

**Scottish Law Commission response to the Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback**

**Scottish Law Commission**

**140 Causewayside**

**Edinburgh**

**Scotland, United Kingdom**

**EH9 1PR**

**Tel: +44 (0)131 668 2131**

**Fax: +44 (0)131 662 4900**

**Email:** [**info@scotlawcom.gsi.gov.uk**](mailto:info@scotlawcom.gsi.gov.uk)

**Web:** [**http://www.scotlawcom.gov.uk/**](http://www.scotlawcom.gov.uk/)

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Introduction

This response is from the Scottish Law Commission, a statutory body set up under section 2 of the Law Commissions Act 1965 and tasked with promoting the reform of Scots law.[[1]](#footnote-2) We are the sister organisation of the Law Commission for England and Wales, set up under the same statute.

The response has been agreed collectively by the Scottish Law Commissioners. The submissions follow upon an earlier submission to the United Kingdom Government’s call for evidence on the options presented by the Green Paper,[[2]](#footnote-3) and our submission to the questions posed by the Green Paper itself.[[3]](#footnote-4)

In this response, we first offer some brief comments of a general nature, before turning to answer the specific questions posed by the Feasibility Study.

**General comments**

Generally, the Scottish Law Commission welcomes the outcome of the Feasibility Study and the production of a draft instrument. We believe this to be an interesting and worthwhile exercise, which may benefit cross-border trade across the internal market. As a law reform body, the Scottish Law Commission has worked with the DCFR as a comparative toolbox on numerous recent projects, most notably, our review of Scots contract law in light of the DCFR, under our Eighth Programme of Law Reform. This builds upon work the Commission has regularly undertaken over the last two decades in relation to contract law reform more generally. We note from this experience that many of the provisions of the DCFR and draft optional instrument are in line with existing Scots law and, where differences lie, these generally afford consumers more extensive protections than currently exist. For example, the DCFR and the Feasibility Study give consumers civilly enforceable rights in relation to pre-contractual information duties. In Scotland (and England & Wales) these duties are currently enforced only in criminal proceedings; but it may be noted that in at least part of this area we are working with our Law Commission colleagues in England & Wales on establishing a scheme of civil consumer redress.[[4]](#footnote-5)

While we therefore welcome the results of the feasibility study, we would temper this by offering some select points of criticism, identifying areas for improvement in the responses which follow below. Some of these flow from work jointly carried out with or Law Commission colleagues in England & Wales in recent years. While we are in favour of the promulgation of an optional instrument, we find it unfortunate that the instrument does not yet benefit from a comprehensive contents list, index or (in particular) commentary. The addition of such tools would increase the user-friendliness and intelligibility of the instrument, attributes which we believe will be key to its attractiveness (and thereby its success) as an optional choice of law. We expand on our concerns in this regard below in our answer to Question 1.

**Question 1**

***On the one hand, a European contract law instrument should cover most of the problems which could appear in contractual practice. On the other hand, the instrument should also be user-friendly and therefore as concise as possible. To which extent does the text developed by the Expert Group meet these objectives? To which extent could it be improved?***

We begin our answer with some preliminary observations on the terms of the question. Our initial thought in relation to whether the text is "user-friendly" is to ask who the intended "user" is. Is the instrument primarily aimed at lay readers, or lawyers? Consumers, or those running SMEs? Of course the drafting will need to accommodate a range of potentially interested readers, but we consider that some clarity as to the main audience would be useful. With this in mind, the stated aim of the instrument being "as concise as possible" is – in our view – not necessarily a desirable one (if concision is understood in terms of overall brevity). For example, if the primary focus is the lay reader then concision may not be beneficial at all as it may come at the expense of clarity and comprehensive coverage. Equally, one eye must be kept on the ease with which the eventual text can be appropriately translated into all official languages. We suspect that this may favour a more detailed style of drafting as opposed to one which casts the text in short and general principles. However, if "concise" is read as referring to the style of drafting then this is, for us, certainly a desirable feature. We go on later in this answer to deal with this topic.

