

An Innovative Legal Approach to Regulating Digital Content Contracts in the EU

by Joshua M Warburton*

Abstract: Unifying laws between States to better facilitate cross-border transactions is not a new concept. Within the EU, such unification has generally been achieved by harmonising Directives and Regulations. However, legislative techniques to govern digital content transactions are still in their infancy; it is likely that any harmonising instrument would be based upon pre-existing legislation that could be refined to better serve its purpose. States themselves would likely attempt to formulate innovative legislative proposals to give contracts formulated under their jurisdiction a competitive advantage. But, once harmonization occurs, attempts to innovate in contract law for individual gain would cease. Analysing

the functionality of mutual learning legislative exercises can lead to the conclusion that allowing experimentation, whilst establishing a separate unified optional framework, may well be the most practical way to continue to develop more efficient contractual rules and obligations, that may eventually be proliferated throughout transnational markets. Separating the legislative efforts between national law and an optional law that governs cross-border contracts, overseen by a centralized body attempting to collate the most beneficial aspects of digital content legislation across the breadth of the EU, would be a more progressive system of digital content contract regulation.

Keywords: Optional Instrument; Digital Content; Harmonisation; E-Commerce; Mutual Learning; Jurisdictional Competition

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Recommended citation: Joshua M Warburton, An Innovative Legal Approach to Regulating Digital Content Contracts in the EU, 7 (2016) JIPITEC 246 para 1.

A. Introduction

1 The expansion of cross-border trade of digital content is an unequivocal imperative for the European Commission. However, bringing uniformity across Member States' legislative outputs is no simple task. In a market with constantly evolving technology, it is difficult to legislate adequately without constant adaptation and innovation in the legal fields. As can be demonstrated by investigating mutual learning methods, the "knowledge problem" lends credence to the idea that the best form of regulation is yet to be discovered, and, therefore, transnational jurisdictional competition should be encouraged in order to discern the more favorable legislative techniques and policies to cover digital content transactions. The unfortunate ramification of this is that, whilst this development is occurring, there

would be little in the form of legislation to encourage cross-border sales. The Draft Digital Content Directive¹ could fulfil some of the need for legislation, but it is too narrow and restrictive. In this paper it is suggested that a reformulation of the currently retracted² Common European Sales Law (CESL)³ as a digital optional instrument would serve to allow both legal development and mutual learning, whilst creating a parallel system that allows uniformity in cross-border digital transactions.

1 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634(final).

2 European Commission 'Commission Work Programme 2015 – A New Start' (Communication) COM(2014) 910 final Annex 2, item 60.

3 European Commission, 'Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (CESL)', COM (2011) 635 final.

2 The view portrayed in this paper is that lessons can be learned from the ‘Open Method of Coordination’ utilized in the European Union (EU) and the Uniform Commercial Code in the United States of America (USA), as both demonstrate the issues of centralized organizations in mutual learning legislative exercises. The argument is that once harmonization occurs, the experimentation - by necessity - must cease, therefore stifling legal innovation. In such a rapidly developing area as e-commerce, this cannot be a beneficial thing, as many rules in traditional consumer legislation are not applicable for the vast majority of digital content sales. Separating the legislative efforts between national law and an optional law that governs cross-border contracts, overseen by a centralized body attempting to collate the most beneficial aspects of digital content legislation across the breadth of the EU, would be a more progressive system of e-commerce regulation.

B. The Alternatives to the Optional Instrument

3 In light of the Digital Single Market Strategy in May 2015,⁴ the EU faces a potential issue from the implementation of the proposed Draft Digital Content Directive.⁵ The Directive itself is intended to be a “targeted maximum harmonisation” instrument that would mean that “once in force Member States cannot retain or introduce more consumer-friendly rules within its scope”.⁶ The issue with this is that the protections introduced by the Draft Directive are vague given the complexities and nuances of the myriad types of digital content types already available. This will only be exacerbated as new digital content types emerge and evolve. The protections needed will naturally shift as technology evolves, and legislative output needs to reflect that. The Draft Directive will not allow a sufficient degree of flexibility for states to adapt, and thus it is contestable that the Directive should either be reconsidered, or allow other legislation to work alongside it.

4 It is argued in this paper that in order to encourage legal innovation and to disincentivize behaviors detrimental to other states, an optional instrument is preferable. In order to make this argument,

4 European Commission ‘Priority: Digital Single Market’ (*Europa*, 21 September 2016) <http://ec.europa.eu/priorities/digital-single-market_en> accessed 21 September 2016.

5 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634(final).

6 Mánko Rafal, ‘Contracts for Supply of Digital Content: A Legal Analysis of the Commission’s Proposal for a New Directive (2016) EPRS In-depth analysis, PE 582.048.

decentralized and centralized versions of mutual learning methods shall be examined, with the exemplifying versions of such being trans-jurisdictional competition and the Open Method of Coordination (hereinafter: OMC) respectively. As the American Uniform Commercial Code (UCC) system has a great deal in common with the latter, and some common ideals shared with the former, the Code shall then be discussed in some detail. The construction of the UCC acts as a useful exemplar of the amalgamation of both methods and illustrates some key practicalities of any optional instrument. These examinations shall be formulated into insights that are relevant to a restructuring of the CESL as this is the current form an optional instrument in consumer sales law would likely take.⁷ A discussion as to whether elements of these methods should be utilized by future unifying instruments is also included.

