THE CHALLENGES OF TRANSPOSING (AND NOT TRANSPOSING) THE SALE OF GOODS DIRECTIVE AND THE DIGITAL CONTENT AND SERVICES DIRECTIVE INTO COMMON LAW JURISDICTIONS: IRELAND AND POST-BREXIT ENGLAND AND WALES

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2022 was a significant year for European consumer lawyers with the provisions of the Sale of Goods Directive (EU) 2019/771, Digital Content and Digital Services Directive (EU) 2019/770 and the Omnibus Directive (EU) 2019/2161 all required to come into force. This paper examines the challenges of transposing these Directives into common law jurisdictions where, in relation to sale of goods law at least, consumer law is a mixture of well-established statutory material and case-law authority. It contrasts the implementation of the Directives in Ireland with their non-transposition in post-Brexit England and Wales, two common law systems with strong historical ties. Examining Irish law, we see the challenges of transposition, including how to fit EU law into established legal structures and to ensure that consumers are aware of their rights while changing engrained business practices. These challenges are likely to arise in all Member States. Transposition raises questions, therefore, of legal development, not least how to change legal (and business) cultures in EU Member States.

Key words: digital content; digital services; consumer protection; transposition challenges; maximum harmonisation

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1. INTRODUCTION

2022 was a significant year for European consumer lawyers. Three key consumer law directives from 2019 came into force, aiming to improve the position of European consumers by making Europe fit for the digital age as part of a proactive European Commission strategy. The 2018 New Deal for Consumers, for example, sought to strengthen the enforcement of EU consumer law in light of a growing risk of EU-wide infringements and to modernise EU consumer protection rules in view of market developments.[1] The 2020 New Consumer Agenda presented a vision for EU consumer policy from 2020 to 2025, examining whether additional legislation or other action would be needed in the medium term to ensure equal fairness online and offline.[2] In spring 2022, a fitness check on EU consumer law was launched, evaluating the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU, and the Unfair Contract Terms Directive 93/13/EEC to determine whether they ensure a high level of protection in the digital environment.[3] In creating "a Europe fit for the digital age"[4], the Commission aims to empower citizens with a new generation of technologies. Citizens should, therefore, be able to know their digital rights, enabling them to embrace the opportunities presented by new technology. The aim is to help everyone in the EU get the most out of the digital transformation.[5]

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1 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM(2018) 183 final, 11 April 2018.

2 Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final, 13 November 2020. The agenda covers five key priority areas: (1) The green transition; (2) The digital transformation; (3) Redress and enforcement of consumer rights; (4) Specific needs of certain consumer groups; and (5) International cooperation.

3 *Digital fairness – fitness check on EU consumer law*, European Commission, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en (1 December 2022), examining the adequacy of these Directives in dealing with consumer protection issues such as consumer vulnerabilities, dark patterns, personalisation practices, influencer marketing, contract cancellations, subscription service contracts, marketing of virtual items, the addictive use of digital products, and others.

4 *A Europe fit for the digital age*, European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en (1 December 2022).

5 *Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030*, European Commission – Press Release, Brussels, 9 March 2021. See also

Change is clearly afoot, with a clear steer toward regulating the digital environment. This paper will focus on the three 2019 Directives that came into force in EU Member States in 2022, namely the Sale of Goods Directive (EU) 2019/771 (SGD)[6], the Digital Content and Digital Services Directive (EU) 2019/770 (DCSD)[7], and the Enforcement and Modernisation Directive (EU) 2019/2161 (Omnibus Directive)[8]. The latter introduces measures to improve the enforcement of existing EU consumer protection rules. Member States were required to adopt the SGD[9] and DCSD[10] by 1 July 2021, with these Directives becoming applicable in the Member States from 1 January 2022. The Omnibus Directive was to be transposed into national laws by 28 November 2021, applicable from 28 May 2022.[11]

These Directives bring major reforms to the very core of European consumer law. The 1999 Consumer Sales and Guarantees Directive 1999/44/EC (CSD) is repealed. New measures are introduced for the first time to regulate digital content and services contracts and give an express right to a remedy when faulty content or services are provided. Measures dealing with lack of conformity involving sales of goods are revised. These are supplemented by the Omnibus

Proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

6 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Official Journal, L 136, 22 May 2019.

7 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Official Journal, L 136, 22 May 2019.

8 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, Official Journal, L 328, 18 December 2019. This paper will not discuss the 2020 Directive on Representative Actions (Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Official Journal, L 409, 4 December 2020), except to note that it repealed Directive 2009/22/EC and that Member States were required to adopt implementing measures by 25 December 2022; the measures to apply from 25 June 2023.

9 Article 24 SGD.

10 Article 24 DCSD.

11 Article 7 of the Omnibus Directive.

Directive, which seeks to update elements of the Unfair Contract Terms Directive 93/13/EEC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC, and Consumer Rights Directive 2011/83/EU.

