HOUSE OF LORDS

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Justice Sub-Committee

One-off Evidence Session
on

CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND CONTRACTS FOR THE ONLINE AND OTHER DISTANCE SALE OF GOODS

Evidence Session No. 1 *Heard in Public* *Questions 1 - 11*

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Witnesses: Professor Hugh Beale and Lucy Rigby

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Members present

Baroness Kennedy of The Shaws (Chairman)
Lord Cromwell
Baroness Eccles of Moulton
Baroness Hughes of Stretford
Lord Judd
Lord Oates
Lord Richard
Baroness Shackleton of Belgravia

Examination of Witnesses

Professor Hugh Beale, Professor of Law, Warwick University; and **Lucy Rigby**, Which?

Q1 The Chairman: Thank you for your attendance here today. I know it is going to be very helpful to us. I want to indicate that this session is open to the public. There will be a webcast, which goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be made of the evidence and that will also be put on the parliamentary website. A few days after the evidence session, you will be sent a copy of the transcript to check for accuracy, and we would be grateful if you could advise us of any corrections as soon as you can, as it helps us to speed up getting it out. Afterwards, if you want to clarify anything or amplify any of the points that you have made during your evidence, or there are any additional points you would like to make, you are absolutely welcome to; just submit them to us as supplementary evidence. Would you introduce yourselves for the record, starting with Ms Rigby?

Lucy Rigby: My name is Lucy Rigby. I am a solicitor on behalf of Which?, the Consumers' Association, the largest consumer body in the UK, with over 1.4 million members and supporters. We are apolitical and independent.

The Chairman: Thank you very much, Ms Rigby. Professor Beale.

Professor Hugh Beale: My name is Hugh Beale. I am a professor of law at the University of Warwick. I also hold a senior research fellowship at Harris Manchester College, Oxford. I have been involved in European contract law in one guise or another since 1987, and I suspect I have been invited because I was involved in the ill-fated common European sales law proposal, which was withdrawn by the Commission in December 2014; I was on the expert group. I have remained involved in the sense that I am a member of a working group set up by the European Law Institute and chaired by the Lord Chief Justice, which is supposed to be

preparing a statement on these proposals. Of course what I am going to say today is entirely my own view, because the others do not yet know what is in the draft.

Q2 The Chairman: You are certainly very able and amply qualified to help us today. I wanted to ask you both first whether you agreed with the Prime Minister, who said, "As the digital economy expands there are more and more opportunities for companies across Europe to grow, create jobs and help consumers to secure a better deal. All too often however these opportunities are being stifled by burdensome regulations and differing national regimes". Do you agree with that? We will go on to deal with how you might remedy it. Ms Rigby, perhaps you could help us first.

Lucy Rigby: We agree about the benefits that may arise from the digital single market. Overall, we welcome the Commission's objective of improving the digital single market, which we think will be of benefit to consumers by increasing competition and choice, improving access for consumers, and generally encouraging the growth of online sales. However, we do not believe that the level of regulation is burdensome, certainly for consumers. UK consumers currently benefit, as I am sure you know, from a very good, high level of consumer protection, certainly compared to many other member states. While we do not object to full harmonisation per se, we think that harmonisation should occur at a high level to protect UK consumers' rights well.

We do not necessarily think that the fact of differing consumer protection regimes across the EU at the moment is what is stopping more consumers from buying cross-border. That is also down to factors such as fear as to what happens if a purchase does not go right, as to enforcement and what you can do, language barriers and fear of fraud. There is a whole host of other factors, not just the fact that consumer protection is not harmonised across the EU. Of the two Directives we are going to discuss today we are really quite concerned about the tangible goods Directive, which we believe will be really quite detrimental to UK consumers if it is implemented in its current form.

The Chairman: Thank you very much. Professor Beale, do you take the same view?

Professor Hugh Beale: I would agree with everything that Lucy Rigby has just said. We are dealing here with two Directives that are intended to be full harmonisation Directives. The purpose of that, of course, is to try to reduce the burden on traders, because at the moment they have to cope with the consumer law of the country that they are targeting with their website, or whatever. The idea is to try to reduce the cost to traders of having those legal differences, as well as to try to encourage consumers to purchase. It is very hard to prove

that differences between the different laws of contract or the laws of sale and supply of digital content discourage cross-border trade.