C. Trans-Jurisdictional Competition and Pure Yardstick methods

5 First, it is prudent to understand what trans-jurisdictional⁸ competition entails. The reference is usually made to the manner by which individual jurisdictions attempt to make their legal system more appealing, and thus attract more transnational trade, by providing simpler and more beneficial legislation for traders, or to attract more companies to establish themselves within the State.⁹ Constant improvement to Member State jurisdiction with the aim of being more favorable than their counterparts, works in much the same way as competition between companies in free markets, and, in theory, creates an internal market that constantly improves. Successful trans-jurisdictional competition often leads to legal transposition of the best methods of jurisdiction, but it can be difficult to qualify the success of such methods as it is a decentralized system. A centralized system is easier to assess qualitatively, but it is likely that the competitive elements diminish in such a system. Thus, the current functioning of these two methods within the EU is worthy of appraisal.

6 The lauded European Economic and Monetary Union

7 It should be noted that the CESL was withdrawn to unleash the power of e-commerce, which suggests some intention to review it. Should it be reformulated, it is the opinion of this author that lessons taken from these comparable measures should be observed.

8 Sometimes referred to as ‘traditional jurisdictional competition’.

9 This is a somewhat more simplistic definition of the theory. For a more complete discussion of the terminology, see William Bratton and Joseph McCahery ‘The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World’ (1997) Faculty Scholarship Paper 849.

(EMU)¹⁰ - designed to assist in the convergence of EU economies - has unintentionally paved the way for a form of mutual learning. The EMU led to the introduction of the European Employment Strategy¹¹ and then to the creation of the Open Method of Coordination (OMC).¹² The OMC was formed as a new type of governance with the aim of reforming policies throughout Member States via the use of soft law, intended to encourage the adoption of the best policies within the EU to foster a stronger economic policy base.¹³ Although the OMC is a centralized benchmarking system, it is a particularly useful method of jurisdictional competition,¹⁴ without the caveat of being as lax in political persuasion as a method such as *laboratory federalism*,¹⁵ which is an entirely decentralized version of such a method. The intention here is to assess the value of decentralized trans-jurisdictional competition and centralized mutual learning on the basis that the continued development of legislative techniques is beneficial to the market as a whole. The value of such ideas in a general sense is not discussed here, as that is an issue for pure economic theory to address.¹⁶

- 7 Three forms of mutual learning through competition exist,¹⁷ and it is important to understand how each affects the legislature. The first method is that of *pure yardstick competition*, a method by which two states observe the policy decisions - and their consequences - with another state; this is best described as a pure mutual learning exercise as there is little competitive element implied here. *Trans-*

jurisdictional competition is that where legislative efforts and policy making are continually adapted in the face of market circumstances where it is clear that some jurisdictions have more favorable laws for trading.¹⁸ Finally, *regulatory competition*¹⁹ is the type of laboratory federalism that would be most prevalent should an optional instrument arise; being that it is when those governed by law may choose which regulatory system they are to be governed by due to a free choice of law.

- 8 The OMC is used here as an example of a centralized legal and policy dissemination technique, most reminiscent of *pure yardstick competition*. Although the OMC is a policy based instrument concerned with culture, it accurately portrays how the EU has become involved with mutual learning and self-coordination in the proliferation of laws;²⁰ it is particularly useful in demonstrating how such methods are unsuitable in regards to consumer contract law. The OMC is notably different from traditional ideas of harmonization, in that policy making is conducted at a national level. Policies in Member States are evaluated at the central level by the OMC, and the very best policies are identified and potentially spread via policy recommendations. The OMC ensures that experts from various ministries meet frequently to create policy manuals to be spread throughout the EU. The instrument is primarily used to build consensus on issues and increase understanding of commonalities - there is no intention of creating binding harmonizing instruments. The Commission oversees the functioning of the OMC to a very minimal extent, instead relying on national governments to monitor their own input. The production of reports on the progress made by the OMC is carried out by the Commission,²¹ which otherwise has little involvement. External evaluation is of the opinion that the “OMC generally functioned well and was relevant to the policy objectives in the Work Plan for Culture. The evaluators pointed out that the OMC adds value primarily through mutual learning and the exchange of best practices”.²²

10 ‘Economic and Monetary Union’ (*European Central Bank*, 2015) <<http://www.ecb.europa.eu/ecb/history/emu/html/index.en.html>> accessed 4 July 2015.

11 ‘European Employment Strategy’ (*European Commission*) <<http://ec.europa.eu/social/main.jsp?catId=101&langId=en>> accessed 4 July 2015.

12 Open Method of Coordination. See ‘European cooperation: The Open Method of Coordination’ (*European Commission*) <http://ec.europa.eu/culture/policy/strategic-framework/european-coop_en.htm> accessed 4 July 2015.

13 Wolfgang Kerber and Martina Eckardt ‘Policy Learning in Europe: The “Open Method of Coordination and Laboratory Federalism” [2007] 14(2) *Journal of European Public Policy*, 227.

14 Adrienne Héritier ‘New Modes of Governance in Europe: Policy-Making without Legislating’ in Adrienne Héritier *Common Goods: Reinventing European and International Governance* (1st edition, Rowman & Littlefield Publishers, 2002), 5.

15 Wallace Oates, ‘An Essay on Fiscal Federalism’ [1999] 37(3) *J Econ Literature*, 1120.

16 For a discussion on the general value of these ideas see Wolfgang Kerber and Martina Eckardt ‘Policy Learning in Europe: The “Open Method of Coordination and Laboratory Federalism” [2007] 14(2) *Journal of European Public Policy*, 227.