*Structure*

Turning now to the instrument itself, we have examined the issues raised in this question from a number of angles. One is the overall scope and structure. The instrument itself still very much resembles a general law of contract, as applied to sales. It does not yet fit the model of a self-standing sale of goods and related services regime. If that is the objective, it might accordingly be improved by a restructuring of its provisions. For instance, provisions relating to consumer contracts could be separated out from the general body of Articles, to create a free-standing section or regime for B2C contracts. Likewise, B2B contracts might be separated from the general corpus of provisions. Overall, whatever structure is eventually adopted, it is clear that the instrument would benefit from increased use of headings and signposts to guide both lay users of the instrument and their legal advisers. User-friendliness is notably lacking in the current draft, in this regard.

*Scope*

In terms of scope, the European Commission may wish to consider, in striving to deliver concision, whether the application of the instrument might be narrowed, or alternatively whether two or more instruments might be produced. For instance, were the instrument to apply only to internet-based cross-border sales contracts, many of the current draft provisions could be dispensed with (e.g. provisions on pre-contractual matters). This would not only deliver a concise instrument, but might also result in a more focussed and incisive regime as a whole. Alternatively, the provisions relating to B2B transactions could be put in one instrument and those relating to B2C transactions in another. This would allow the drafting to be simplified in places and would provide a sharper focus for each instrument.

These comments on scope lead to certain observations on the "feel" of the instrument, which we consider could be improved. Generally, it is a little difficult to grasp as a whole, or sometimes, in its component parts. Many of the Articles are drafted in technical, legal language and are likely to be difficult for the lay-person (eg a consumer or a small business-person) to understand. This is particularly true of those Articles reflecting the existing *acquis* on consumer protection, an outcome which may be regarded as unfortunate. Whilst we recognise that the instrument must be drafted so as to afford certainty and to be consistently interpreted and applied by advisers and the courts, there may also be scope for it to be framed in a more easily comprehensible way. We give some specific examples in later answers. As a general point, many of the Articles are qualified by sub-provisions, which provide that they do not apply in certain scenarios. Many also include cross-references to other Articles within the instrument, without express reference to their effect (whereas the DCFR, for instance, generally also cites in brackets the title of the other Article). This necessitates the reader having to refer back to previous provisions (and in some cases, their qualifying sub-provisions) in order to understand the full effect of each provision. A single example, one amongst many which could be given, is the run of Articles 24 to 26 which contain references to many other Articles (referred to by number only) and each of which ends with a sub-provision applying only to B2C contracts. Incidentally, we note that these sub-provisions are almost exactly identical to Article 22. It is potentially confusing for the reader that such a proviso is sometimes contained within the Article to which it relates and at other times is in a nearby Article. A more consistent approach might be preferable, even if it ends up being slightly lengthier.

Finally, we note that what is presented is the bare text without commentary or guidance, both of which may be valuable aids, especially for the lay reader.

**Question 2**

***For consumer contracts, Article 81 of the feasibility study extends the unfairness control of business-to-consumer contract terms, to terms which are individually negotiated (as opposed to covering only non-individually negotiated terms as in the existing EU legislation). Do you think this is appropriate?***

Yes. In 2005, this Commission along with the Law Commission for England and Wales published a Joint Report on Unfair Terms in Contracts.[[5]](#footnote-6) In the UK, two separate, but overlapping, regimes govern unfair terms in contracts, namely the Unfair Contract Terms Act 1977 and the Unfair Contract Terms in Consumer Contracts Regulations 1999 (the latter implementing the EC Directive of 1993 on the subject). Our work in this area sought to unify the two regimes, and in considering this topic, we commented in 2005 that we were in favour of applying a ‘fairness and reasonableness’ test to all terms (other than core terms) within a consumer contract, whether they were individually negotiated or not. This is a position which we maintain and we view it as analogous with the “unfairness” test in Article 81.