Most consumers of course are unaware of their individual rights. They do not know the details. On the other hand, they are probably reassured by a vague feeling that there is some kind of European guarantee behind purchasing from a website in another country, or indeed purchasing abroad. I think there is probably more of a barrier to businesses, and particularly to small and medium-sized enterprises, which are more likely to be frightened by having to deal with consumer law in another country. They do not have the in-house expertise, and because they are dealing with relatively small value transactions the cost of taking legal advice about consumer law in Germany or Slovakia is going to be proportionately very much higher. There is probably something of a barrier there, although you cannot really prove it. It is more intuition that there must be at least some kind of psychological barrier.

I often think the real differences between the laws are relatively slight, but there is a psychological barrier of their simply being frightened of the unknown. It is the unknown unknowns, as it were, that frighten them. It seems to me that these proposals could bring benefit in encouraging more traders to offer their goods and their digital content across borders, and, as Lucy Rigby said, that should then lead to greater competition, greater consumer choice, and so on.

Q3 Baroness Eccles of Moulton: You have both pretty well answered the question about the current protection rules establishing minimum standards and whether it is necessary to harmonise. You have gone a long way to answering that already, but the question that arises in my mind is that when I read that I was focusing on the consumer, yet your answers have very much brought in the trader and how difficult it is for them to try to deal with the situation as it is at present. Even so, you would not necessarily find it necessary to harmonise the rules. I was interested by the fact that the emphasis seemed to be much more on the supplier than on the consumer. I am all for that, and I am not saying it is a bad thing.

Professor Hugh Beale: I would respectfully agree with that. I think there has been a significant shift in the European Commission's approach. Until about 2003, its method of trying to improve the internal market was to make consumers confident in shopping abroad by making sure that wherever they bought something they would have certain minimum rights. We have the unfair terms Directive, the consumer sales Directive, and so on, which all require member states to give consumers certain rights wherever they shop. In about 2003, in the run-up to what became the consumer rights Directive, you can sense a switch in the thinking and the

thinking is now that because each consumer is entitled to the protection of the law of their habitual residence, that creates burdens on businesses and is hindering the internal market. You may remember that the original consumer rights Directive proposal was very broad. It was to cover not only the distance and doorstep-selling Directives but the consumer sales Directive and the unfair terms Directive, and it was supposed to result in full harmonisation of the whole lot. That was lost for political reasons, because member states said, "Why should we reduce our consumer protection for all purposes?" The Commission then switched to its different approach of the optional instrument, the common European sales law, which would simply set up a parallel system that could be used for cross-border sales. That was also a political failure and now the Commission is back to full harmonisation. I think it is very much about trying to make it easier for businesses and sweetening the pill slightly by giving a bit of additional consumer protection. There is some additional consumer protection in these proposals, but I suspect that from the Commission's point of view, as I read it, the main thrust is full harmonisation to make it easier for businesses.

The Chairman: Just before I move on, is there very much of a difference? What I am getting from your testimony is a sense that in fact most European countries that are part of the European Union have quite similar sale of goods legislation and protections. Is that true?

Professor Hugh Beale: In the sense that everyone has to adopt these minimum standards in the areas that are covered, the answer must be yes, but some countries go significantly beyond what is required by the minimum harmonisation. For example, the unfair terms Directive requires member states to enable consumers to challenge terms that are not individually negotiated in a contract. Our Consumer Rights Act allows them to challenge any term other than a core term. That is an example of what used to be called gold-plating but now I think is recognised as being a valuable bit of additional consumer protection. Of course, that means that a seller from Germany, say, who is used to a system that only allows non-negotiated terms to be challenged, might be frightened and say, "Oh well, I don't know what's going to happen when I start trying to sell in Britain where I'm subject to different controls". As I said earlier, I do not think the substantive differences are that great; the issue is very often the psychological barrier.

The Chairman: Thank you. I remember you saying that.

Baroness Shackleton of Belgravia: Do all member states have parity in enforcement when it goes wrong, when it is necessary to rely on the law? Do you find that there is equal

satisfaction, or are there offending people who are very bad to do business with? If so, what should be done about that?

Lucy Rigby: My understanding is that enforcement is a problem and that consumers would view it as a problem. I understand that the Commission is looking at that via the enforcement—the CPC—regulation. I think that is right. My understanding is that it is a problem and that the Commission is looking to address it.

The Chairman: Enforcement is one of the issues that concerns Lord Cromwell.

Q4 Lord Cromwell: It is always good to harmonise and to get the law right, but we are talking about an industry where typically you are selling quite small, low-value items at distance, and there is a potential dispute about whether the goods were wrong or your digital environment, your hardware, was wrong to receive it. It seems impractical to me to go after the German supplier of a £15 game that you bought, who says that it is your fault when you believe that it is theirs. Could we tease out a little more how you see this enforcement working in practice, because if we get a harmonised law that is unimplementable or unenforceable, we have not made much progress?