17 Wolfgang Kerber and Martina Eckardt ‘Policy Learning in Europe: The “Open Method of Coordination and Laboratory Federalism” [2007] 14(2) *Journal of European Public Policy*, 227, 232.

18 Or similar economic venture.

19 Damien Geradin, Daniel Etsy, *Regulatory Competition and Economic Integration: Comparative Perspectives (International Economic Law Series)* (Oxford University Press, Oxford, 2001).

20 GOVECOR ‘EU governance by self-coordination? Towards a collective “gouvernement économique”’ (August 2004, European Commission). <<http://cordis.europa.eu/documents/documentlibrary/100124131EN6.pdf>> last accessed 3 August 2015.

21 European Commission ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the implementation and relevance of the Work Plan for Culture 2011-2014’ COM 2014 0535 final.

22 Quote from - Open Method of Coordination. See ‘European cooperation: The Open Method of Coordination’ (*European Commission*) <<http://ec.europa.eu/culture/policy/strategic>>

- 9 To understand the impact of the OMC as a centralized mutual learning exercise, one must look at the effect of a system devoid of centralization. As previously mentioned, *Laboratory federalism* encompasses a few similar definitions. For the purposes of this research, it is viewed as the diffusion of public policies on the basis of innovation and effectiveness as the key aspect of jurisdictional competition - essentially being trans-jurisdictional competition with a focus on mutual learning rather than the improved economic yield of any one Member State.²³ The theory is that within a unified system of States,²⁴ the individual States will develop and experiment with different policy ideas, the best of which will proliferate the market. The primary goal is to overcome the concept known as the “*knowledge problem*”,²⁵ which states that, in the majority of fields, the optimal policy has not yet been found, resulting in a suboptimal proliferation of legislation. Many of the ideas of jurisdictional competition and laboratory federalism come from the work of Friedrich Hayek and the concept of competition as a discovery procedure,²⁶ but the conclusions drawn by Hayek are that people are ultimately limited in their ability to intervene in complex societies, thus ensuring that the best policies and legislative techniques may well never be discovered.
- 10 Both the OMC and laboratory federalism are faced with the common problem of whether it is possible to assess the benefit of others’ experience. A solution applied out of context may be actively detrimental. The idea of a singular method being optimal in all situations is demonstrably incorrect, yet this is of course, no indicator that there is nothing to be gained from the exercise. The crucial role of either method is to ascertain better methods for jurisdictions and specific circumstances, as this leads to greater economic efficiency and, therefore, justifies their existence. This difficulty in utilizing information gathered by others is well documented in the economic literature;²⁷ the diffusion of ideas is difficult, uncertain and lengthy. Even if positive lessons are consistently difficult to apply, it is easier to assess ideas that should not be diffused, with unsuccessful legislation being less likely to find application in other jurisdictions.²⁸ Regardless of the positive or negative diffusion of ideas, the result is the same, an attempt to unify jurisdictions with the supposed optimal legislative techniques - irrespective of whether the techniques in question have been adequately judged. The potential for non-optimal legislation to be proliferated throughout the EU is in that respect of little difference to harmonization attempts, so long as it appears beneficial politically and creates a uniform market.
- 11 Whether the OMC has been effective is contestable, yet it appears as though the consensus is somewhat negative. The issue is that in order for the OMC to be effective, it needs to function properly at both the data collection stage (national) and the EU level, and it appears that the data collection stage is not functioning adequately.²⁹ Furthermore, the incentives to implement the best practices seem to lack in efficacy.³⁰ Lessons from the European Employment Strategy (EES) show that, without soft sanctions, parties involved with the implementation of these policies show little desire to do so.³¹ Laboratory federalism, however, does not depend on multi-national cooperation, so the difficulties in maintaining functionality on different levels are moot in this regard. Yet in the face of this, such a method of mutual learning is near impossible to evaluate, and, in particular, seeks only to improve the economic position of the individual State, rather than the functioning of the larger body. For that reason, the EU would not seek to rely on laboratory federalism to yield positive results for the internal market; a centralized body is required to ensure that the policies suggested are beneficial for all. This should not be taken as a dismissal of trans-jurisdictional competition, however, as there are significant benefits that are not present in
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- framework/european-coop_en.htm> accessed 4 July 2015, original text to which it makes reference is currently unavailable.
- 23 Viktor Vanberg, Wolfgang Kerber, ‘Institutional Competition among Jurisdictions: An Evolutionary Approach’ [1994] 5(2) *Constitutional Political Economy*, 193.
- 24 It should be noted that the theory discusses the idea of a true federal system, whereas the EU is most likely a quasi-federal entity, for a view that it is entirely a federal jurisdiction see Alain Marciano and Jean-Michel Josselin ‘How the court made a federation of the EU’ [2006] 2(1) *The Review of International Organizations* 59, but this paper does not share that view, only that the theory of laboratory federalism is applicable to the EU.
- 25 Wolfgang Kerber and Martina Eckardt ‘Policy Learning in Europe: The “Open Method of Coordination and Laboratory Federalism”’ [2007] 14(2) *Journal of European Public Policy*, 227, 232.
- 26 F.A. Hayek *Studies in Philosophy, Politics and Economics*, (New edition, University of Chicago, 1980) 66.
- 27 Everett Rogers, *Diffusion of Innovations*, (5th revised ed., Simon and Schuster International, 2003).
- 28 Richard Rose, ‘When all other Conditions are not Equal: The Context of Drawing Lessons’, in Catherine Jones Finer (ed.), *Social Policy Reform in Socialist Market China: Lessons for and from Abroad*, (Ashgate Pub Ltd, 2003).
- 29 Caroline de la Porte, and Patrizia Nanz, ‘The OMC – A Deliberative-democratic mode of governance? The Cases of Employment and Pensions’ [2004] 11(2) *Journal of European Public Policy*, 267, 278.
- 30 James Arrowsmith, Keith Sisson and Paul Marginson, ‘What can “Benchmarking” Offer the Open Method of Coordination?’, [2004] 11(2) *Journal of European Public Policy*, 311.
- 31 Wolfgang Kerber and Martina Eckardt, ‘Policy Learning in Europe: The “Open Method of Coordination and Laboratory Federalism”’ [2007] 14(2) *Journal of European Public Policy*, 227, 237.