This paper will reflect on the challenges of transposing (and not transposing) the SGD, DCSD, and Omnibus Directive into European common law jurisdictions, with reference to the Irish experience and the impact (if any) of such changes on consumer law in England and Wales. It will examine how Irish common law has sought to introduce these changes in the face of established sales of goods legislation dating back to 1893 and a practice of introducing EU consumer law by free-standing regulations. My study will highlight issues relevant to all Member States seeking to transpose these directives successfully, namely, how to fit the measures into established legal structures, notably for the sale of goods, how to change engrained business practices, and how to ensure consumers are conversant with their rights. As we will see, transposition raises questions of legal development and how to change legal (and business) cultures. This paper will also reflect on where such changes leave a recent departure from the EU: the United Kingdom. The UK has strong trade ties with the EU, and with Ireland in particular, and its sale of goods rules have developed in parallel to those in Ireland. Will EU change trigger revision of UK consumer law despite Brexit, or will political ideology ensure a widening gap between EU and UK consumer contract law?

2. THE NEED FOR CHANGE

These three Directives, abbreviated as the SGD, DCSD and Omnibus Directive, have several key objectives. The Commission argues that if we are to make Europe fit for a digital age and empower citizens with new generations of technologies, then consumers need greater protection to persuade them to transact with confidence. It also found a strong empirical case for reform in the fields of sale of goods and contracts for the sale of digital content and for digital services. Surveys indicate consumers do have serious concerns about buying online, particularly in relation to websites in other countries.[12] A 2015 survey found, for example, that at least 70 million consumers had experienced one or more problems with just four popular types of digital content (music, anti-virus, games, and cloud storage), while only 10% of consumers experiencing problems

[12] Collated helpfully at *Digital contract rules*, European Commission, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en (1 December 2022).

received remedies.[13] As a result of these unresolved problems, consumers in the EU suffered a financial and non-financial detriment estimated in the range of €9–11 billion.[14] Equally the Commission found that traders are deterred from selling cross-border because of legal complexities, notably that contracts for supplying digital content prior to the Directives were categorised differently from one country to another as sales contracts, services contracts, or rental contracts. Consequently, while increasing numbers of consumers wish to make purchases online, the share of consumers buying from traders in their own country is more than double (52%) that of those buying from other Member States (21%).

The 2019 Directives have three key goals, therefore. First, gap-filling. EU consumer law has traditionally focused on contracts for the sale of goods and now needs to address the digital age. Given the economic importance of contracts for the sale of digital content and digital services and the absence of national provisions in most Member States, a maximum harmonisation directive in this area of law could provide both consumers and businesses with greater certainty in a fast-developing area of law. The new rules offer consumers a remedial framework should the digital content or service prove to be faulty, requiring the trader to fix the problem or, if the problem persists, offer a price reduction or allow the consumer to terminate the contract and get a refund. This will apply regardless of whether the consumer has paid for it or provided personal data instead. Businesses will no longer need to deal with contract law differences in each EU country. Consumers will know what to expect when they buy digital content online and that they have rights if the digital content or digital service is faulty.

The second goal is to improve the law relating to sale of goods contracts, providing greater consumer protection and reducing fragmentation of the law. Prior to the SGD, Union rules were fragmented[15], with key contractual elements, such as the conformity criteria, the remedies for lack of conformity, and the main modalities for their exercise subject only to minimum harmonisation un-

[13] ICF International, *Economic Study on Consumer Digital Content Products: Final Report*, European Commission, Brussels, 2015.

[14] Commission Staff Working Document, Executive Summary of the Impact Assessment on Proposals for Directives of the European Parliament and of the Council on (1) certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods, SWD(2015) 275 final, 9 December 2015.

[15] Although rules on delivery conditions and, as regards distance or off-premises contracts, pre-contractual information requirements and the right of withdrawal had already been fully harmonised by Directive 2011/83/EU.

der Directive 1999/44/EC (CSD). National provisions transposing the CSD, for example, had significantly diverged on essential elements, such as the absence or existence of a hierarchy of remedies.[16] The Commission took the view that legal fragmentation negatively affects consumers' confidence levels in cross-border transactions and that a maximum harmonisation directive was needed to reduce legal differences across EU countries. The SGD will encourage businesses to sell cross-border and inform consumers of the remedies available if they do not receive the order promised or receive a damaged or faulty product. It provides that goods have to be in conformity both with what is agreed and with what the consumer could reasonably expect. In the event of lack of conformity, the same remedies will now apply throughout the EU. Further, it does not matter whether the consumer buys a new camera online or in a street shop – if the product is faulty, the consumer's rights and trader's obligations will now be the same.

The third goal is to improve enforcement. Consumer rights without adequate enforcement frustrate the objectives of the Directives and diminish consumer confidence. The Commission seeks key improvements here, as highlighted in the Omnibus Directive, which not only modernises rules in line with digital developments (goal 1) but also provides stronger tools to enforce consumer rights, such as requirements for transparency on online marketplaces and information rights for "free" digital services such as cloud services or social media, for which consumers do not pay. Victims of unfair commercial practices will also now be given a right to compensation. These powers include increased penalties for widespread breaches of the laws of up to 4% of turnover in the relevant Member State or Member States, or up to €2 million.[17]

The Directives, therefore, in line with the market-orientated policies of the EU, seek to tear down unnecessary regulatory barriers and move from individual national markets to one single EU-wide rulebook. They seek to encourage consumers to feel confident purchasing goods and services without fearing online fraud or abuse. At the same time, they do recognise the need to protect vulnerable consumers, particularly in an increasingly complex digital market. The question of the balance between market stimulation and consumer protection, implicit in these directives, is one that Member States will have to address.