Lucy Rigby: Certainly with regard to enforcement, I would have to go away and look at that and provide you with some supplementary evidence. In so far as you are talking about the digital content Directive, we have most of the key protections for consumers already in the form of the Consumer Rights Act here in the UK. I think I am right in saying that it is only the Netherlands that has also legislated in that field, so we are quite far advanced. The digital content Directive therefore concerns us far less, because the Consumer Rights Act dealt with what we think consumers consider to be the main issues with the provision of digital content. We therefore think that issues such as the fact that the digital content is defective or has harmed your digital environment or device, or you cannot download it have already been dealt with.

Professor Hugh Beale: I think we need to distinguish between two kinds of enforcement. There is enforcement at the behest of the individual consumer who has bought something that does not work. Then there is what I call public or collective enforcement, the sort of thing that at the moment happens with unfair contract terms where the Competition and Markets Authority—previously the Office of Fair Trading—now has the power to forbid traders to use particular terms or to recommend the use of particular terms. I must confess that when I first read that in the draft Directive I did not think it would amount to anything. I was completely wrong, because actually the Office of Fair Trading had an enormous impact on the standard

terms that are offered by many kinds of traders. For example, the mobile phone contracts that we all have are infinitely better because the OFT intervened and reached an agreement with the industry.

It is very hard for me to answer Baroness Shackleton's questions, because I am not involved in the practical enforcement, but my sense is that private enforcement varies very much from country to country. We all know that in some countries there are very long delays and in some countries, including our own, litigation is extremely expensive, although obviously there are small claims procedures and so on. There are also differences in public enforcement. What is interesting about these two Directives, and arguably the most important aspect of all, is that each of them has a provision for public enforcement. Article 18 of the digital content Directive, if that is what I may call it, states, "Member states shall ensure that adequate and effective means exist to ensure compliance with the Directive". That does not just mean that you have to enact the Directive; it means giving powers to bodies that can then presumably act on behalf of consumers. That sort of action would be extended to the kind of trader who, as you say, is producing a low-value item where the loss to the individual if it does not work is very low but the aggregate loss is very large. Those collective enforcement powers are therefore very, very important, and I must confess that I am very happy to see them, although they came as a complete surprise. They were in none of the documents which the Commission circulated beforehand. I have a sense they have been tacked on the end and I am not quite sure how they are going to work.

Lord Richard: Ms Rigby, when you made your original statement, you said that harmonisation should take place at a high level. I do not know what you mean by "a high level".

Lucy Rigby: As I said, in the UK we have a relatively high level of consumer protection.

Lord Richard: You are talking about the quality of the protection?

Lucy Rigby: Yes, sorry, not literally at a high level.

The Chairman: I made a note of that expression too. I think you have now clarified it. You are saying that the quality of it should be particularly high.

Lucy Rigby: Yes.

Lord Oates: Can I ask a quick, related question? You said that you were less concerned about the Directive relating to digital content, because the Consumer Rights Act already covers a lot of these things. My understanding is that part of the reason for the Commission seeking to act at this point was to avoid a proliferation of different laws and to try to harmonise at the point where there is only us and the Netherlands or whoever. Is that correct?

Lucy Rigby: That is certainly my understanding, yes.

The Chairman: Lord Judd, your question has been answered to some extent, but I am happy for you to ask it more fully.

Lord Judd: I think it would be a bit pointless.

The Chairman: It is basically about whether you think the proposed Directives will deliver benefits. I think you have both said that you think that they will, but you have concerns, particularly with the second one on tangible goods.

Lucy Rigby: Grave concerns about tangible goods.

The Chairman: We will come on to tangible goods shortly.

Q5 Baroness Hughes of Stretford: Specifically in relation to the Directive on contracts for digital content, you have partly intimated what you might say in relation to this first question, but I think we ought to delve into it anyway. We are interested in what impact you think the proposal might have on the equivalent rules currently operating in the UK. The Government are undertaking a review on this particular question, but they have not yet produced their analysis for us, so we are interested in your views on the impact it might have on the current laws here.

Professor Hugh Beale: I will try to answer that. We agreed to do a double act. We did not practise beforehand, because we thought that might ruin the fun, but I said that I would try to lead on the digital content Directive. We have our new Consumer Rights Act, and Chapter 3 of that gives consumers very significant and important rights in relation to digital content. The problem with digital content all over Europe is that in most countries there is no clear law or specific legislation dealing with digital content that is downloaded. There must be a legal solution and the consumer must have some rights, but it is extremely hard to find out what those rights are in many countries. In the UK, and now in the Netherlands, there is a clear statement.