harmonized markets. Most notably, under this type of competitive legislative effort, innovation and progressive policies thrive, bringing about a swifter end to the “knowledge problem”. This is particularly beneficial to emerging contract types, such as those involving digital content, as the legislation needs to adapt quickly in order to address new challenges. No other mutual learning method is as quick and efficient as trans-jurisdictional competition; but the issue is that it simply does not create uniformity, which is central to fundamental objectives of the EU.

- 12 With trans-jurisdictional competition judged as too independently minded, the question is then raised: why, beyond issues of current ineffectiveness, should the centralized OMC method be dismissed? It has been established that the knowledge problem illustrates that the best legal method is likely not discovered, and it is also clear that the development of technology and social progress continually alters what the best method would be. For these reasons, jurisdictions must be responsible for their own legal innovation in order to respond adequately to issues promptly.³² However, if the OMC proliferated the best innovations to other Member States, this would surely result in consistently adequate protection for consumers and traders, on the condition that the Member States were responsive to such non-binding recommendations.³³ However, the manner of the functioning of the OMC does not encourage the introduction of innovative legal and policy methods, merely the proliferation of perceived successful existing versions of such. This is an issue shared by any benchmarking method of harmonization.³⁴ Therefore, the OMC is useful in attempts to bring heterogeneity to issues under the exclusive jurisdictions of Member States. However, as a non-binding source of law, which crucially offers no incentive for innovation, it is clearly not ideal as a method to legislate for rapidly developing technology types, and is unlikely to become such without external influence.
- 13 The conclusion to be drawn here is that transnational jurisdictional competition will not lead to convergence towards a single market, but will encourage innovative legislative methods. Pure yardstick competition based on mutual

learning (such as the OMC) will suffer from a lack of innovation as increasingly fewer benefits result from such endeavors, particularly considering the economic risks of modifying policies; yet it will assist with the convergence of the market. A halfway point is possible, as the USA has demonstrated with the Uniform Commercial Code or UCC. The Code is created by a centralized body, and then disseminated to the States who choose whether and which parts to adopt, therefore allowing a State to continue to innovate in regards to legislation, whilst the Code still, *theoretically*, ensures that the best ideas proliferate the market as the centralized organization acts as an external examiner of policies in order to benchmark them. However, whether the two mutual learning techniques function well together is an issue worthy of discussion.

D. The American Experience

- 14 The EU is not alone in trying to create a single market in unified, yet legally distinct, territories. The systems of market integration in the USA is a useful example as it demonstrates a functioning internal market achieved through optional unification.³⁵ The USA has drawn interest from scholars in the past for its relevance towards system building within the EU.³⁶ It has been claimed that it works because the States have different Private Laws but the Federation as a whole provides at least a common legal system³⁷ (albeit with the exception of Louisiana which has a civil legal system) and a shared legal training method.³⁸ Legal fragmentation is at a much lower point than in the EU for this reason.³⁹ This is not to say that the laws of the USA should be transposed into the European legal system; but rather that interpretation of historical data from the federalist system may yield information as to what conditions are conducive to trade within an internal market, particularly given its relevance to mutual

32 GOVECOR ‘EU governance by self-coordination? Towards a collective “gouvernement économique”’ (*European Commission*, August 2004). <<http://cordis.europa.eu/documents/documentlibrary/100124131EN6.pdf>> last accessed 3 August 2015.

33 Kerstin Jacobsson, ‘Soft Regulation and the Subtle Transformation of States. The Case of EU Employment Policy’, [2004] 14 *Journal of European Social Policy*, 355, 366.

34 James Arrowsmith, Keith Sisson and Paul Marginson, ‘What can ‘Benchmarking’ Offer the Open Method of Coordination?’, [2004] 11(2) *Journal of European Public Policy*, 311.

35 David Leebron, ‘Claims for harmonization: A theoretical framework’, [1996] 27 *Canadian Business Law Journal*, discusses harmonization from a Canadian viewpoint, however America is more useful as it is a larger economy.

36 Eric Stein, Terence Sandalow, ‘On the Two Systems: An Overview’ in Eric Stein and Terence Sandalow (eds) *Courts and Free Markets: Bk 2: Perspectives From the United States* (Oxford, Oxford University Press, 1982) 3.

37 Hein Kötz ‘Contract Law in Europe and the United States: Legal Unification in the Civil Law and the Common Law’ [2012] 27 *Tulane European and Civil Law Forum*, 1.