16 Recitals 6 and 8 SGD.

17 Article 13 of the Omnibus Directive (penalties).

3. TRANSPOSING THE SGD, DCSD AND OMNIBUS DIRECTIVE INTO THE COMMON LAW OF IRELAND: KEY CHALLENGES

The Irish Consumer Rights Act 2022 (CRA 2022) was signed into law by the President on 7 November 2022. The Irish government rejected its previous practice of simply transposing EU directives, virtually word-for-word, in stand-alone regulations. This time, transposition is part of a major overhaul of Irish consumer law. The CRA 2022 represents the most significant reform of consumer rights law in the history of the Irish State[18] and it transposed the SGD, DCSD, and Omnibus Directive into Irish law. The Irish Competition and Consumer Protection Commission (CCPC) has welcomed the Act as one that will strengthen consumer rights and provide clarity for consumers and businesses by setting out specific obligations for traders and ensuring greater transparency for consumers before and after purchase.[19]

This section will examine the challenges Ireland, as a common law jurisdiction, has faced in transposing these three Directives into national law before examining the CRA 2022 in more detail in the next section. Ireland has well-established sale of goods legislation, supplemented by case-law authority. In contrast, it had no existing law on digital content and services, where there was an acknowledged gap in the law. The challenges of reform for Ireland were threefold.

3.1. Integrating new provisions into sales of goods legislation dating back to 19th century

Any change must be integrated into a well-established legislative framework and practices. The Sale of Goods Act 1893 remains Ireland's main sales of goods legislation, despite being introduced in colonial times, although it has since been amended and updated by the Sale of Goods and Supply of Services Act 1980.[20] Although the main purpose of the 1980 Act was to strengthen the protections available to consumers, it did this by means of additions and amendments to

[18] *Government approves new law strengthening consumer rights*, Department of Enterprise, Trade and Employment, 22 February 2022, https://enterprise.gov.ie/en/News-And-Events/Department-News/2022/February/20220222.html (1 December 2022).

[19] *CCPC welcomes passing of consumer-rights bill*, Law Society Gazette, 27 October 2022, https://www.lawsociety.ie/gazette/top-stories/2022/october/ccpc-welcomes-passing-of-consumer-rights-bill (1 December 2022).

[20] See Clark, R., *Contract Law in Ireland*, 9th edn., Round Hall, Dublin, 2022, Chapter 8.

the 1893 Act rather than its repeal and replacement. This means that the pre-CRA 2022 statutory framework bore a closer similarity to the sale of goods law applicable in the UK than that in other EU Member States.

3.2. Lack of integration of EU consumer law into national law

Prior to the Act, Ireland had primarily implemented EU consumer directives by means of free-standing regulations which were interpreted separately from the 1893 Act.[21] Regulation 3 of the 2003 Consumer Sales Regulations, for example, provides that these Regulations are in addition to, and not in substitution for, the 1893 and 1980 Acts. This has inevitably led to complexity in Irish consumer law, as seen with the transposition of the Consumer Rights Directive 2011/83/EU by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, which again existed alongside the two main statutes.[22] The pre-Act position has been described as "neither in keeping with the principles of better regulation nor one conducive to the accessibility and understanding of the law".[23]

3.3. A tendency to follow English case-law on digital content or services

Due to the aforementioned similarities, the Irish courts have traditionally looked to English law for persuasive authority on interpreting the 1893 Act. In relation to digital content, Ireland, like many other EU Member States, had experienced problems in applying traditional consumer legislation to computer software and again turned to the UK for guidance. Clark, in previous editions of his leading textbook, had relied on the English Court of Appeal decision in

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[21] See: European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI 1995/27) and European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (SI 2000/307) transposing the Unfair Contract Terms Directive 93/13/EEC, and the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (SI 2003/11) transposing the Consumer Sales Directive 1999/44/EC. With very limited exceptions, the directives have been transposed more or less verbatim.

[22] European Union (Consumer Information, Cancellation and other rights) Regulations (SI 2013/484).

[23] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services*, Stationery Office, Dublin, 2011, p. 47.

St Albans Council[24] to state that Irish sale of goods legislation could apply to digital content provided on tangible media, while noting uncertainty on how to deal with content not so provided, e.g., software or music provided via a download or content streamed to a device.

It has long been accepted, however, that a review of *Irish* consumer contract law was overdue. The Sales Law Review Group in 2011 made over 120 recommendations for change.[25] The initial proposal in May 2015 was to introduce a Consumer Rights Bill modelled on the UK Consumer Rights Act 2015, which did introduce, *inter alia*, measures dealing with digital content. However, the publication of the draft EU directives on contracts for the sale of goods and supply of digital content in December 2015 led the Irish Government to halt prospective legislation. With the UK voting to leave the EU in 2016, Ireland was presented in 2019 with changes that would not apply in the UK. More positively, however, there was a growing frustration that, while the UK has had provisions dealing with this digital content since 2015, Irish law was still waiting in 2022.