The draft Directive incorporates virtually everything that we have—not exactly in the same words but in substance—in Chapter 3 of the Consumer Rights Act, and it does a bit more because it deals with not only what I might call a one-off download but with the case where I am buying digital content that is to be sent to me over a period of time. I do not play computer games, because I am not adept enough, but I think there are many computer games which now depend on continuous interaction with the cloud or some server somewhere that is feeding information in all the time. Clearly, if you have a program on your sat-nav, it is dependent on picking up information about traffic and so on, and it covers that as well. Under the Consumer

Rights Act, that kind of digital service, which is digital content to be supplied over a period of time, would fall under Chapter 4, dealing with services, which is entirely general and has nothing specific about digital content.

In a sense, therefore, if the digital content Directive were to be enacted, with a couple of reservations, which I will come to in a moment, it would probably be fine for us. It would not result in a big loss or, indeed, any real loss of our consumer rights. Conversely, having a uniform system all over Europe should make it significantly easier for our traders to feel confident about selling to consumers in other countries. I will come to my reservations as and when you ask me.

Baroness Hughes of Stretford: Unless Ms Rigby has anything to add on that question, I think you made it very clear that you do not think that this Directive will diminish the current rights of consumers in this country and may go a little further in general services.

Professor Hugh Beale: Provided that we manage to fix a couple of problems.

Q6 Baroness Hughes of Stretford: Okay. I will get to those now. What, then, are your main concerns, if you have any, about the proposal? What gaps would you like to see filled?

Professor Hugh Beale: I would hope that my biggest concern is just a question of clarification. It is about the consumer's right to damages. Consumers may suffer very serious losses as a result of faulty digital content. If I use my sat-nav to go to Birmingham and it sends me over Beachy Head, I think I need some compensation.

The Chairman: Contributory negligence could play a part in any decision. Sorry, I was being facetious. Carry on, please.

Professor Hugh Beale: Article 14 says that the consumer shall be entitled to damages for any loss or damage to their digital environment, which is fine, but some people have interpreted this as meaning that that will be the only right to damages that consumers have. Certainly some of the Explanatory Memoranda seem to suggest the same thing. Commission officials tell me that that is not what they intended. They intended that other damages would be left to national law. If that is clearly stated so there can be absolutely no confusion about it, that would remove one big problem.

The second big problem that I see is that what I call the conformity requirements have been watered down. In the online sale of goods, the consumer is entitled to goods that are fit for any purpose for which those goods are commonly supplied. The same is true under the Consumer Rights Act for digital content. It has to be fit for the purpose for which digital content of that description is commonly supplied. In the draft digital content Directive those

minimum standards, as it were, are watered down very significantly because of the opening words of Article 6(2): "To the extent that the contract does not stipulate … in a clear and comprehensive manner, the requirements for the digital content", the digital content shall be fit for those common purposes. In other words, it enables the trader to set its own minimum standards in the terms and conditions, which the consumer agrees to by ticking a box, clicking on a button, or whatever. We all know that consumers do not read the small print. When did any of us last read Microsoft's terms and conditions? I have never read them, although I have downloaded their products.

Baroness Hughes of Stretford: I have tried and you cannot very easily.

Professor Hugh Beale: Absolutely. That worries me significantly. It is one thing to say that the trader may describe the good or the digital content as only doing something and not doing something else. That is fine, because the consumer will know up-front, for example, this is digital content that they can use only on one machine. But if that restriction is hidden away somewhere in the terms and conditions, many consumers might find that their perfectly legitimate expectations are completely undermined by the small print. So I am very unhappy about those opening words, which seem to me to be completely unnecessary. For years, we have been selling digital content on disks and so on, which is subject to the Sale of Goods Act, without that qualification.

Lord Richard: Can you read those opening words again?

Professor Hugh Beale: Yes. It says: "To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1", which is about the description and so on, "the digital content shall be fit for the purposes for which digital content of the same description would normally be used". They have the same basic test, but it is qualified by "to the extent that the contract does not set it all out". That is what worries me.

Baroness Hughes of Stretford: Would that problem, in your view, be remedied just by the deletion of that phrase?

Professor Hugh Beale: You just need to take those words out. That is the sort of thing that I very much hope negotiations with the European Parliament will do. That is what I mean by a fixable problem.