As we noted in our Report in 2005, we are in favour of this approach because it recognises that consumers seldom have sufficient understanding of the impact of any terms to have a meaningful negotiation about them. Moreover, in any event, uncertainty can arise over whether any terms have in fact been individually negotiated. A general unfairness test, regardless of whether terms have been individually negotiated, makes for a simpler and clearer regime, offering a high level of consumer protection. We accordingly think this extension of the unfairness control in the draft instrument is appropriate.

While we agree with this extension as a matter of policy, the current drafting and structure of Article 81(2) is unnecessarily confusing, with its language clumsy and unclear. Its purpose might be better achieved by stating its aims directly in the body of Article 81(1) itself.

**Question 3**

***Article 92 foresees an exceptional possibility of altering a contract due to change of circumstances. Do you think that this provision represents real added-value, especially in consumer contracts? Do you think that the procedure which leads to the alteration of a contract is appropriate?***

No. The Commission is not convinced of the utility of Article 92. We think this a controversial inclusion within the provisions of the instrument. Its scope goes considerably further than the general law of frustration found in the UK, and introduces a more onerous duty to re-negotiate. (We note that frustration is covered by Article 91. It should also be noted that that there is no doctrine of equitable adjustment in Scots law to deal with change of circumstances, as distinct from the law of frustration: e.g. *Lloyds TSB Foundation for Scotland v Lloyds Banking Group* [2011] CSOH 105, 2011 GWD 21-477.) We are not in favour of this more onerous requirement and do not feel it represents real added value, particularly for consumers.

Conceptually, the scheme and procedure of Article 92 are full of uncertainty and doubt. The Article comprises many tests and contingency clauses, and is somewhat arduous to follow, particularly for lay consumers. We think the procedure itself is inappropriate, as it is onerous in nature, and is likely to produce different results across all the court systems of the EU member states because of these inherent uncertainties.

As a basic concept, we moreover think the inclusion of a positive duty to renegotiate is unlikely to help consumers. All evidence indicates that consumers generally do not negotiate with suppliers, and where attempts are made, these are inevitably without real success. We therefore think that a positive duty requiring them to renegotiate is naively optimistic and fruitless. It is also unclear what test is to be applied to the question of when such a duty has been fulfilled. We are moreover aware that many B2C contracts, and indeed those of a B2B character will in any event, provide for the eventualities of a change of circumstances in their own standard terms and conditions. If the draft instrument were to be adopted as choice of law for such transactions, we think it likely that Article 92 would routinely be excluded by the parties in favour of their own arrangements. This is an area where we think the draft instrument is too ambitious in its reach, and it may be unrealistic to include such a procedure in its Articles, especially considering that parties are likely to have made their own contractual arrangements for such scenarios.

**Question 4**

***According to Article 110, in business-to-business contracts, the seller of a faulty product has in principle a right to cure the defect. Do you consider this rule appropriate?***