The Irish legislator was therefore faced with the challenge of integrating the new directives into its complex legislative framework. It chose to do so by means of a comprehensive Consumer Rights Act, which would consolidate national and EU law. This will take Irish law away from its UK counterpart but closer to its fellow EU Member States.

4. THE IRISH CONSUMER RIGHTS ACT 2022

Having decided to introduce a Consumer Rights Act, the challenge for Ireland was self-evident: how to draft legislation that would transpose the Directives in time while rendering the law coherent for consumers and businesses. The COVID-19 pandemic was unhelpful in this respect and has been partially blamed for the delays in transposition, which led Ireland to miss the relevant deadlines, although one might argue that the challenges of such an ambitious transposition were underestimated by the Irish legislator. Nevertheless, the new legislation was signed by the President in November 2022.[26] Consumer rights in Ireland now extend to anything streamed or downloaded, and cloud products, while the Irish Competition and Consumer Protection Commission has stronger powers to uphold consumer rights. The section below will examine

[24] *St Albans City and DC v International Computers Ltd* [1996] EWCA Civ 1296.

[25] Sales Law Review Group, *op. cit.* (fn. 23), Annex I.

[26] Ireland was not alone in missing the deadlines: Poland, Slovenia, and Slovakia also missed the deadlines for all three Directives.

key characteristics of the Irish transposition and to what extent it is likely to create differences with other Member States despite the maximum harmonisation nature of the Directives.

4.1. Consolidation of national and EU law in one statute

The CRA seeks to consolidate and modernise consumer rights legislation for the sale of goods and digital content and the supply of services (digital and otherwise), ensuring that the updated legislation aligns better with the digital age. In doing so, the drafters chose not only to integrate the new Directives into the Act but also consolidate other EU directives that had previously been transposed via standalone regulations. They also sought to revise consumer law generally, particularly provisions relating to hire-purchase and general services contracts, re-examine the provisions on unfair terms, and address other issues of national importance. The CRA 2022 is more than a vehicle for EU directives; it is a major piece of Irish consumer law.

If we examine the framework of the Act, the scale of this enterprise becomes clear. While Part 2 (Sales Contracts) implements the SGD, Part 3 (Digital content contracts and Digital services contracts) implements the DCSD, and Part 5 (Consumer information and cancellation rights) addresses parts of the Omnibus Directive[27], other Parts of the Act consolidate national consumer law: see Part 1 (Preliminary), Part 4 (Services Contracts)[28], Part 6 (Unfair Terms)[29], Part 7 (Proceedings & Penalties)[30], Part 8 (Amendment of the Consumer Credit Act 1995), Part 9 (Amendment of the Consumer Protection Act 2007)[31], with further minor amendments in Parts 10–14.

A consolidating Act represents a major step forward in consumer protection in Ireland and vastly improves upon earlier law, where such rights were spread across different pieces of legislation. The devil, however, lies in the detail. The Act consists of 14 Parts, six Schedules, and 176 sections. As we will see, the language is not always consumer friendly. It also represents what I would term a distinctive common law transposition. This will be examined in more detail below.

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27 Together with rights previously included in the Consumer (Information and Cancellation Rights) Regulations 2013 (SI 2013/484).

28 Amends Part IV of the Sale of Goods & Supply of Services Act 1980 (non-digital services, in respect of consumers).

29 Integrating Regulations that previously transposed Directive 93/13/EEC (see fn. 21), together with updates from the Omnibus Directive.

30 Although this does include updates from the Omnibus Directive.

31 Although this does include updates from the Omnibus Directive.

4.2. Transposition the Irish way

The Irish transposition is targeted at a common law audience and seeks to bridge any conceptual gap between EU and common law. Three distinctive characteristics may be noted. First, there is a willingness to go beyond the Directives, notably in relation to services and unfair terms, where this assists the integration of EU law into the Irish legal system. Secondly, a distinctive drafting style is adopted that seeks to provide detailed and precise provisions and "translate" the Directives into the language of the common law. Finally, the Directives do permit States discretion on certain points, and Ireland has sought to use this discretion to provide measures that fit the specific needs of the Irish State. As will be seen, all three characteristics represent an attempt to integrate EU law more smoothly into existing Irish law, but may, nevertheless, potentially distinguish the Irish transposition from that of other EU Member States. The extent to which this may undermine the maximum harmonisation strategy of the Directives will be examined below.

4.2.1. Going beyond the three Directives: services and unfair terms

In relation to services, the provisions in the Irish Sale of Goods and Supply of Services Act 1980 were basic; s. 39 imposing limited implied undertakings as to the quality of service.[32] Part 3, ss. 48–73, implementing the DCSD, sets out detailed provisions for those supplying a digital service.[33] The Directive does not cover non-digital services, which are left to national law, potentially leaving Member States with two separate regimes depending on the type of service. The drafters favoured, instead, in Part 4, ss. 74–95, remodelling Irish law relating to services with the earlier reforms in mind. It thus provides a parallel regime, including s. 79 (service to be in conformity with service contract),

[32] "Subject to section 40 (exclusion of implied terms), in every contract for the supply of a service where the supplier is acting in the course of a business, the following terms are implied— (a) That the supplier has the necessary skill to render the service, (b) That he will supply the service with due skill, care and diligence (c) That, where the materials are used, they will be sound and reasonably fit for the purpose for which they are required, and (d) That, where the goods are supplied under the contract, they will be of merchantable quality".

