
Roger Brownsword*

Introduction

Twenty years ago, when UNCITRAL published its Model Law on Electronic Commerce,¹ there was felt to be an urgent need to set out ‘internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce.’² In particular, it was thought to be important to provide ‘equal treatment to paper-based and electronic information’.³ In Europe, too, this sense of urgency and importance was shared. If small businesses in Europe were to take advantage of the opportunity afforded by emerging ICTs to access new markets, and if consumers were to be sufficiently confident to order goods and services on-line, it needed to be absolutely clear that e-transactions (no less than ‘traditional’ contracts) were recognised as legally valid and enforceable.⁴ Accordingly, at the time of the enactment of Directive 2000/31/EC (the e-commerce Directive), the regulatory priority was to remove any uncertainty about the legal status of ‘on-line’ transactions, Article 9(1) of the Directive duly requiring Member States to ensure that, in effect, their national legal frameworks for ‘off-line’ transactions (paradigmatically, for the supply of goods and services) apply also to e-transactions.⁵

Today, in Europe, against the background of the Digital Single Market Strategy,⁶ there is a renewed sense of urgency. If the participation (especially, the cross-border participation) of small businesses and consumers in e-commerce is to increase and, with that, if the European economy is to grow, further legal action is required: there are obstacles to be removed and

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² Ibid (expressing the purpose of the Model Law).

³ Ibid.


⁵ It was in this context that the idea crystallised that regulators should act on the principle that ‘what holds off-line, must hold on-line’: see Bert-Jaap Koops, Miriam Lips, Corien Prins, and Maurice Schellekens (eds), Starting Points for ICT Regulation—Deconstructing Prevalent Policy One-Liners (The Hague: T.C.M. Asser, 2006).

legal predictability needs to be improved. As the Commission puts it, if the potential of e-commerce is to be ‘unleashed’, there is a ‘need to act now on the digital dimension.’

Elaborating on this imperative, the Commission states:

The pace of commercial and technological change due to digitalisation is very fast, not only in the EU, but worldwide. The EU needs to act now to ensure that business standards and consumer rights will be set according to common EU rules respecting a high-level of consumer protection and providing for a modern business friendly environment. It is of utmost necessity to create the framework allowing the benefits of digitalisation to materialise, so that EU businesses can become more competitive and consumers can have trust in high-level EU consumer protection standards. By acting now, the EU will set the policy trend and the standards according to which this important part of digitalisation will happen.

It is in this setting that the Commission has proposed two new Directives—one on contracts for the supply of digital content, the other on online and distance sale of goods contracts—which, together with a proposed Regulation on the cross-border portability of online content services, mark the first new legislative initiatives adopted under the Digital Single Market Strategy.

This paper is not about the detailed provisions of these proposals but about the assumptions that underpin the current legislative ‘framework’ for e-commerce in Europe; and, in particular, it is about the appropriateness of those assumptions in a context that the Commission rightly recognises as one of rapid technological and commercial change—a context that, so far as consumers are concerned, includes not only changes in the way that goods and services are purchased but also changes in the products themselves as devices become smarter by virtue of being digitally enabled.

As is well-known, the so-called legislative framework for e-commerce is not found in one comprehensive Directive; and the e-commerce Directive itself is but one element in a group

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8 European Commission (n 7), at 7.


11 European Commission (n 7) at 3.
of legal instruments that have been pressed into regulatory service as e-commerce has developed.\textsuperscript{12} Thus, as a research paper for the European Parliament helpfully explains,

Whereas there is no legal instrument which \textit{specifically} addresses the problems posed by [on-line] contracts, they are covered by existing legal instruments, both at EU and member State level. In particular, consumers’ information rights and the right of termination at will (cooling-off period) are regulated by the Consumer Rights Directive; the seller’s liability for non-conformity of the object sold, as well as guarantees, are regulated in the Consumer Sales Directive; the legality of fine-print terms in a sales contract falls within the scope of the Unfair Terms Directive; and the e-Commerce Directive provides the legal framework for online consumer transactions.\textsuperscript{13}

It would be surprising if legislative provisions that pre-dated even the earliest on-line consumer transactions, let alone e-commerce as it has now developed, were fully fit for purpose. And, indeed, as the Commission recognises—notably, by bringing forward the proposed Directive on contracts for the supply of online digital content (including not only video, audio, and games, but also digital content for upcoming 3D printing applications)\textsuperscript{14}—these legislative provisions leave some glaring gaps. The focus of this paper, however, is not on the obvious shortcomings of the legislative framework but on the assumptions that underlie it.