No. The Scottish Law Commission has over the years taken a consistent line on its opposition towards a seller/supplier’s ‘right of cure’. This problem was first considered in a Joint Report with the Law Commission for England and Wales on Sale and Supply of Goods (LC No 160; SLC No 104; 1987), where the right to cure was not recommended (paragraph 5.28). The Commissioners at the time were not in favour of formalising the seller’s right to cure through statutory mandate, but instead encouraged its use as an informal means of resolving disputes. This position was tied up with the Commissions being in favour of a buyer’s right to rejection; it was felt that any formalisation of the seller’s right to cure would lead to the reduction of the potency of the buyer’s right to reject. This is a position which the Commissions have maintained, most recently in their Joint Report on Consumer Remedies for Faulty Goods, published in 2009 (LC No 317; SLC No 216). The right of cure was specifically considered during the Commission’s previous Review of Contract Law, in the Report on Remedies for Breach of Contract (SLC No 174). This Report, published in 1999, outlined that Scots law probably provided (but subject to exceptions) that an aggrieved party may rescind a contract without giving the other party the opportunity to remedy the breach (paragraph 7.21). This was supported by consultees, and accordingly, as a majority were agreed this was the existing law, no recommendation for a legislative proposal to this effect was deemed necessary. There is, though, room for doubt as to the precise state of the law, as can be illustrated by a case from the 1970s involving a contract for the provision of catering at one of the main football grounds in Edinburgh.[[6]](#footnote-7) (This case is not cited in the 1999 Report.) After sustained complaints from fans about the quality of the catering and its service, the football club rescinded the contract. The caterers then sued for damages, which the judge awarded principally because the club had failed to prove that the breach was such as to justify rescission of the contract "without giving the pursuers a reasonable opportunity to remedy the breach". This case illustrates what we see as a general concern, namely that, to a noticeable degree, the law in this area develops in response to the particular facts of the cases before the courts rather than by means of general principles. This can make it hard to predict exactly what the law is, as illustrated by the fact that the 1999 Report mentioned above was only able to say what was "probably" the law. In *Strathclyde Regional Council v Border Engineering Contractors Ltd* 1998 SLT 175 (a case involving defective mains water pipes, whose principal arguments turned on whether any contractual claim had prescribed), where Lady Cosgrove, quoting McBryde, *Contract* as authority, observed: "It is clear however that it is a basic principle of the law of contract that if one party is in breach, the innocent party is not entitled to treat the contract as rescinded without giving the other party an opportunity to remedy the breach." It can be argued that this statement is too broad, since Professor McBryde only said (and continues to say in the most recent edition of his book) that “The idea that a party in material breach should be given a ‘second chance’ if the breach is remediable is attractive and should develop as a principle in our law” (*Law of Contract in Scotland*, 3rd ed (2007), para 20.127). Turning to more recent cases, a succinct analysis of which can be found in a 2009 journal article,[[7]](#footnote-8) it may be suggested that the courts have somewhat departed from the analysis set out above – see *Magnet Ltd v John B Cape t/a Briggate Investments*,[[8]](#footnote-9) Cupar Sheriff Court, 19 July 2007 (involving a defectively installed kitchen; the buyer was not entitled on the facts to rescind contract without allowing the supplier a chance to remedy the defects)

The supplier’s right of cure under the draft instrument does not apply to B2C contracts except in relation to any services element in the supply (see Articles 108(3)(a) and 110(8)); so the only question is whether such a right should be allowed in the B2B context. All the Scottish cases mentioned above arose in a B2B context, it may be noted. The first element of the right in the draft instrument – the supplier delivers defective goods earlier than the contract requires, and has a right to re-tender conforming goods if it can be done by the required date – seems unlikely to arise very often in practice. In other cases, the supplier is entitled to *offer* cure but the buyer can only refuse that offer in certain (rather open-ended) circumstances. The supplier can go ahead with cure if the offer is not refused, and cure is not precluded by notice of termination from the buyer. The buyer may withhold its own performance but otherwise its rights are suspended so far as inconsistent with the supplier’s right of cure. Even if cure is achieved, the buyer may claim damages for delay and other losses caused by the cure process. It would seem that the buyer might still be able to terminate after a cure in the circumstances found in the unusual Scottish case, decided in the House of Lords, of *J & H Ritchie Ltd v Lloyd Ltd* 2007 SC(HL) 89 (where the supplier of a specialist piece of farm machinery was permitted to cure an initial defect but then refused the buyer's requests to explain what had been involved in the cure, leading the buyer to reject the machinery).

Although the proposed right thus appears to be of fairly limited scope, we continue to prefer the view that ‘cure’ should be left as an informal option available to parties without prejudice to either the right of termination or the right to specific performance (under which a customer might in effect be able to compel a cure of a prior defective performance, for example the delivery of replacement and conforming goods). This view is also without prejudice to the consumer buyer’s right of repair/replacement under the EU’s 1999 Consumer Sales Directive, which is firmly ensconced as a first-tier remedy required before rescission (although not yet necessarily well understood by consumer advisers in the UK: see *Douglas v Glenvarigill Motors Co* 2010 SLT 634). This right, we note, also appears in the draft instrument (Article 112).