Baroness Shackleton of Belgravia: This is probably prehistoric law, because it was when I was at law school, but I seem to remember a case called Thornton v Shoe Lane Parking Ltd and conditions having to be in a manner so that people could actually read them or they were

not valid. Is there any benefit in bigging up the obligations to make whatever you need to rely on more obvious?

Professor Hugh Beale: You are absolutely right that if you have not signed a document, you have to be given reasonable notice, and Thornton v Shoe Lane Parking Ltd, the case you mentioned, indicated, and this was confirmed by subsequent cases, that unusual or onerous conditions would have to have particular prominence. It is often called the red hand rule. Of course, that does not apply if you have signed a document—or the modern equivalent, clicked on a button—to agree the terms.

The European Court of Justice has insisted recently that plain and intelligible language, which is what is required here, should mean something that consumers have a chance of understanding. The problem is that that is really quite a recondite argument, a difficult argument, to make. I want simply to take these words out to make sure that the consumer cannot lose their basic rights on the small print, if you see what I mean. Those words could be deleted without any danger at all to the trader, because, as I have said, they did not exist in previous legislation that has been applied to both goods and digital content. They are just a hostage to fortune.

The Chairman: Professor Beale, the Minister will undoubtedly have access to your testimony and have it in her back pocket when she goes to negotiate. Lord Judd, you have a question.

Q7 Lord Judd: My question slightly comes back to the question I was going to put until you covered it very fully. May I say that I have never heard a better, more dynamic or clearer statement for equivocation than the one you are giving, but I want to pin it down a bit? We are living in a very political time and people are looking very acutely at whether things will be positive or negative for Britain. I support the Prime Minister 100% in his political objective, so I do not want to give ammunition to those who I think are completely wrong and are looking for ammunition. Would it strengthen the Prime Minister's position that it will deliver real benefits if he were to say that it should be subject to certain modifications? Would it not also be a good idea, taking up your last point, not only to leave words out, but where, for example, you say that officials are telling you that it is being interpreted in a way they did not intend, to do something to spell out what they really did intend?

Professor Hugh Beale: With respect, I could not agree more. Quite a bit of the effort of the working party of the European Law Institute that I mentioned is directed precisely at trying to improve the drafting to make sure that we are all singing from the same hymn sheet. That is absolutely crucial. I do not mean to be critical of the European Commission. It is often working

with a very small team and does not, as far as I can see, have anybody equivalent to our parliamentary counsel. It has legal services experts, but they tend to be brought in rather late in the day, in my experience. What we really need is a European parliamentary counsel's office or even a European law commission to draft these things properly. We try to get the Parliament to improve the drafting. With the common European sales law, for example, the Parliament produced some very useful amendments. I know the whole thing died a death later on, but the European Parliament introduced a number of very useful clarifications. I could not agree more that it is very important for it to be clear.

The Prime Minister is quite right to say that it would be good if we can encourage more cross-border sales and that this might be a way of doing it. Like my colleague, Ms Rigby, I feel that contract law is only one of the problems. None the less, removing barriers and trying to make it easier for traders, because they know they will be selling subject to more or less the same law in each country, would be beneficial in removing these psychological, if not real, barriers.

The Chairman: Lord Richard wanted to come in with a supplementary. Then I am going to take Lord Oates' question, because it fits in better here.

Lord Richard: I want to look at the section that you read out to us so kindly. Do you get the impression that what the Commission is trying to do is to get a fit-for-purpose test put in? It has said that it should be fit for purpose, but that if, in making it fit for purpose, some parts of it have already been spelt out in the contract, you do not need to put it in the Directive. That approach, I think, is rather different from the one that you have been sketching out. Do you have any insight into what the Commission actually wants to do?

Professor Hugh Beale: I am afraid I do not. I have not been directly involved in developing these proposals. I have been in spasmodic contact with the Commission, but I have never worked out what it is trying to do. There are different views on this. I take the view that it is probably trying to produce something that industry can work with without too much difficulty. Of course, digital content is infinitely variable, so the industry is probably saying, "We want to be able to say what we are selling". My argument is that that should be in the description that is given to the consumer in the first place, not tucked away in the small print. That is my concern. I have to say there are others who take this as a sign that the Commission is selling out to the digital industry and allowing the digital industry to write its own law. That would probably be an exaggeration, but I have heard people far more eminent than me say that.