38 G. Edward White, *Law in American History: Volume 1* (Oxford University Press, 2012).

39 For a more detailed look at the fragmentation of Europe, see Stefan Vogenauer and Stephen Weatherill, *The European Community’s Competence to Pursue the Harmonisation of Contract Law – an empirical contribution to the debate in The Harmonisation of European Contract Law* (Oxford, Hart Publishing, 2006) 105.

learning methods. The American method was a primary influence upon the formation of the Vienna Convention on Contracts for the International Sale of Goods (CISG). The fact that the CISG was a primary focus of the Lando Commission in their goal of creating a singular European private law system is an indication of the significance that the American system holds upon global commercial legislation. The CISG, however, is not relevant to this paper as it explicitly excludes consumer transactions from its applicability,⁴⁰ making it more prudent to examine its predecessor's commercial law system.

- 15 The USA comprises of individual States that have their own contract, tort, unjust enrichment, property, family and succession law. Though theoretically possible, uniform federal law has not attempted to legislate to create a singular system in any of these fields. Argument may be made that this is primarily due to issues regarding competency, in that the US Constitution restricts the ability of Congress to legislate in this manner by stating that: "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".⁴¹ However, this is not the exhaustive rationale, as in some areas, power has been delegated to the US central government by the Constitution, meaning Congress has the competence to act but remains inactive. This is particularly true in regards to interstate commerce, which Congress has competency to act upon by virtue of Article 1(8)(3) of the Constitution, wherein they are granted the power to legislate on commerce affecting multiple states, foreign nations or Indian tribes. This is different from the EU, wherein Member States retain their sovereignty and are competent and responsible for their foreign policies.⁴² However, the competencies to regulate the internal market are separate and shared with the EU as in Arts.3-4 of the TFEU.⁴³ The Common Commercial Policy, on the other hand, is under the exclusive competence of the EU.
- 16 In the USA, the National Conference of Commissioners on Uniform State Law (hereinafter: NCCUSL) has attempted to bring uniformity. The NCCUSL is in many respects similar to the aforementioned OMC, in that they examine the laws of states, and suggest what they deem to be the best policies for adoption. In its current form, from its inception in 1892 to the present, the Conference has constructed over three hundred Acts designed to bring uniformity

to States that wish to adopt them. Only a small number of these have been implemented.⁴⁴ The Uniform Commercial Code (UCC) is the piece that has been the most influential since the creation of the Conference. The Code, introduced in 1952 after a ten-year drafting period in conjunction with the American Law Institute (hereinafter: ALI), covers the Sales of Goods and many other aspects of private law. Although it falls short of being a complete Commercial Code, remaining silent on a number of Commercial issues, it is wider in scope than the former CESL. The uniformity this Code brings is beneficial but is hampered by the fact that the States are entitled to amend the Code should they so wish. The importance of the Code to the system of the USA is not to be understated as it covers transactions cumulatively worth trillions of dollars.⁴⁵

E. The UCC in Context

- 17 Throughout its tenure, considerable criticism has been levied against the Code, particularly in regards to Art. 2,⁴⁶ which is important for the analysis in this paper. "Where the practitioners wanted problems answered in the statute, the draftsmen were content to leave answers to the judicial process".⁴⁷ Perhaps the greatest sustained criticism to the UCC in this respect is in relation to its approach to warranties under contract. All States have supplemented Art. 2 to an extent in order to increase consumer confidence, but these actions were seen by some academics as otiose in nature.⁴⁸ Only Maine,⁴⁹ Connecticut⁵⁰ and Maryland⁵¹ made significant impact in that they prohibit the use of clauses that either remove implied warranties or limit remedies for breach of warranty. However, this clearly demonstrates the need for a strong base level of protection for consumers in any form of unifying instrument.

40 CISG Art 2 (a).

41 U.S. Constitution 10th amendment.

42 Catherine Banyard, Steve Peers *European Union Law* (1st edition, Oxford University Press, 2014), 3.

43 Jukka Snell 'Who's Got the Power? Free Movement and Allocation of Competences in EC Law' [2003] 22 Yearbook of European Law 323.

44 NCCUSL 'Home page' <<http://uniformlaws.org/>> accessed 4 May 2015.

45 The 2007 economic census estimated the value at approx. \$3,917,663,456,000 for retail sales alone. 'QuickFacts United States' (United States Census Bureau, 5 August 2015) <<http://quickfacts.census.gov/qfd/states/00000.html>> last accessed 15/08/15.

46 Carol Swanson, 'Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine', [2001] 31 N.M. L. REV., 359.

47 Homer Kripke, 'The Principles Underlying the Drafting of the Uniform Commercial Code' [1962] University of Illinois Law Forum, 321, 332.

48 'Joan Vogel, 'Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal For Reform', [1985] Ariz. St. L.J. 589.

49 § 2-316.

50 § 42a-2-316.

51 § 2-316.1.