[33] "Digital service" is defined at Article 2(2) DCSD and s. 2(1) of the CRA 2022 (the Act adding that this includes in particular video and audio sharing and other file hosting, social media, and word processing and games offered in the cloud computing environment). Section 2(1) also defines "service" and "service contract".

s. 80 (subjective requirements for conformity with service contract), and s. 81 (objective requirements for conformity with service contract). Remedies equally focus on non-conformity and bringing the service into conformity with the service contract or allowing the consumer to obtain a proportionate reduction in price or termination of the service contract. Some more traditional common law provisions remain. Section 83, for example, stipulates that where the contract does not fix the price of the service, a reasonable price will be paid. The Irish example raises an interesting question for other national jurisdictions – should the provisions on digital services be an inspiration for national reform *à la mode européenne*, or should they simply be regarded as a "digital" addition to existing law?

Equally, the Irish legislation in Part 6 (ss. 126–140) complies with Article 1 of the Omnibus Directive, which strengthens the deterrent effect of penalties by amending Directive 93/13/EEC, but it goes far beyond this. The opportunity is taken to review the law on unfair terms and insert new provisions that reflect not only the Directive but its subsequent application in the CJEU.[34] The new provisions include (i) a new black list of standard contractual terms and conditions that are always unfair (s. 132); (ii) the expansion of the existing grey list of potentially unfair contractual terms (s. 133); (iii) new legislative provisions that insert the substance of key CJEU decisions, such as the duty of the court to consider whether a term of the consumer contract is unfair (s. 136) and the meaning of transparency (s. 134); and (iv) a narrowing of items excluded from potential assessment for unfairness and the extension of the Act to terms individually negotiated (s. 131).

The result is a set of measures that seek to reflect more accurately developments in EU law, both in terms of legislation and case-law. The form, however, is likely to differ from that of other EU Member States.

4.2.2. Differences in drafting style

The Irish transposition also highlights differences in drafting style that can be attributed to its common law tradition. While EU law and civil law generally focus on purposive or teleological interpretation of legislation[35], the common law

[34] *Cf.* UK Consumer Rights Act in 2015, which also used the Act to integrate and update the transposition of the 1993 Directive. See Giliker, P., *The Consumer Rights Act 2015 – a bastion of European consumer rights?*, Legal Studies, *vol.* 37, no. 1, 2017, pp. 78–102.

[35] Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, Cambridge – New York, 2012, p. 11.

has traditionally favoured a more literal approach, meaning the starting point in construing any statutory provision is to focus on the language of the provision itself, with words given their ordinary and natural meaning.[36] In recent years, courts have moved towards a more modern contextual and purposive approach[37], but this has not changed the common law drafting style, which aims to provide detailed and precise provisions that try to cover all possible eventualities that can be foreseen.[38] Thus, the law should be drafted in a way that is clear and unambiguous to the reader.

The CRA 2022 adheres to these requirements. Several provisions illustrate the Irish draftsman's effort to add more detail to the text, avoiding any ambiguity and making the text clearer. For example, the key definitions of digital content and service in s. 2(1) build on the Directive's definitions by adding practical examples to make them clearer to the reader.[39] Another technique is to avoid cross-references and set out the Directive's requirements in a single place, even at the cost of repetition. For instance, the complex provision in Article 7(3) SGD on goods with digital elements, which cross-references Article 10 SGD (118 words), is expanded to ss. 18(4)–(6) (245 words) in the CRA 2022. In other cases, explanations from the Directive's preamble are incorporated into the Act. Accordingly, s. 18(2) on durability of goods includes supplementary text taken from recital 32 of the SGD, and s. 61(4) (reasonable time for bringing the digital content or digital service into conformity) draws on recital 55 of the SGD to bring greater clarity to this term.[40]

What we see here is a distinct style of drafting. This means that, in practice, the law will look very different to a civil lawyer attuned to the style of a civil law codification or statutory drafting. This does not mean that the content of the Directive has changed, merely that it is written in a manner expected by common lawyers.

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[36] *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [5].

[37] Burrows, A., *Thinking About Statutes: Interpretation, Interaction, Improvement*, Cambridge University Press, Cambridge – New York, 2018, p. 5.

[38] *Ibid*., pp. 91–93. This contrasts with the civil law approach: see MacCormick, D. N.; Summers, R. S., *Interpreting Statutes: A Comparative Study*, Ashgate Publishing, Dartmouth, 1991.

[39] The transposition of Article 2(6) DCSD "digital content" has the additional words "including in particular computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publications". For "Digital service", see fn. 33.

[40] *Cf.* s. 25(3) for goods and s. 85(4) for services.

