contract’ means a contract where offer and acceptance are electronic and do not involve the exclusive exchange of individual communications; a communication is not individual merely because a party has made a selection among pre-formulated options or was able to add remarks in a box provided for that purpose’.”

⁹ European Law Institute, ‘Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law’, note 6 above, at (7) to (11).

¹⁰ European Law Institute, ‘1st Supplement to the Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law’, note 6 above, at (3) to (6).

14. Such an approach would not only mark a significant advance in respect of other comparable instruments, such as the UN Convention on Contracts for the International Sale of Goods, but would move the focus away from one that depended on defining the contract-parties. It would provide a simple regime applicable to what are likely to be the majority of digital transactions. Moreover it would not only ensure that the high level of customer protection to be provided by the proposal would apply irrespective of who or what the customer was, but it would also mean that sophisticated purchasers, ordinarily LEs and in some cases SMEs, who tend to individually negotiate their contracts would, by doing so, place the contract outside the new instrument. It would thus balance effective customer protection for the vast majority of digital contracts with freedom of contract and do so quickly, as the digital market is beginning to replace the conventional market of face to face trading in many areas.

15. The ELI further considers that reference to buyers, sellers, businesses, traders, etc. is inapt in the digital market place. It is particularly inelegant when suppliers and customers of services are in scope. Where such terminology is necessary within any new proposal the ELI suggests that the Commission focuses the proposal on 'supplier' or other appropriate term and 'customer'.

III. STRUCTURE – MAKING THE DIGITAL CONTRACT

(i) Regulation or Directive

16. The question whether the proposal should take the form of a Directive or Regulation to a certain degree depends upon the substance of the proposal. The ELI's provisional view is, however, that given the nature of the digital market place, a Regulation would be the most appropriate legal instrument. A long implementation period and scope for different approaches to implementation would neither secure a necessarily uniform approach across the European Union in respect of what is in reality a truly single market accessible by European citizens at any time, wherever they may be, nor do so at necessarily the same time. A digital single market requires a single, consistent approach implemented at a single point in time across the European Union.

(ii) Advance Information

17. Standardised pre-contractual information should be provided in all cases i.e., irrespective of the nature of the potential customer. This should encompass practical, administrative information i.e., details concerning the identity of the supplier and contact details, etc. It should also encompass sufficient detail concerning the nature of the product or service, and any related services. It should, obviously, where digital content or services are concerned require the provision of sufficient information to enable a potential customer to determine if the product is compatible with their physical or digital devices, digital operating systems (including cloud-based services) and other digital content. There should equally be clear remedies for non-compliance.

(iii) Obligations under the Digital Contract

18. Any new proposal should contain clear provisions for the suppliers' and customers' obligations. The obligations should be set out within the proposal, so that there can be no scope for differential approaches to implementation developing across the European Union. The proposal should also be self-contained, so that recourse to national law is also avoided. A single digital market requires a single set of digital contractual obligations.

(iv) Contract Terms

19. Contract terms should be drafted in a straightforward manner. They should be readily understandable by individual consumers and businesses as customers, and brought to their attention prior to any contract being finalised. Long lists of complex terms, which are in practice rarely read or readily understandable, should not be permissible under the proposal. If the new proposal is to provide a sufficiently high level of uniform customer protection, it will need to ensure that contract terms are, as far as ever possible, included within it and that there is therefore no need to have many standard terms complementing or even deviating from the provisions of the proposal. Detailed consideration is needed whether and, if so, to what extent, unusual or otherwise onerous terms should be specifically highlighted and whether they should require positive action on the part of the customer to indicate that they have been read and

accepted. In this respect an apposite starting point for such considerations is chapter 8 of the Proposal of the CESL and the ELI's previous comments on that chapter¹¹.

20. National laws take differing approaches to how contracts are concluded. A uniform approach is necessary. Any new proposal will need to make specific, and exclusive, provision for this aspect of contract formation.
21. If, as is suggested above, the proposal covers a range of goods and services, it will need to clarify the approach taken to: passing-of risk; transfer and/or retention of ownership; licensing; multiple or single-use streaming. A much simpler approach to these issues than was, for instance, taken in the CESL should be taken in order to maximise any new proposal's utility. In this regard, recent developments in this field from a wide range of jurisdictions should be considered in detail.