Where legislative instruments, such as the Directives on consumer sales and on unfair terms in consumer contracts, pre-dated the development of e-commerce there was no need to consider whether off-line environments for consumer transactions were comparable to on-line environments. However, by the time of the e-commerce Directive, this had become one of the central regulatory questions. In some respects, notably in relation to the potential liability of ISPs for the transmission, caching, and hosting of information,\textsuperscript{15} the Directive recognises that on-line environments are different and that some adjustment of off-line law is required. However, so far as contracts are concerned, the Directive reflects an approach that David Post describes as that of the ‘unexceptionalists’,\textsuperscript{16} this being the view that on-line transactions

\textsuperscript{12} This group currently comprises: Directive 2011/83/EU on consumer rights (amending earlier Directives); Directive 1999/44/EC on consumer sales and guarantees; Directive 93/13/EEC on unfair terms in consumer contracts; and Directive 2000/31/EC on e-commerce.


\textsuperscript{14} Proposed Directive (n 9).


require no special regulatory treatment (other than to confirm their legal enforceability in principle).

The Directive’s unexceptionalist view of contracts is underpinned by three key assumptions. First, it is assumed that on-line contracts are functionally equivalent to off-line contracts—for example, the sale of a book at Amazon on-line is no different functionally to the sale of a book off-line at a bricks-and-mortar bookshop. Secondly, expressing an idea of normative equivalence, it is assumed that those laws that apply to off-line transactions should also apply to on-line transactions. In Europe, this means that the general law of contract, in conjunction with a special body of regulation for consumer transactions, should be copied across from off-line transactions to on-line transactions. Thirdly, it is assumed that the context for on-line transactions is not materially different from the context for off-line transactions. To be sure, the architecture of on-line shopping environments is different to the architecture of off-line shopping environments and it affects the options available to consumers—for example, as Eliza Mik remarks, one is rarely ‘teleported’ into a bricks-and-mortar shop but, in the web world, ‘a person browsing recipes can easily [click into] an on-line book shop’. However, it was assumed that the differences would not operate in ways that would be prejudicial to on-line shoppers. Indeed, there was even reason to think that the on-line architecture—at any rate, ‘click wrap’ assent rather than ‘browse wrap’ notice—might prove to be more protective of consumers’ interests because it would make it possible to encourage consumers to read the supplier’s terms and conditions carefully before proceeding with the purchase. Insofar as the Directive was criticised, it was mainly to regret that, in the final version of Article 11 (dealing with the placing of the customer’s ‘order’), an opportunity had been missed to clean up some inconsistencies in the general law on the formation of contracts. If anyone thought that on-line transactions might need some special regulatory attention, this was something to be revisited in the uncertain future.

In fact, at the time of the Directive, there were a few speculative thoughts about where we might be going with e-commerce, notably a prescient article by Richard T. Ford in the *Stanford Law Review*. Amongst the developments anticipated by Ford were the profiling of consumer preferences (which, aided by machine learning, gets better and better) and the servicing of one’s consumption needs by automated processes, or by something akin to what Ford called a ‘cyberbutler’. Imagining such a future, Ford foresaw that a consumer would sign over their paycheck to the cyberbutler who would hold it in trust for the consumer’s benefit; then, guided by the consumer’s profile, the cyberbutler would place appropriate orders so that, each day, the consumer would ‘come home to a selection of healthy and