Further adaptation to the "common law" style may be seen in the use of implied terms. The Irish Sale of Goods Act 1893, like its English counterpart, uses statutory implied terms to insert conformity standards into contracts, dealing with specific issues such as correspondence of goods with description (s. 13) or sample (s. 15), and merchantable quality and fitness for purpose (s. 14). Austen-Baker argues that while the common law has an in-built reluctance to prescribe the content of a contract directly, statutory intervention like this represents an attempt to balance freedom of contract against statutory intervention in favour of consumers.[41] It is not a great surprise, therefore, that this technique persists in the CRA, as seen in ss. 20 (implied terms of sales contract), 56 (implied terms of digital content contract or digital service contract), and 82 (implied terms of service contract), all continuing to utilise this distinctive common law technique.

A more troubling example of potential path dependency may be found, however, in relation to the short-term right to reject. A long-standing feature of common law sale of goods law, the SGD permits Member States to provide, in addition to the right to repair or replacement, a specific remedy to reject defective goods if the lack of conformity of the goods becomes apparent within a specific short period of time after the delivery of goods, which should not exceed 30 days.[42] Section 23(1) of the CRA provides that "where goods are not in conformity with the sales contract at the relevant time, the consumer shall have the following rights—(a) the right to exercise the short-term right to terminate the sales contract in accordance with section 24, and (b) subject to subsections (2) and (3), the right to have the goods brought into conformity with the contract through repair or replacement in accordance with section 25." Note, however, that the short-term right to "terminate" is listed first, before any mention of repair or replacement. Should we read anything into this in terms of hierarchy? At the very least, what might be regarded as a concession for common law systems is not only picked up by Ireland but listed first as a remedy under s. 23. Is this what the Commission intended?

4.2.3. Exercising discretion permitted in the Directives

The Directives, despite their maximum harmonisation character, do allow national legislators some discretion. One obvious question, therefore, is to what

41 Austen-Baker, R., *Implied Terms in English Contract Law*, 2nd edn., Edward Elgar, Cheltenham – Northampton, 2017, para. 1.07.

42 Recital 19 SGD.

extent the national legislator has taken advantage of this freedom and thereby been permitted to insert its own practices and law distinct from those of other Member States. The Irish legislator has used this discretion in several ways. Both the SGD and DCSD allow the consumer's right to pursue other remedies for the same loss under national law (provided the same loss is not recovered twice), which is expressly included in the Act (ss. 34 and 73). This permits consumers to continue to pursue remedies such as specific performance under s. 52 of the SGA 1893. While this assists integration into national law, it offers consumers parallel systems of remedies. Does this diminish the impact of the Directives, or might we regard it as a necessary adjustment to enable "fit" within national law? Again, the problem of path dependency comes to mind: to what extent do such measures discourage consumers from embracing changes by retaining more familiar remedies?

Perhaps more surprisingly, the definition of "consumer" is not fixed in the Directives. While both the Article 2(2) SGD and Article 2(6) DCSD define a consumer as a natural person who is acting for purposes outside that person's trade, business, craft or profession, both Directives (in recitals 22 and 17, respectively) allow Member States to determine whether this should include contracts concluded for dual purposes, that is, purposes that are partly within and partly outside the person's trade. The Irish legislation takes up this option, defining a "consumer" in s. 2(1) as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession". However, it does not extend the Directive's application to non-consumers, such as non-governmental organisations, start-ups, or SMEs, as permitted by recital 21 SGD and recital 16 DCSD. This will lead to national variation of a key element of the Directives.

Another obvious example relates to time limits set by the Directives. This was a source of debate in their drafting process. Article 10 SGD, while setting time limits on the seller's liability for lack of conformity at two years, allows Member States to maintain or introduce longer time limits than those referred: Article 10(3). Section 21 CRA chooses to adhere to the normal limitation period for contractual liability, six years.[43] This is just one example of different time limits likely to arise across the EU.

The Directives also expressly leave certain matters open. For example, recital 38 SGD leaves it to Member States whether they wish to define "delivery" of goods. Section 2(1) of the CRA defines delivery as "voluntary transfer of possession from one person to another". Equally the Act picks up the option to

[43] See also s. 58 (digital content/service) as permitted by Article 11 DCSD.

regulate the conditions and modalities regarding the withholding of payment of the price by the consumer (ss. 32 and 69), the consumer's entitlement to compensation for damage suffered (s. 34), and the consequences of termination beyond those provided for in the Directives (s. 30). The Irish legislator also takes the opportunity to make special provision for spare parts (s. 17(4)).[44] It also makes provision for the relevant Minister (s. 25(8)) to specify in relation to a specific category of products what will be a "reasonable period" for their repair or replacement.[45] These examples highlight that there will be variance among Member States in relation to these, and other, issues. Respecting national autonomy comes at a price and diminishes the impact of what are intended to be maximum harmonisation directives.