(v) Withdrawal from the Digital Contract

22. The digital market place is predicated on purchase of goods or services without the customer having an opportunity to examine them prior to purchase. While this is particularly true where physical goods are supplied, it is also true of digital content or services the exact application of which a customer will not be able to test or otherwise scrutinise prior to purchase.
23. In such circumstances, any new proposal should include a right of withdrawal from or cancellation of the transaction. While this will be of particular benefit to individual consumers, it will also be of benefit to those business customers who purchase products or services via the digital market. In order, however, to facilitate freedom of contract this should only be a default position. One particular matter for further detailed consideration is whether customers should be provided, at the supplier's discretion, with the option of opting-out of such a right through a tick-box on the payment screen. The availability of such an opt-out may, of course, enable a supplier to provide a fixed price

¹¹ European Law Institute, 'Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law', note 6 above, at 34, 81ff, 223ff; European Law Institute, '1st Supplement to the Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law', note 6 above, at 74ff.

reduction should the opt-out be exercised, thus increasing the range of buying options available as a means of generating increased competition and trade.

(vi) Online Fraud

24. The issue of online fraud is a serious problem, which can be manifested in a variety of ways. Tackling it will be essential to fostering increased confidence in online trade. In so far as any new proposal is concerned, it should provide effective protection for customers in terms of the risk of online fraud or misleading commercial practices. In terms of agreements concluded under the proposal, fraud should form the basis of a right to avoid the digital contract.

(vii) Prescription

25. An effective regime requires a straightforward approach to prescription that properly balances the interests of both contract parties.

IV. EFFECTIVE ENFORCEMENT AND DISPUTE RESOLUTION

26. If the European Union is properly to develop the digital single market, European consumers and businesses will need to have confidence in the market place. It requires confidence that products or services purchased with the touch of a button on a computer or Smart device will be, on delivery, as they appear and are described on the screen and will arrive timeously. It also requires confidence that where this does not occur or where a product or service is faulty, that effective redress can readily be achieved.

27. The ELI considers that fostering such confidence is the key to unlocking the digital single market and will be achieved by the proposal including the following measures.

(i) Payment Protection

28. The ELI noted in its work on CESL that growth of the digital market place was inhibited by lack of confidence on the part of consumers that they would be able to secure repayment of sums paid if the digital contract had to be unwound.¹² This is equally applicable in the context of a new proposal.
29. The ELI suggests therefore that any proposal should require suppliers to offer protection of advance payments by way of accredited escrow services, insurance companies or similar schemes. Such schemes to be provided at no more than cost. The utility of such protection is, in its view, as applicable to individual consumers as it is to businesses. However, it recognises that the latter, and in some cases the former, may choose not to take out such protection. An easy opt-out mechanism should also therefore be provided through, for instance, a tick-box on the payment screen.

(ii) Remedies

30. However the regime governing remedies is drafted, it should – as should be the case with obligations (see above) – be self-contained and uniform in application across the European Union. The proposal should not permit the prospect of differential remedial regimes developing if it is to be fully effective.

(iii) Dispute Resolution

31. A digital single market requires a simple, speedy and accessible dispute resolution mechanism. When transactions are taking place over the Internet between contract parties in geographically distant locations traditional methods of dispute resolution are not able to provide such a mechanism. Reliance on differing national justice systems, even if they are administering a European dispute resolution mechanism such as the European Small Claims Procedure (and it is to be remembered that not all digital

¹² European Law Institute, 'Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law', note 6 above, at 32.

transactions will come within the financial limits of that procedure), is not considered to be a realistic option.

32. A digital market place requires a bespoke digital dispute resolution mechanism, and one that should be designed so as to be consistent with the Commission's approach to Online Dispute Resolution (ODR), particularly Directive 2013/11 on Consumer ADR and Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes.
33. Consideration needs to be given to whether litigation should be carried out through bespoke digital courts in each Member State. Such consideration should include: how such a digital court would relate to the provision and operation of any ODR mechanism, whilst ensuring that where necessary the development and clarification of the law can be effected properly; how such courts can operate in a properly speedy and cost-effective manner, not least through rendering all court forms and fees available, and payable, online; and how evidence, much of which will have been available for the ODR process, should be capable of electronic filing. The judicial determination should come either following a decision by a judge on the papers or following a virtual hearing.

CONCLUSION

34. The ELI welcomes the Commission's digital single market initiative. It is the market place of the future. It needs an appropriate legislative framework; one that is fit for the 21st Century rather than one predicated on the assumptions of the 20th. In this paper the ELI has outlined a basis upon which such a framework could be developed. A companion paper with detailed legislative recommendations, devised in the light of the roadmap set out above, will follow.

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