Q8 Lord Oates: I have a question relating to digital services that are provided not for price but in return for data, for example. As you probably know, the Government have expressed

concern that the proposed Directive treats digital content the same, whether it is provided for price or for personal data. Their concern is that this might inhibit what they describe as this often low-margin but innovative business model. Do you share their concern? Do you think there should be different treatments depending on whether services are provided for money or for data? If you do think there should be a different regime, do you have any ideas about how that should work?

Lucy Rigby: This is one of the keys ways in which the digital content Directive goes beyond the Consumer Rights Act, because the Consumer Rights Act does not apply to contracts just for data. I am aware that industry as well as government has expressed concern about this. I think the concern is about there being fewer remedies for low-margin products, so that consumers might have less choice and there might be less innovation in that area. We have not done research or economic thinking about that, so I am afraid that I cannot express a firm view on it.

The Chairman: Can you give an example of how that is done where you are getting a service in return for data?

Lord Oates: There are many examples. You can get an email service in return for the data, and lots of apps are free in return for the data that you provide. I guess the argument is that although you are being provided with a free service, data is unbelievably valuable to these companies, and this goes beyond questions of data currency to the whole issue of privacy, et cetera.

Lucy Rigby: There is also a follow-on question about whether, if the Directive did not apply to contracts for data, you would be able to get damages should that service corrupt your device. There are a number of questions involved in this.

Lord Oates: Is this an area that you think you might do future research on? It is potentially key to consumers, because a lot of people rely on digital content that is given for free.

Lucy Rigby: I could take it back and see whether we think that would be worth doing.

The Chairman: It is a return to bartering. Basically, the consumer is giving something that does not have no value—it has value—in return for something that they are receiving in the form of the application, which might provide music or whatever. There is an exchange taking place. There is what we would consider to be "consideration" in contractual terms. There ought to be something in all this. It should not be just left on the side, not to be thought about. I think we would be interested to hear about that, if you would not mind. Lord Richard, you had a question.

Q9 Lord Richard: Could I turn now to the other Directive? The Commission has claimed fairly boldly that this Directive will "reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law". That is a pretty hefty claim, a pretty major aspiration and a pretty major harmonisation if it gets through. How do you assess it?

Professor Hugh Beale: It is extremely hard to assess the financial costs, because it is very difficult to collect this kind of figure. I think the Commission made some attempt to do that when the common European sales law was being considered. All I can say is that to some extent there must be a cost to having different laws. I quite agree with Ms Rigby that the differences in the laws is only one aspect. Differences in language, payment mechanisms, delivery mechanisms and so on are also very important, but there is a contribution to be made by having a single system so that traders can be fairly confident that they are not going to be up against nasty legal surprises. As I say, it is probably more important for the trader than it is for the consumer. The trader is more likely to be bothered about this than the average consumer. When I walk through the streets of Rome, I do not think, "Should I buy that rather sharp-looking Italian suit? No I won't, because it might be subject to Italian law". I am afraid that is not what goes through my mind.

The Chairman: I am envisaging you in a sharp Italian suit.

Professor Hugh Beale: There is at least a marginal gain to be made through having a system that we can all use with relative confidence for these cross-border trades. Whether you achieve that by full harmonisation or by an optional instrument is another question. I am an unreconstructed optional instrument-preferrer myself, but that is for another day. Full harmonisation is one way of doing it, provided that full harmonisation does not then undermine consumer protection in countries that have good consumer protection.

As I said, the problem with digital content is that most member states have no legislation on this. In some countries it is treated as a kind of sale of goods and in others they analogise it to services and so on. Legally it is a mess. So there is certainly a case for having a European standard set of rules. Whether they are minimum rules or fully harmonised rules is a matter that we could discuss, but there is a gain to be made there. I am much more sceptical about the need for something on the sale of tangible goods, because there we have a much more common system anyway. We have the minimum requirements of the consumer sales Directive that member states have sometimes gold-plated, but that is not such a big issue. None the less, that is the other side of the coin, and we will leave it.

The Chairman: Ms Rigby, you have real reservations about this.

Lucy Rigby: Yes, we have very grave reservations. If the Directive on tangible goods were to be implemented as is, it would mean a very serious reduction in the level of rights for UK consumers. If you will allow me, I could go through the main ways in which consumer rights would be affected.