4.3. Differences between the Irish transposition and that of other EU States

As we have seen above, the transposition of the Directives is part of a larger Irish project – drafting a much-anticipated consumer law consolidation statute. While previous legislation had covered both consumer and business contracts, the CRA (like its UK counterpart, the Consumer Rights Act 2015) revises existing legislation to produce a new consumer statute that combines EU and national law. Such an endeavour thus extends to national consumer issues, such as Part 2 making specific provision for gifts (s. 46) and motor vehicles (s. 47), and, as indicated in section 4.1. above, revisions to existing legislation in Parts 1, 4, 6, 7, 8, 9, and 10–14. The Act's ambition is undoubtedly one of the reasons for Ireland missing the deadlines set out in the Directives. Its decision to revise the law on services in addition to the new provisions on digital services is an interesting one and highlights the potential knock-on effect the Directives may have on consumer law generally. The revisions to unfair terms going beyond the Omnibus Directive also demonstrate a willingness to embrace EU regulation of unfair terms, although this might be considered somewhat premature given the current review of the 1993 Directive.

However, the CRA also betrays its character as a common law statute. It is very detailed and, for an Act seeking to protect consumers, not an easy read. It is unlikely, therefore, that the average consumer will be able to use it as a direct source for their rights and will thus be reliant on others to break it down into user-friendly soundbites. Such detail is required by the common law style of

[44] Permitted by recital 33 SGD.

[45] Recital 55 SGD.

drafting, but the resultant complexity does not necessarily work to the benefit of consumers.[46]

Finally, section 4.2.3. has highlighted some of the areas where the Directives allow Member States to supplement the Directives with more detail, respecting the autonomy of States to deal with core matters of contract law. Here we will see variance amongst Member States on matters as basic as the meaning of "consumer" or "delivery" of goods. This seems worrying in a series of Directives where the choice of maximum harmonisation was deliberately taken to avoid the fragmentation seen to result from the 1999 Consumer Sales Directive. The Irish approach also raises the question of to what extent such opportunities will allow a State to continue its traditional approach rather than fully embracing the EU approach. This is particularly salient in areas where existing legislation exists. Differences are therefore likely to arise between Member States. The key question is to what extent they will serve to diminish the impact of the Directives.

5. THE 2019 DIRECTIVES AND THE UK POST-BREXIT: A RUPTURE IN THE COMMON LAW?

In contrast to Ireland and other EU Member States, the 2019 Directives do not apply in the UK, which left the EU in 2020.[47] Nevertheless, the UK retains strong trade ties with the EU, particularly with Ireland. UK and Irish sale of goods law have developed in parallel, sharing the common starting point of the Sale of Goods Act 1893. Indeed, the Irish CRA resembles the UK's Consumer Rights Act 2015 (UKCRA) in many ways. It is a consumer law consolidation statute that integrates EU provisions with national law, resolving overlaps and inconsistencies. Both Acts have a specific section on unfair terms that goes beyond the provisions of the 1993 Directive. However, examining the UKCRA, it is very clear that the 2019 Directives go far beyond anything found in UK law. While the UKCRA has a specific section (Part 1 Ch. 3) on contracts for the supply of digital content, its measures are not as detailed or technically advanced as those found in the DCSD and do not cover digital services.[48]

[46] A criticism also made of the drafting style of the UK Consumer Rights Act 2015: Whittaker, S., *Distinctive features of the new consumer contract law*, Law Quarterly Review, *vol.* 133, 2017, pp. 47–72.

[47] See EU (Withdrawal) Act 2018; EU (Withdrawal Agreement) Act 2020.

[48] See Giliker, P., *Implementing Directive 2019/770/EU on Contracts for the Supply of Digital Content and Services: A common law perspective*, in: Slakoper, Z.; Tot, I. (eds.), *EU Contract Law and the CISG: The Effects for National Law*, Routledge, Abingdon – New York, 2022, pp. 15–36.

It further only applies to contracts to supply digital content to a consumer for a price paid by the consumer (s. 33(1)) and does not cover personal data. In so doing, it adopts a conventional approach to digital content in which implied terms mirror those implied into sale of goods contracts, for example, digital content must be of satisfactory quality (s. 34), fit for particular purpose (s. 35), and as described (s. 36). It nevertheless gives consumers a clear right to repair or replacement of faulty digital content. In contrast to the complicated termination provisions of the DCSD, however, the UKCRA does not permit a right to reject non-conforming digital content and obtain a refund of the price. The only exception is where the trader has no right to supply the digital content (e.g., pirated content). It was thought impractical to impose a requirement for the return of digital content. Part 1 Ch. 2 on contracts for the sale of goods combines national law with EU directives that had been transposed until the end of 2020. The 1999 Consumer Sales Directive, therefore, remains preserved in the UK Act, despite its abolition in EU law.[49]

At present, UK sale of goods law is similar, but far from identical, to that now applying across the EU. In relation to contracts for the supply of digital content, there are key differences. It does not regulate digital services, and its services provisions remain based on common law principles. This represents a major cleavage between the common laws of Ireland and England, Wales, and Northern Ireland in these fields. It also places the UK at a digital disadvantage in that the provisions that do exist on digital content are not as sophisticated as those found in the EU and fail to engage with personal data provision in lieu of financial payment or the expanding market for digital services. Equally, the UK business community will soon be faced with an EU model for sale of goods and digital contracts when trading across Europe.