**Question 5**

***Article 177 determines that a buyer who avoids or terminates a contract is, as a matter of principle, liable if the goods to be returned have been destroyed in the meantime. Article 178 also includes an obligation for the buyer to pay for the use of the goods to be returned. However, this obligation only exists under certain, restricted circumstances. Thus the risk of destruction of the goods is placed on the buyer and the risk of depreciation mainly on the seller. Do you consider these rules appropriate, especially in business-to-consumer transactions?***

We note first that the draft’s general rules on when risk passes are contained in its Chapter 14 rather than in Articles 177-178, which are primarily about rights of restitution when contracts are avoided or terminated for non-performance. In Chapter 14 a distinction is drawn between B2B and B2C contracts. In B2B contracts risk generally passes when the buyer “takes over” the goods or the documents representing them (Article 146), and there are various rules explaining or qualifying this in case of goods placed at the buyer’s disposal (Article 147), goods to be the subject of a contract of carriage between the seller and the buyer (Article 148), and goods sold in transit (Article 149). In B2C cases, risk generally does not pass until the consumer has acquired physical possession of the goods (Article 145). A consumer who fails to perform its obligation to take over the goods has the risk from the time when, had it performed its obligation to take over the goods, it would have acquired physical possession, unless the consumer’s failure is excused under Article 91, i.e. was due to an impediment beyond the consumer’s control and which the consumer could not have been expected to take into account at the time when the obligation was incurred, or to have avoided or overcome the impediment or its consequences.

The B2C rules cannot be excluded or derogated from to the detriment of the consumer; but the B2B rules are subject to the parties’ freedom of contract (Article 7).

The effect of the passing of risk is that the buyer remains liable to pay the price despite subsequent loss of or damage to the goods (Article 143). However, if the loss or damage is due to an act or omission of the seller, the buyer’s risk liability does not arise (Article 143).

We now turn to Articles 177 and 178, which deal with the remedy of restitution where a contract of sale has either been avoided (on invalidity grounds) or terminated (for fundamental non-performance by the other party) rather than risk as such. Thus it seems to us somewhat misleading to frame the question here in terms of risk. The issue is rather whether the interaction of Articles 177 and 178 with the Chapter 14 rules on risk is satisfactory.

Under Article 176, there is a general obligation to return what has been received from the other party under the uncompleted contract’s performance. Before the obligation to restore can arise, however, it seems clear that there must have been performances on each side: goods must have been delivered, services rendered, and prices paid or part-paid. Otherwise there is nothing to return.

In general under the risk rules in Chapter 14 the buyer who has taken over or is in possession of the goods will have the risk, whether the contract is B2B or B2C, and will therefore be liable to pay for the goods. In the event of avoidance, the obligation to pay will disappear, although there will be a right of restitution from the seller in respect of any payment already made. If since delivery to the buyer the goods have been destroyed, consumed, re-sold or damaged so that the buyer cannot return them, then the restoration of the value of the goods instead seems to be a reasonable solution.

The position where the buyer who has taken delivery and has the risk (it will be a rare case, we think, where a B2B contract leaves the seller with the risk while the buyer has possession) turns out to have a right to terminate as a result of the seller’s non-performance – for example, by supplying goods that are not fit for the purpose – seems to us to be different. First, if the goods’ destruction or damage is due to their non-conformity, then we think that this will be a case where the seller has the risk and is not entitled to the price (Article 143, above). If Article 177 means that despite this the buyer must pay the monetary value of the goods, then this seems to contradict the rules on risk; although we note that the monetary valuation of the goods would take into account the defect which led to their destruction or damage, which might render the goods value-less, meaning that the buyer’s obligation was to restore nothing. Indeed, the value of the goods might be negative in the sense that they inflict loss on the buyer. For example, a seller delivers a bulk lot of defective batteries which are defective and leak, causing environmental damage to the buyer’s premises and clean-up costs. It seems highly desirable for the draft instrument to be clear that the buyer does not have to pay anything for the batteries in such a case, and is entitled to damages for its loss.