First, the Directive would take away what we refer to as the short-term right to reject. At present in the UK, you will know that you can return a faulty good and get a full refund within 30 days of buying the product. The trader has to pay the cost of you returning it and you get that money back within 14 days. That right would go completely under this Directive. The short-term right to reject has existed in the UK since 1894. It is well established and well understood. In response to a survey that we did on this, an overwhelming majority—about 90%—of members told us that if they bought a product online they would expect to be able to give it back and receive a full refund. In our view, a clear legal route for exiting a contract when the consumer discovers that the goods are faulty is a key element in creating consumer trust. Even if consumers do not always exercise their rights, they really value their right to be able to return that good. I am sure there are plenty of instances that you could think of where you would rather give the product back and receive a refund, particularly if your purchase is time-critical, and you get another one from a different supplier. Specifically, getting rid of the short-term right to reject is really quite serious.

Secondly, there is a pretty unfortunate result in the way in which Article 9 of the Directive is drafted at the moment whereby a consumer could be caught in an endless cycle of fault-repair, fault-repair. In the UK at the moment you have to give the trader one opportunity to repair or replace the product once that initial 30-day period of getting a refund is up. If after that one attempt you get a product back, either a replacement or a repair, and it breaks again, or if it is faulty again in the same way, you can ask for a refund. Because of the way in which the Directive is drafted at the moment you would not be able to do that. It is not time-limited in any way. It does not say that after two or three months you can get a refund. It is not limited by the number of times you have to get it repaired. It is not limited at all. You can see that you could be in the scenario of "If it is faulty, give it back, get it repaired". I do not think that is good for consumers, or for traders, because, particularly for low-value items, it would make no sense to pay the postage, haulage or whatever.

Thirdly, a situation will arise whereby there are two separate legal regimes. This Directive applies to online sales, so a different set of consumer rights would apply to offline. If I buy a

bed from John Lewis online, one set of rights would apply. If I bought that same bed in store, a different set of consumer rights would apply. That makes no sense from the trader's perspective, certainly financially in terms of having to provide different sets of terms and conditions, and it certainly does not make sense from a consumer perspective either. In any case, if you limit consumers' rights online, you give them an incentive to buy the same product in store, which does not facilitate the growth of the digital single market. We would say that that is counterproductive.

Fourthly—there are two more points after this, so bear with me—the Directive introduces the idea of a guarantee period, which you will know is foreign to UK law. Currently, under the Consumer Rights Act, UK consumers can claim a remedy for a faulty good if that fault becomes apparent within the period of time that the good would be expected to last. The backstop is our limitation period of six years, five years in Scotland. The Commission's proposal for a two-year guarantee period would mean that, for all goods sold online, after two years consumers would have no remedy at all.

The Chairman: So it reduces rights.

Lucy Rigby: Yes, and quite substantially in some cases. In the case of big-ticket items, such as a bed, consumers would very legitimately expect to have a remedy if the bed that you paid so many hundreds or thousands of pounds for developed a fault two years and one day from purchase. That two-year guarantee period appears to us to be arbitrary and very detrimental indeed, all the more so in the case of high-value, big-ticket items.

Fifthly—and this is a problem that we touched on earlier with regard to the digital content Directive—the tangible goods Directive in effect gives traders the opportunity to contract out of their rights to consumers, because there is a provision in Article 4 whereby, as long as the trader tells the consumer and gets express acceptance from them, they can effectively contract out of their rights. It seems to us that the most obvious way to do that would be via the terms and conditions, which, as we know, very few consumers read anyway. We would therefore like to see that express acceptance narrowed quite some way.

In the consumer rights Directive there is a provision that means that pre-ticked boxes are not allowed. We would therefore say to the Commission, "Let us do something very similar and narrow this down, so that in effect consumers cannot contract out of their rights without knowing that".

Lastly, the Directive means in essence that national remedies would be completely excluded. At present, if you wash your favourite top in your new washing machine, under the Directive

you have remedies in relation to the washing machine if it is faulty, but we would like to see things that take account of consequential losses included too, so that you could also claim for the damage done to your top. That is essentially what I am saying.

The Chairman: Have you already drawn your set of concerns to the attention of the Government?

Lucy Rigby: Yes. Fortunately, we understand that BIS has very similar concerns. I should also add that we have a whole host of other concerns.

The Chairman: Those are the headlines.

Lucy Rigby: They are the headlines, yes.

Q10 Baroness Eccles of Moulton: It occurred to me a bit earlier in your evidence that sometimes it seems that the question of subsidiarity arises between what can be in the Directive and what can be left to the national Government, to Parliament, to do for themselves. Somehow we have not talked about that at all. Is it a factor in the new Directives, and has it been already in previous EU law, or has it just been taken for granted?

The Chairman: Is that not where your optional instrument comes in?