Given the gaps in UK law and the close trading relationship with Ireland and the rest of the EU, one politically less contentious option might be for legislators to look across the Irish Sea at the Irish Consumer Rights Act 2022 for inspiration for reform. This common law statute will look familiar to common lawyers both in style and in content. While it is legitimate to criticise its dense drafting style, for another common law jurisdiction might this seem less European and so more acceptable as a basis for change?

Ultimately, the UK must accept that one of the prices is Brexit is the non-implementation of measures seeking to advance consumer rights and regulate key developments in the digital market. The question troubling UK lawyers is

[49] Subject to its removal by legislation, see, for example, the Retained EU Law (Revocation and Reform) Act 2023.

where this leaves law reform which, as highlighted above, seems necessary. Will anti-EU sentiment give rise to resistance to consumer law reform, or can a case be made for adjustments that may perchance look very similar to those being applied in EU Member States? Can Irish law provide a bridge to such reforms?

6. CONCLUSIONS

This paper has examined the challenges facing Ireland in transposing the SGD, DCSD, and Omnibus Directive into its common law system. It has had to deal with amendments to long-standing statutory provisions and the "translation" of EU measures into the drafting style and language of the common law. The choices of the Irish legislator, however, highlight questions that legislators across the EU must resolve. What method should be used to transpose the Directives? Should the legislator draft specific consumer legislation, favour stand-alone measures, or simply integrate them into existing codal provisions? How should the Member State respond to areas left to national discretion? Should Member States, in particular, consider revising provisions on non-digital services? The Irish example also raises specific questions about effective implementation. The Irish Act is very detailed and engages in a major review of consumer law but is arguably far too dense and complex for the average consumer (or even some businesses) to understand easily. To what extent should transposition, therefore, take into account ease of navigation for consumers or even businesses? It will also be interesting to see whether other Member States view the Omnibus Directive as an opportunity to review the implementation of existing Directives or, more likely, simply regard it as a means to improve enforcement of consumer rights. What is clear is that many Member States have taken a less proactive approach than the Irish legislator.

At the very least, what this means is that the transposition of the Directives will differ across the EU, despite all three being maximum harmonisation directives. One further factor we can identify is that the gap between EU and UK consumer protection is now starting to grow, despite traditional ties between states such as the UK and Ireland. Given the Commission's ambitions examined at the start of this paper, this division will continue unless the UK legislator rethinks its approach to consumer law. At present, it represents an example of an EU/common law remedial framework frozen in time with an outdated and limited response to the digital environment.

To conclude, Goanta has commented that "it is important to acknowledge that the EU consumer protection regime contains a wealth of rules aiming to safeguard the interests of the weaker party in a transaction and that those

rules are now more important than ever because of fast paced opaque market developments in the digital market."[50]

The 2019 Directives are a key part of this regime. They are likely, however, only the beginning of changes to consumer law in the years to come as the European Commission grapples with new forms of contracting and digital products and the digital market continues to evolve. With the prospect of forthcoming EU regulations on product safety, a reframing of the Product Liability Directive, and a new Digital Services Act, consumer law is on the move. It is timely, therefore, to reflect on how we transpose directives, the choices Member States make, and how best to achieve the goal of harmonised protection of consumer rights across the EU.

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[50] Goanta, C., *European Consumer Law: The Hero of our times*, EuCML – Journal of European Consumer and Market Law, *vol.* 10, no. 5, 2021, p. 177.

Sažetak

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IZAZOVI TRANSPONIRANJA (I NETRANSPONIRANJA) DIREKTIVE O KUPOPRODAJI ROBE I DIREKTIVE O DIGITALNOM SADRŽAJU I USLUGAMA U *COMMON LAW* PORETKE: IRSKA TE ENGLESKA I WALES NAKON BREXITA

Godina 2022. bila je značajna za europske pravnike specijalizirane za potrošačko pravo jer su odredbe Direktive (EU) 2019/771 o kupoprodaji robe, Direktive (EU) 2019/770 o digitalnom sadržaju i digitalnim uslugama te Omnibus Direktive (EU) 2019/2161 morale stupiti na snagu. Ovaj rad ispituje izazove transponiranja tih Direktiva u common law *poretke, u kojima je potrošačko pravo, barem u segmentu kupoprodaje robe, uhodana kombinacija zakonskih odredbi i sudske prakse. U radu se uspoređuju dva* common law *poretka s jakim povijesnim vezama: irsko pravo nakon transponiranja direktiva te pravo Engleske i Walesa u kojemu nakon Brexita direktive nisu transponirane. Proučavanjem irskog prava uočavaju se izazovi transponiranja, uključujući kako uklopiti pravo EU-a u postojeće pravne strukture te osigurati svjesnost potrošača o svojim pravima dok se mijenjaju ukorijenjene poslovne prakse. Ti će se izazovi vjerojatno pojaviti u svim državama članicama. Transponiranje stoga nameće i pitanja pravnog razvoja, posebice kako promijeniti pravnu (i poslovnu) kulturu u državama članicama EU-a.*

Ključne riječi: digitalni sadržaj, digitalne usluge, zaštita potrošača, izazovi transponiranja, maksimalna harmonizacija

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