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18 Moreover, with burgeoning ex post consumer reviews, one might have expect this information to have some corrective effect on conspicuously unfair terms: see, e.g., Shmuel I. Becher and Tal Z. Zarsky, ‘E-Contract Doctrine 2.0: Standard Form Contracting in an Age of Online User Participation’ (2008) 14 Michigan Telecommunications and Technology Law Review 303.

nutritious groceries from webvan.com or a Paul Smith shirt from boo.com or the latest Chemical Brothers CD from cdnow.com’. By 2016, the cyberbutler would have changed to different suppliers of groceries, shirts, and CDs (webvan.com and boo.com being spectacular dot.com failures, and a declining cdnow.com being purchased by Amazon); and, while groceries and shirts would still be required, many consumers, rather than buying CDs, would subscribe to streaming services such as Spotify or Apple Music or even revert to vinyls. Nevertheless, Ford’s sense of the bigger picture is sound. Moreover, Ford’s view chimes in with what, much more recently, Mireille Hildebrandt terms a ‘new animism’ that characterises a transformative ‘onlife’ world that is ‘situated beyond the increasingly artificial distinction between online and offline.’ What the new animism signifies is

the fact that our life world is increasingly populated with things that are trained to foresee our behaviours and pre-empt our intent. These things are no longer stand-alone devices; they are progressively becoming interconnected via the cloud, which enables them to share their ‘experience’ of us to improve their functionality. We are in fact surrounded by adaptive systems that display a new kind of mindless agency…. The environment is thus becoming ever more animated. At the same time we are learning slowly but steadily to foresee that we are being foreseen, accepting that things know our moods, our purchasing habits, our mobility patterns, our political and sexual preferences and our sweet spots. We are on the verge of shifting from using technologies to interacting with them, negotiating their defaults, pre-empting their intent while they do the same to us.

In this onlife world, the consumption of goods and services becomes more personalised, more profiled, more anticipatory and more automated; and, while we can assume that, at some originating point, a human consumer signs up for the service, from that moment on humans play little or no part in the world of transactions. As with smart technologies generally, the...

20 Ibid., at 1578.
22 Mireille Hildebrandt, Smart Technologies and the End(s) of Law (Cheltenham: Edward Elgar, 2015) viii.
23 Hildebrandt (n 22) at 8.
24 Hildebrandt (n 22) at viii-ix.
25 Generally, see Christopher Steiner, Automate This (New York: Penguin, 2012).
26 I make no predictions about the precise array of technologies that will be employed to ensure that consumer orders are seamlessly processed and delivered. For one possibility, see James Dean, ‘Roboshop: now drones really deliver the goods’ The Times, April 26, 2016, p 1. Similarly, I take a technology-neutral view of how payment of the price will be automated. However, for an example of a smart contract, employing GPS tracking of a package and payment by Bitcoins, that covers both the risk of non-delivery and non-payment, see Rolf H. Weber, ‘Contractual Duties and Allocation of Liability in Automated Digital Contracts’ in Reiner Schulze and Dirk Staudenmayer (eds), Digital Revolution: Challenges for Contract Law in Practice (Baden-Baden: Nomos, 2016) 163, at 180.
consumer signs up for a device that comes with a package of services and then ‘sets and forgets’.

It follows that the distinction between a mature off-line consumer marketplace and an embryonic on-line marketplace—a distinction that is implicit in but central to the e-commerce Directive—is not only the precursor to an on-line marketplace that blurs the on-line/off-line distinction but also to a quite different distinction between consumer transactions that are actively negotiated and performed by human agents and transactions for the supply of consumer goods and services that are processed automatically (by ‘mindless’ agents) with at best the passive involvement of human agents. Framing e-commerce in this way, two questions arise. First, even if, at the time of its enactment, the e-commerce Directive was right to treat off-line and on-line transactions as functionally, normatively, and contextually equivalent, does that continue to be the appropriate regulatory view? Or, should some special regulatory allowance be made for what now seem to be material contextual differences between the two transactional environments? Secondly, how should regulators view the distinction between transactions that are made (off-line or on-line) between business suppliers and consumer contractors and automated transactions for the supply of goods or services to consumers? Should regulators treat this distinction as immaterial and regard anticipatory and automated transactions as equivalent to non-automated transactions? What is the significance of the on-line world for transactions? If, instead of regulating the consumer marketplace by specifying the transactional groundrules for sellers and purchasers, the technological management of transactions takes the regulatory strain, what should we make of this?27 Rather than asking whether the e-commerce Directive (or the regulatory environment of which the Directive is a part) needs some modification, should we be asking whether the assumptions that the Directive made about how to regulate the routine consumption of goods and services need to be fundamentally reconsidered?