Professor Hugh Beale: That is an alternative approach, as it were. If I may go back to the question about subsidiarity, what we are really talking about is the extent to which member states are going to be free to give alternative or additional remedies. Of course, we are in a bind here, because member states would like to be able to say, "We will give our consumers something extra", as indeed we have in the Consumers Rights Act, because that Act in relation to goods gives consumers significantly better rights than the consumer sales Directive requires. As soon as you start doing that, of course, you end up making it harder for traders, so this full harmonisation approach gets one into a bit of a bind, I think. On the one hand, consumer organisations in member states are likely to say, "Let's keep the scope of the Directive narrow and targeted, so that on matters outside the scope of the Directive we can give our consumers better rights". These are relatively targeted proposals. That is how the Commission describes them. Of course, as soon as you do that, you increase the risk for the traders, because less is harmonised, as it were, so it does less good to them. There is this constant battle going on, really because the Commission has two not wholly compatible aims, and it is very difficult to strike the right balance. I said that I was in favour of an optional instrument, because that allows domestic law to continue to govern for domestic purposes, and of course allows traders to sell to consumers under the domestic law or would give the alternative of the new pan-European system, which would be the same for everyone. In a

sense, it creates less interference, but I think that is a battle that has been lost, at least for the time being.

The Chairman: Baroness Shackleton, I think your questions have been answered.

Baroness Shackleton of Belgravia: I agree with you entirely.

Q11 The Chairman: We had some questions lined up there, but I think they have been answered. That takes us to the end point. We are presented with the economic argument that having one system, a digital single market, will benefit Britain's economy and create opportunities that should be seized, but there might be a price in lowering the protections that we have for consumers. Do you think that is a trade-off or a prize—the prize being greater economic benefits by having a single market—that is worth the reduction in consumer protections, because those are the choices that will be presented eventually to British citizens? What is the answer to that one?

Lucy Rigby: You can have all the benefits of a digital single market and you can introduce these things, but there is no need to do so at such a low level, certainly in relation to tangible goods. In relation to digital content, we can see the huge benefits of bringing in the Directive, but essentially if the tangible goods Directive was going to be implemented in its current form, then, no—the much greater prize would not be worth it. Indeed, we would question some of the suggested benefits that it is said would arise.

The Chairman: So you are for a levelling up rather than a levelling down on the business of protections.

Lucy Rigby: Indeed.

Professor Hugh Beale: I agree with Ms Rigby. We could achieve a harmonised system, but it would require levelling up to do a proper job. Obviously, one cannot go for the highest level of consumer protection that is available in any member state on any given point; you have to reach some sort of compromise. However, it seems to me that there could be significantly more consumer protection in the sale of tangible goods in particular but also in relation to digital content. These are concerns that I have already voiced. Those could be achieved without too much difficulty. There really is something to be gained by having a harmonised system for digital content in particular, because the law is so vague in so many countries—not in ours, but in others—and that would help our traders. On tangible goods, having full harmonisation of this kind would probably not be particularly helpful. I would not go there. If it were improved, I would be happier. I do think that it needs improvement.

Lord Oates: Ms Rigby, you said that we could have a digital single market by raising consumer protections to a certain level, and we are probably the highest. Can I question that? The clear message that we have heard from other member states is that that is not possible and that they would not accept that. I am sure there are equivalent areas where we have lower rights where we would not accept impositions. Is the key here to focus on some of the key issues, for example the 30-day issue and some of the things that you have outlined, and accept that you have to compromise if you are going to have harmonisation? One must also accept that the point that has been made about the importance to traders as well is a significant one, potentially because otherwise it simply advantages the big multinational companies with massive legal departments that can trade happily across these areas. It is the small businesses that we also need to be concerned about.

Lucy Rigby: As I said at the outset, we welcome what the Commission is doing overall with regard to the digital single market, but I do not feel that amending the Directive in some of the key ways that I outlined in relation to the tangible goods Directive would be so unbelievably massive as to mean they could not be done. Certainly preventing consumers being trapped in that cycle of repairs and replacements, for example, seems sensible for business and for consumers too.

I take the point about multinationals and SMEs. Harmonising consumer rules at a decent level of consumer protection would give consumers the confidence to buy from smaller suppliers, because they would know their rights are guaranteed and they would not necessarily have to go for the bigger brands that they know, the trusted brands; they could go for a brand that they have not heard of previously.

The Chairman: Are there any other questions? Would anyone else like to come in? I thought that was a very, very helpful session. It was really most enlightening, and I want to thank both of you for being such stellar witnesses. As I said, do let us know if there is anything you would like to assist us with further, please, and correct the transcript as quickly as you can. Thank you both very much. I am really grateful to you.