- 18 Proposed amendments to the Code are also difficult to implement as States will often refuse them, such as the amendments to Art. 2 proposed by the NCCUSL in 2003, which were refused by all States. The importance of the Uniform Computer Information Transactions Act (UCITA) is that it was designed to deal with intangible products and licenses, which the Code was ill-formed to deal with. The aforementioned Act has not been well received, only being adopted by Maryland and Virginia, whilst being actively condemned by IT groups.⁵² The Act is easily overwritten by a shrink wrap license, yet free software distributors and small software developers with limited legal knowledge would be found liable for faults within the software. This is important to any model legislation in that the addition of important modifications are difficult to implement without significant political lobbying, which costs time and money that most supranational organizations could find better uses for, and may be ultimately fruitless.
- 19 Additions and amendments have consistently been an issue for the UCC, particularly those concerning consumers. Art. 2 in particular, has been difficult to amend since its inception as the Committee, especially Spiedel,⁵³ have been aware of.⁵⁴ The first reason was that no relevant group of consumers or merchants were asking for a revision of Art. 2; with no demand for the revision, change was unlikely to be welcome. Secondly, some of the amendments in the 1999 drafts were so controversial that the Article appeared unfamiliar. Third, the removal of computer data from the scope of the Article did nothing to remove the controversy about computer data. Fourth, the consumer protection provisions consistently attracted the ire of commercial interests.⁵⁵ Finally, and perhaps most importantly, the political aspect was too important in the drafting of the revisions; any revision needed to appeal to State legislatures, who would be lobbied by commercial interests.⁵⁶ Too much consumer protection would be politically untenable whereas too little would be almost useless.
- 20 This issue of the difficulty of making amendments is a key argument against any instrument that relies upon soft law methods to implement changes to the legislation. Much like the *pure yardstick competition* type instrument of the OMC, there is little incentive for States to implement any of the proposed changes unless it brings about an obvious economic advantage over the previous system, and if consumers remain unaware of the areas to which they lack protection due to the advances in technology, there would be no increased trade due to consumer confidence brought about by any changes. Furthermore, it is obvious from the historical aspects of the UCC that these amendments are too time consuming to formulate, but even more so to implement, as the large number of States that must be persuaded to adopt the instrument present far more of a challenge than the more autonomous *trans-jurisdictional competition* method would require.

F. No Need for Digital Legislation?

- 21 The release of the *Principles*⁵⁷ in 2010 gave an impression regarding the issues deemed to be facing US consumers in relation to digital content transactions. The surprising element was that the text addressed very few legal problems that were specific to software transactions, and this is deemed to have been intentional due largely to the strength of the (predominantly) common law system.⁵⁸ Of course, the EU is not solely made up of Common Law jurisdictions. It is perhaps an incontrovertible truth that there is little software contract specific case law available in the USA, or the EU for that matter, which will lead some academics to suggest that this confirms the strength of the current system.⁵⁹ However, that is not the only conclusion that may be drawn, as an overwhelming majority of digital software that is faulty is of so little value outside of opportunity cost that the majority of claims would be brought about under the relevant small claims procedure.⁶⁰ As such, this means that the majority of cases involving digital content would go unreported, and whereas judges may simply be able to apply existing sales law or the relevant parts of the draft

52 Dorte Toft 'Opponents blast proposed U.S. software law' (CNN July 2 1999) <<http://www.cnn.com/TECH/computing/9907/12/ucita.idg/index.html>>, last accessed 6 May 2015 and Richard Stallman, 'Why we must fight UCITA' (GNU, February 28, 2013) <<http://www.gnu.org/philosophy/ucita.html>> last accessed 6 May 2014.

53 Chief reporter for the Committee.

54 Richard Spiedel, 'Introduction to Symposium on Proposed Revised Article 2', [2001] 54 SMU L. Rev., 787.

55 For a discussion on the impact of such groups upon Art 2(B) see Bruce Kobayashi, Larry Ribstein 'Uniformity, Choice of Law and Software Sales' [2000] George Mason Law and Economics Paper No. 00-07, 16.

56 Edward Rubin, 'Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4', [1993] 26 Loy. L.A. L. REV. 743, 759.

57 American Law Institute, 'Principles of the Law of Software Contracts' (2010) (ALI PRINCIPLES).

58 Juliet M. Moringiello, William L. Reynolds, 'What's Software got to do with it? The ALI Principles of the Law of Software Contracting', Widener Law School Legal Studies Research Paper Series no. 10-02, 12.

59 *Ibid* specifically '... there were few serious legal issues for the project to address. We know that because there has been little litigation over software-specific issues'.

60 In Europe this would be under Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure OJ L 199/1.

Directives⁶¹ to beneficial effect, it does not mean that the rationale is applied correctly, consistently or adequately. With the value of digital content likely to continue to rise, it would be naïve to assume that little case law means that prior law is suitable.

- 22 This argument of prior law being fit for purpose has frequently been raised in respect to the software regulation in the USA, particularly the unpopular Art. 2B that relied heavily on supposed pre-existing law in regard to license agreements.⁶² In fact, even the ALI's *Principles* intended to not to go so far as a restatement of laws, but merely intended to be guidance for courts to consider. The *Principles* do make some bold assertions, such as that federal intellectual property law should harmonize contrary State law.⁶³ However critically, the *Principles* are very different from EU harmonization methods because of the reliance upon the unconscionability doctrine⁶⁴ to ensure fairness, rather than on extensive - and potentially exhaustive - lists of unfair contract terms. This ensures the flexibility of the principles, but, flexibility comes at the cost of certainty. Most strikingly, the *Principles* are not binding in any way, as legislation typically is. It is stated that: "Courts can apply the Principles as definitive rules, as a 'gloss' on the common law, U.C.C. Article 2, or other statutes, or not at all, as they see fit",⁶⁵ which is, at best, a wholly non-committal assertion of authority, making the variation in State law regarding software a foregone conclusion. Yet, despite the failure of Art. 2B, UCITA and the arguable failure of the *Principles*, the growth of the digital market in the USA appears unimpeded,⁶⁶ as the variation in State law appears to not be concerning consumers.
- 23 A conclusion can be drawn that soft law and the extension of ideas present in sale of goods and services contracts may be extended successfully to digital content. Nevertheless, as precedence diverges from the wording of the UCC, and the re-evaluation of ideas occurs in cases such as in