If we suppose that the destruction of or damage to the goods is the result of external factors for which neither the seller nor the buyer is responsible, then it seems that what we must envisage under Article 176 is that the buyer’s obligation was to restore the defective goods which have now been the subject of destruction or damage which has nothing to do with the original defect. Under Article 177 the obligation is to restore the monetary value of the defective goods – which may be nothing (as above), or considerably less than the buyer might otherwise have had to pay as the contract price. This would also apply, we think, if the destruction of or damage to the goods was the responsibility of the buyer. In all cases where the buyer has paid the price, or part of it, the seller must restore the payment. The buyer can thus offset any seller’s claim to whatever value the defective goods may have had with its own claim to restoration of the price.

In conclusion on Article 177, the only case where it seems to us to contradict the rules on risk is where the destruction of or damage to the goods results from the defect in the goods themselves and is therefore at the seller’s risk, even although we think that the buyer’s liability to restore a monetary equivalent of such defective goods may well be minimal or even zero. We note that in the United Kingdom the Sale of Goods Act 1979 also lacks a direct provision on this issue but that case law suggests that the risk always remains with the seller when the buyer has a right of rejection, e.g. if a seller supplies defective or non-conforming goods entitling the buyer to reject, the risk will remain with the seller unless and until the buyer accepts the goods (*Vitol SA v Esso Australia Ltd (The Wise)* [1989] 1 Lloyd’s Rep 96). An example of a clearly-drafted legislative provision to this effect can be found in UCC Article 2-510. This Commission and the Law Commission for England & Wales have previously expressed some concern about the lack of explicit provision in the Sale of Goods Act, but in their Joint Report on the Sale and Supply of Goods in 1987 (LC No 160, SLC No 104) chose not to make any recommendation on the subject (paragraph 5.40).

Turning now to Article 178, the suggestion that it places the risk of depreciation on the seller does not seem to us an accurate summary of its effect. The Article creates an obligation for a party to pay for any use of goods supplied under a contract that is avoided or terminated. We see the basic idea of justice which underpins this proposition but note that in our recent joint work with the Law Commission of England & Wales on consumer remedies we have come down against deductions for use from a consumer’s basic entitlement to regain any payments made towards the price.[[9]](#footnote-10) This is because we think that such an entitlement may unduly complicate the position, not only of the consumer, but also of the trader.

It seems, however, that Article 178 would not give rise to this situation. It provides that the person who has made use of goods received under a contract now terminated for non-performance by the supplier is *not* liable to pay for use unless that recipient “caused the ground for … termination” (Article 178(1)(a)), which in the case of the consumer rejecting faulty goods is certainly not the case. Article 178 seems instead to envisage a situation where the recipient of the goods in breach of contract does not pay for them, leading the seller in the end to terminate the contract. The other conditions for the Article’s application appear to apply sensibly to that situation: the buyer/recipient of the goods would know of its obligation to pay for them (Article 178(1)(b)); and “having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods” (Article 178(1)(c)).

**Question 6**

***Article 172 contains specific rules for consumers who are late with payments. In particular, the consumer is obliged to pay interest for late payment only 30 days after receipt of a notice informing him about this obligation and the interest rate. The interest rate is set at the average commercial bank short-term lending rate to prime borrowers. Do you think these rules are appropriate?***

Yes. In our Report on Interest on Debt and Damages (SLC No 203; 2006), we recommended that interest should run for late payment of a debt stemming from supply (including sale) of goods and services, either on the date agreed by the parties or 30 days after the purchaser has received notice of the amount due from the supplier (paragraphs 3.16-3.19). This broadly accords with Article 172 and we remain in favour of such a scheme. We considered that the period of 30 days represented a fair and reasonable time for which to delay commencement of the period during which the creditor of a contractual debt may be said to be deprived of the use of the money due by the debtor. We also deemed it an appropriate timeframe to allow the debtor to pay after performance of the creditor’s obligation and quantification of the sum demanded.

As regards the rate of interest to be applied, we recommended in our 2006 Report that a prescribed universal rate of interest be set out in statute and to that extent we are in favour of the aim of Article 171. We are not however in favour of its terms in delivering this aim. We find the concept of “the average commercial bank short-term lending rate to prime borrowers” unhelpful and potentially, confusing. This test is not user-friendly. It would require the undertaking of a series of complex calculations and comparisons, which will not be welcomed by consumers or indeed businesses. We agree however that the basis for calculating interest should relate to the currency of payment at the place where payment is due.