There are too many questions here for me to answer—and, anyway, I am not sure that I can answer all of them. Some of these questions ask whether the e-commerce Directive, or the Directive in conjunction with other laws, is now ‘disconnected’ from the technological state of the art, from the purposes for which the technology is applied (for example, to facilitate P2P transactions), or from the business models and associated assumptions made by the legislators.28 If so, we should ask whether regulatory re-connection is required; and, if so,
how that re-connection is to be best achieved. Other questions concern the displacement of
the rules that regulate consumer transactions and prompt thoughts about the redirection
of rules towards the technological designs that will structure the automated processes that
service consumer needs. Yet other questions concern the future of the Rule of Law itself: to
the extent that technological management does the regulatory work, will it be possible to
draw on rule-based notions of legality in order to check and correct regulatory use and abuse
of power?

Briefly, what I will suggest is the following. First, there are reasons for thinking that there are
a number of features of on-line transactional environments that have an impact on the balance
of interests that we judge to be ‘acceptable’ in off-line transactional environments. Arguably,
the cumulative effect of these features materially changes the balance of contracting power
and influence in on-line transactional environments; and, it does so to the detriment of
consumers. This undermines the unexceptionalist claim that the context for on-line
transactions is not materially different from the context for off-line transactions; and, once
that claim is undermined, the assumption that it suffices simply to apply the off-line law to
on-line transactions is thrown into serious doubt. Secondly, when routine consumption needs
are served by the equivalents of Ford’s cyberbutler, or by cyberchauffeurs in driverless cars,
consumer contractors seem to be reduced to mere consumers. Although there is a sense in
which cyberbutlers or cyberchauffeurs act as agents on behalf of their consumer principals,
this is a radically new context for consumption that invites a bespoke regulatory response.
Thirdly, the extent to which consumer transactions are technologically mediated or managed
has important implications for the way in which they are regulated. To the extent that rules
are employed to guide the conduct of regulatees, they will not be directed at those who
supply consumer goods or services or at those who consume such goods and services so
much as at those who design and supply the systems that manage those transactions.29

The paper is in four principal parts. First, starting on relatively familiar ground, I consider
whether the regulation of unfair terms in B2C e-transactions is fit for purpose. Secondly, I
ask whether consumers need to be protected against the profiling, personalising, and nudging
techniques employed by on-line suppliers; and, if so, how that protection might be
implemented. Thirdly, I consider whether the automated processing of transactions is a cause
for concern and, if so, whether revising the e-commerce Directive is the appropriate response.
Finally, in the light of the foregoing, I comment briefly on the relevance of the Commission’s
recently announced two proposed Directives (on digital content and on-line goods).30 Once
again, these Directives raise questions about the appropriateness of their underpinning
assumptions—not least, the assumption that, digitally-enabled smart devices notwithstanding,

29 Compare, Roger Brownsword, ‘Technological Management and the Rule of Law’ (2016) 8 Law,
Innovation and Technology 100.

certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final (Brussels,
Council on certain aspects concerning contracts for the online and other distance sales of goods,
the supply of digital content can be cleanly separated from on-line sale of goods. However, so far as the cornerstone assumption of unexceptionalism is concerned, the Directives suggest a change of direction: the Commission’s current thinking is not so much that the regulation of on-line transactions needs special treatment because consumers are especially vulnerable in these environments but because this is required by the digital economic strategy. To this extent, it is the legislative framework for e-commerce, rather than the general law of contract that shapes the regulatory environment.