Bowers v. Baystate Techs., Inc.,⁶⁷ the actual uniformity between States decreases. The USA's commercial system, will however be far more resilient to such a decrease, as the idea of the perception of uniformity will encourage consumers to treat other States' laws as though they were the same as their own.⁶⁸ Resilience is not equal to immunity, and various legal organizations in America seem to be aware of this, hence the repeated attempted revision to unified digital content regulation. If the *Principles* can gain traction in being consistently implemented by States, then they may become a strong and adaptable instrument, but like the UCC before it, it is likely that States will not implement all changes in a uniform fashion. Digital legislation is required, and it would be more beneficial to be in some ways binding, rather than the measures of the *Principles*, UCC or OMC.

G. The Relevance to Optional Law in the EU

- 24 There are obvious concerns as to why the method of legislating by means of an optional Code (such as the UCC), or by means of a mutual learning instrument such as the OMC on commercial transactions, would not be appropriate for EU consumer law. If a future digital optional instrument for consumers were neither a Directive nor a Regulation, but merely a piece of model legislation that States could adopt and adapt to suit the needs of their consumers, the likelihood of Member States adopting such legislation without significant alteration would be negligible. The system of the USA was politically viable because the nation has always maintained a strong sense of unified identity, meaning that national federal measures are not dealt with the amount of skepticism as supranational measures in the EU. The implementation in the USA has been the cause of the majority of issues with the UCC, as the political nature resulted in the difficulty of establishing UCITA. The lesson to be taken from this is that any potential future digital optional instrument for consumers must take the form of a Regulation, and modifications made should be made at a supranational level. It is preferable that amendments be either adopted by all Member States, or none at all, as this avoids the fragmentation that is present in the US system. In order to do so, amendments must be adopted in the Council as it is acknowledged that timely solutions to minor issues are somewhat impractical at a supranational level.
- 25 Fragmentation of the law is not the only issue that the drafters of any future optional instrument need

61 The Draft Digital Content Directive in particular.

62 'The law that is already out there' is a key theme in articles such as Jessica Litman 'The Tales that Article 2B Tells', [1998] Berkeley Tech. L.J. 13, 931, 934 and Hannibal Travis, 'The Principles of the Law of Software Contracts: At Odds with Copyright, Consumers, and European Law?' [2010] FIU Legal Studies Research Paper Series Research Paper No. 10 - 01, 3 though it should be noted that neither of these papers agreed that the law already existed.

63 ALI Principles, supra note 5, § 1.09.

64 Loosely defined as 'not right or unreasonable', see Arthur Leff, 'Unconscionability and the Code - The Emperor's New Clause', [1967] 115 U PA L Rev., 485.

65 ALI PRINCIPLES, supra note 5, § 1.12.

66 See 'E-Stats 2013: Measuring the Electronic Economy' (Census, May 28 2015) <<http://www.census.gov/econ/estats/e13-estats.pdf>> accessed 7 July 2015.

67 *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1337 (Fed. Cir. 2003).

68 Or without notable difference.

to be wary of, however, the matter of evolving transaction types is equally troubling. Anticipating how transactions will evolve is unsurprisingly difficult. In the United Kingdom for example, the provisions laid out in the Sale of Goods Act 1893 were eventually deemed unsuitable and replaced by the Sale of Goods Act 1979. Repeal and amendment of statutes are understandable and expected, but an all too frequent change in commercial law is detrimental from an economic standpoint as it brings uncertainty to a market. More established legal norms and methods are preferable in terms of comprehension for consumers and businesses alike. This is particularly relevant to the different types of digital ‘goods’ that are becoming available through e-commerce.⁶⁹ Although the proposal implies that the initial implementation of a digital optional instrument would involve an element of experimentation, a poor start for the instrument could reduce faith in the instrument to a point where it would not be practical to implement and leave it barely used, sharing a fate with UCITA.

- 26 If it is accepted that pressure from large corporations and consumer groups has stifled the growth of legislation in new areas in the USA, then the concerns of both groups have to be addressed to ensure less friction when attempting to introduce an optional instrument for consumers. Both types of pressure groups have traditionally had primary concerns: large corporations wish to protect freedom of contract; and consumer groups wish to ensure consumer protection measures are enforceable against abuses.
- 27 With companies’ and consumer groups’ primary concerns potentially addressed, the instrument must still hold water politically. The tempering of the UCC to ensure that it is adopted by the individual States is reminiscent of the state of affairs with regard to the original proposal for the CESL. Although the CESL proved popular with the European Parliament, the Council rejected it, as many Member States were simply unwilling to allow it to pass in its current form. Lobbies from consumer groups and technical firms dealing in digital content are cited by many as the reason for the reluctance for the Council to accept the CESL without significant modification.⁷⁰ Because of the hostility, the CESL was formally withdrawn, and the Commission appears to be once again moving towards maximum targeted

harmonization with the Draft Digital Content Directive.⁷¹ The main concern then is that, should the CESL resurface in another form, the scope and power of the instrument might be significantly reduced, leading to a situation not dissimilar to the UCC, wherein the drafters acknowledge a diluted compromise of an instrument being released due to political pressures.