Although not directly in point in this question, we considered the terms of Article 175 (unfair terms relating to interest for late payment) which we found to be drafted in an unclear and convoluted manner.

**Question 7**

***The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?***

***(a) If you consider it should, do you then believe that the rules on pre-contractual information in Article 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)?***

***(b) If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs?)***

***(c) If you consider it should, do you then think that the general rule on passing of risk in Article 145 could be appropriate? Or do you think it may be necessary to include specific rules, for instance to ensure that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content. Do you think that the notion of 'obtaining control of digital content' would be sufficiently clear?***

Yes, we agree that digital content should be covered by the European contract law instrument. Given the increasing prevalence and importance of downloads, either directly from the internet or from media such as CDs, it would be a badly missed opportunity if the instrument were not to cover such situations.

(a) While we are in favour of any European contract law instrument extending to the sale of digital content, we do not see that the rules on pre-contractual information in Article 13 require to be modified. Article 13(1)(a) provides for the supply of information on the “main characteristics” of the goods. We think this concept is sufficiently broad to incorporate the notion of functionality of digital content. We do not think any further specification is required in Article 13; sufficient provision already exists and more specific rules in relation to particular types of goods would be, in our view, superfluous and possibly counter-productive.

(b) As above at (a), we are of the view that the existing provisions of Part IV are sufficient to address such concerns surrounding the quality of digital content making the addition of more case-specific rules un-necessary. The virtues of any European contract law instrument should at least include simplicity, use of ease and flexibility. New technology and mediums for goods evolve rapidly, and Part IV currently retains sufficient flexibility to allow it to adapt to such developments, without the burdens of prescriptive rules specific to digital content sales.

(c) Here, however, we agree that there is a need to modify Article 145 to include a specific rule for digital content. Physical possession will be a difficult test to apply to digital content. We think the notion of ‘obtaining control of digital content’ could be sufficiently clear, if it is well-defined with the instrument itself. Achieving a clear definition of this notion would be all the more important, particularly if the notion of possession continues to be undefined in the instrument.

1. <http://www.scotlawcom.gov.uk/> [↑](#footnote-ref-2)
2. Ministry of Justice and Scottish Government Call for Evidence on the European Commission’s Green Paper about Contract Law, closing date 26 November 2010, available at <http://www.justice.gov.uk/consultations/call-for-evidence-180810.htm> Our response, submitted on 19 November 2010, can be viewed at <http://www.scotlawcom.gov.uk/download_file/view/589> [↑](#footnote-ref-3)
3. The Scottish Law Commission submitted a response on 27 January 2011 and is available at <http://www.scotlawcom.gov.uk/download_file/view/645> [↑](#footnote-ref-4)
4. See the Joint Consultation Paper, [*Consumer Redress for Misleading and Aggressive Practices*](http://www.scotlawcom.gov.uk/download_file/view/681/129/) (CP 199, DP 149; April 2011). [↑](#footnote-ref-5)
5. LC No 292, SLC No 199; available at <http://www.scotlawcom.gov.uk/download_file/view/252>. [↑](#footnote-ref-6)
6. *Lindley Catering Investments Ltd v Hibernian Football Club Ltd* 1975 SLT (Notes) 56. [↑](#footnote-ref-7)
7. <http://www.journalonline.co.uk/Magazine/54-9/1006975.aspx>. All of the cases cited seem to be B2B. [↑](#footnote-ref-8)
8. <http://www.scotcourts.gov.uk/opinions/A85_06.html> [↑](#footnote-ref-9)
9. See Joint Report on Consumer Remedies for Faulty Goods (LC No 317, SLC No 216; 2010), paras 6.40-6.50; and Joint Consultation Paper on Consumer Redress for Misleading and Aggressive Practices (CP No 199, DP No 149; 2011), paras 14.40-14.43. [↑](#footnote-ref-10)