- 28 The idea that consumer protection is decreasing in the “electronic age”⁷² is no different under the CESL - or other EU harmonization - than it is under the American system. The success of either method of legal unification should only be judged on their actual goals, as comparative data in respect to changes in cross-border transactions is not available for both territories. As a goal, the CESL sought to increase cross-border transactions and commentators have suggested it is also intended to enhance European identity.⁷³ Cross-border transactions are fairly easy to measure, so it would be possible to determine whether or not any future optional instrument would have been a success by its own standards. As previously mentioned, the UCC was a success by its own standards, as it far surpassed the initial expectations for the Code and has continued to evolve over half a century of use. That being said, much of the success would be based on public perception of the optional instrument, and for that to be positive, a point by Karl Llewellyn in regards to the UCC still rings true: “... even where agreements are to have effect in law, they must show sign[s] of being agreements, not dictation or overreaching”.⁷⁴ That is to say that if any future optional instrument were perceived as being mandatory in all but name, it would be viewed with disapproval. Regardless of how many transactions are governed by the instrument initially, politically it would draw the ire of both consumers and governments. So it can be said that for the instrument to be viewed as a success initially, it must be applied in a wide number of transactions; but for it to be viewed as successful over a longer time frame, it must not seem to have been forced upon the parties.

H. Conclusions

- 29 This paper asserts that an optional instrument is

⁷¹ *Ibid.*, 5.

⁷² Robert Hillman, Jeffrey Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 NYU L rev., 429, 495.

⁷³ Eric Posner, ‘The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition’ [2012] University of Chicago Institute for Law & Economics Olin Research Paper No. 597.

⁷⁴ Karl Llewellyn, ‘On Warranty of Quality, and Society: II’, [1937] *colum. L Rev.* vol 37, 341, 403.

⁶⁹ Clarice Castro, Chris Reed, & Ruy de Quieroz, ‘On the Applicability of the Common European Sales Law to some Models of Cloud Computing Services’, (2013) 4(3) *European Journal of Law and Technology*.

⁷⁰ ‘Common European Sales Law faces Rocky Reception’ (Euractiv, 24 March 2014) <<http://www.euractiv.com/sections/innovation-enterprise/common-european-sales-law-faces-rocky-reception-301090>> Last accessed 8 September 2014.

desirable on the basis of its unique functionality. By evaluating the functionality of trans-jurisdictional competition and mutual learning methods, a number of impediments to creating an ideal legislative technique to govern digital content were established. Pure yardstick competition, such as the OMC, demonstrated that having a central authority establish best policies, and disseminating such policies throughout the Union is practical, in that it assists in unification and promotes legislative methods that are functional. However, it is difficult to ascertain whether a legislative method would be equally effective in other territories, leading to sub-optimal policies being disseminated on the basis of a misconception of universal applicability. The primary reason that pure-yardstick competition is not the ideal solution is on the basis of the *knowledge problem*, which demonstrates that the best methods in legislating for a particular issue are likely not currently known, and this method is unlikely to make any progress toward that goal.⁷⁵ Without incentive for innovation, this method of unification lacks the ability to create optimal policies. Pure trans-jurisdictional competition is the counterpoint, in that it encourages innovation, but provides no incentive or method of unification.

incentive to innovate, whilst ensuring some level of unification; respecting freedom of contract, whilst maintaining clearly ascertainable protections for consumers. The optional instrument for consumers would consider all of these concerns, establishing a unified contract type for those that wished it, whilst allowing State legislatures to compete against each other for the best national regulatory methods. Businesses would still retain freedom of contract, and consumers would be given strong protections, as long as they remain in line with the former CESL's aims, and are backed up by less specific protections in harmonizing instruments, such as the proposed Draft Digital Content Directive. The benefit of the optional instrument is that, unlike the OMC or UCC, it would not rely on soft law to function effectively, but it would ensure uniformity as States innovate in order to create the greatest economic benefit for themselves. The evolving consumer contract types would be governed by a legislative method that is equally capable of evolving to suit the market. To avert issues such as those faced by the USA with UCITA, the optional instrument would be a more apt solution to govern the evolving consumer contract.

- 30 The American UCC offered a method of legislation that has similarities to both pure-yardstick competition and trans-jurisdictional competition. The history of the Code demonstrates a number of issues with non-mandatory legislative techniques, in that it can be difficult and time-consuming to encourage adoption of policies amongst States. If the incentive for adopting amendments to the Code were not sufficient, States tend to legislate separately, forming a type of trans-jurisdictional competition, in the midst of an intended mutual learning method. The UCC demonstrates that mutual learning methods without any form of clear incentive for compliance, or sanction for non-compliance, are often ineffective at unifying markets. Competition between authorities has arguably created better legislative options to govern digital content, but at the cost of variation between State legislative approaches. Furthermore, the development of legislation on such a scale is hampered by commercial lobbying, which is seemingly far more effective on such a large scale. Because the stakes are higher than at State level, political lobbying is more effective, and can force legislatures into inaction. It is important to remember, commercial interests want to defend freedom of contract, and consumer interests look for the greatest protective measures.

- 31 The solution to these issues appears to be offering

⁷⁵ Wolfgang Kerber and Martina Eckardt 'Policy Learning in Europe: The "Open Method of Coordination and Laboratory Federalism" [2007] 14(2) Journal of European Public Policy, 227, 232.

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