

A Light Touch for a Digital Environment: Attempting to Strike an Effective Legislative Balance between Protecting Consumers and Encouraging Growth in E-Commerce.

By Alex Towers¹

1) E-Commerce and Contract Law

On 11 November, 2013 China's largest online shopping company processed more than USD 5.75 billion through its online e-payment system and thereby set a new record for a single day of online transactions.² The company, Alibaba, reported that in a single day it had 402 million unique visitors and had to dispatch 152 million parcels for shipping. Although resolutely outdone by the Chinese, consumers in the United States also recently broke new online shopping records during the 2013 holiday season, with a 15% increase in sales compared to the previous year.³ Furthermore in Europe, the highest grossing period of online shopping on record was predicted to have occurred between December 9, 2013 and December 13, 2013.⁴

What these figures suggest is that the way in which consumers are doing business today has changed considerably due to the widespread adoption of broadband internet throughout the developed world. Today's consumers have gradually begun to rely less on traditional bricks and mortar businesses and instead have begun to prefer the effortless, credit-facilitated, e-commerce transactions that can be accomplished by whatever device a consumer has immediately at hand.⁵

Accordingly one can surmise that as the volume and scope of online transactions increases, so too must the desirable level of regulation. Traditionally, the exchange of goods and services has always been governed by contract law, a subject rooted in the

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² Shanshan Wang and Eric Pfanner, *China's One Day Shopping Spree Sets Record in Online Sales* *The New York Times* (New York, 1 November 2013)

<http://www.nytimes.com/2013/11/12/business/international/online-shopping-marathon-zooms-off-the-blocks-in-china.html?_r=0> accessed 14/01/2014.

³ Brad Tuttle, *Online Shopping: More Popular (Yet Less Satisfying) Than Ever* *Time Magazine* (New York, 3 January 2014), <http://business.time.com/2013/01/03/online-shopping-more-popular-yet-less-satisfying-than-ever/> accessed 14/01/2014.

⁴ Adobe Digital Index, *2013 E-Commerce Benchmark and Holiday Shopping Report* (Adobe Digital Index, November 2013),

http://www.cmo.com/content/dam/CMO_Other/ADI/2013HolidayShoppingRecap/2013HolidayAndeCommerceBenchmark.pdf accessed 14/01/2014.

⁵ Lorna E. Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Ashgate 2008) 4-8.

adage that real-world actions, words and writings can lend legal credence to even the most seemingly sparse of agreements. However while a contract is no less a contract simply because it is entered into via a computer,⁶ it is apparent that e-commerce presents immediately obvious issues that were not found in the traditional contracts. For instance the Rome I regulation defines a consumer contract quite unmistakably as 'a contract concluded by a natural person (the consumer) for a purpose which can be regarded as being outside his trade or profession with another person acting in the exercise of his trade or profession (the professional)'.⁷

Furthermore the Brussels I regulation, and its definition of what constitutes a 'consumer', was designed to be interpreted harmoniously with the definition of the Rome I regulation.⁸ Yet despite these relatively harmonious interacting legislative frameworks, entering into a contract in a European member state electronically either through an email or through an interactive website creates immediate concerns regarding jurisdiction, choice of law and consumer protection.

The legal doctrine and jurisprudence of contract law was built on the relatively *naïve model that 'Person A' can make 'Person B' a face-to-face offer and 'Person B' can accept that offer and thus be bound and protected by law. Accordingly these quintessential rudiments of a contract experienced profound expansion through the years as the means of making contracts expanded, growing to accommodate infinitely more complex commercial scenarios. However these scenarios were still always anchored to the basic 'Person A' - 'Person B' formula previously mentioned.*⁹ When the relations between 'Person A' and 'Person B' can be said to be of the 'offer and acceptance' formula, the law deems that the consensual arrangement matures into legal rights, duties and obligations. These rights, duties and obligations in turn are provided for by the state and justified under the historically perennial desire to protect consumers.¹⁰ *However the other fundamental formula that different branches of contract legislation share was that none of them were written nor developed to accommodate the internet.*¹¹

E-commerce refers broadly to the delivery of information, products, services or payments by telephone, computer or other automated media.¹² As has been mentioned as a consequence of the commercialization of the internet, e-commerce and by extension the consumer experience has undergone fundamental change and profound expansion in the early years of the twenty-first century. The ubiquity of the

⁶ Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L78/1.

⁷ Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation).

⁸ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial law matters [2001] OJ L12/1, 15.

⁹ David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 202-217.

¹⁰ Joseph Savirimuthu, 'Code, Hybrid Models of Consent and the Electronic Commerce EC Directive Regulations 2002' (2004) 2 JILT.

¹¹ Abduhadi M. Alghamdi, *The Law of E-Commerce: E-Contracts, E-Business* (AuthorHouseUK 2011) 227-228.

¹² Barry B. Sookman, *Computer, Internet and Electronic Commerce Terms: Judicial, Legislative and Technical Definitions* (Carswell 2013) 121.

internet now allows for numerous advantages with regard to the availability of markets and their products; simply put the internet allows consumers and businesses to conclude a seemingly infinite variety of contracts without ever having to either meet in person or even leave their homes.¹³

Given that transactions are now performed wherever an internet connection is available, it is understandable that regulation can barely keep pace with the development of e-business technology and as a result policymakers now have to respond to new technological realities.¹⁴ However even the simplest and most good-natured response to these realities creates debate about the significance of the interface between law, technology and society. If each time a technological innovation emerges it is immediately confronted by the difficult questions and administrative demands of established industries and policymakers, then such innovation might be prevented from developing 'naturally'.¹⁵

Accordingly it is the analysis of the responses and challenges in the EU context that this article is concerned with. Specifically this article seeks to examine the question of the desirable level of state regulation in digital contractual relations between businesses and consumers and what possible effects such regulation can have on the digital environment of the twenty-first century internet. This question is one that requires an analysis not only of the current regulatory frameworks in existence today, but also the possible expansion of these frameworks in the future.

2) EU Approaches to Protecting E-commerce Consumers

E-commerce has contributed significantly to the European economy in general and the success of the European Single Digital Market in particular.¹⁶ However contract law is still regarded by most jurisdictions as predominately a national affair, a view that has significantly hampered the growth of cross-border e-commerce.¹⁷ In particular area of consumer protection has lacked any sort of unifying harmony despite the robust language of Rome I and Brussels I. In reality the traditional legal regimes' application to the multitude of transactions in the electronic commerce environment is defined by a vast array of Directives and different national legal instruments that Christine Riefa has bluntly identified as being both 'long and cumbersome'.¹⁸

¹³ Jorg Binding and Kai Purnhagen, 'Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared- Same but Different?' *Deutschen Gesellschaft für Internationale Zusammenarbeit* (Beijing 2011) http://www.jipitec.eu/issues/jipitec-2-3-2011/3173/binding_purnhagen.pdf. Accessed 18/01/2014.

¹⁴ Chris Reed, *The Law of Unintended Consequences- embedded business models in IT regulation* (2007) 2 JILT http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2007_2/reed/ accessed 18/01/ 2014.

¹⁵ Savirimuthu (n 4).

¹⁶ *Ecommerce Europe, Position Paper E-Regulations: Ecommerce Europe's Proposal for sustainable growth of e-commerce in Europe* (September 2013) <http://www.ecommerce-europe.eu/publications/2013/position-paper-e-regulations>> accessed 17 January 2014.

¹⁷ *Ibid.*

¹⁸ Christine Riefa, *The Reform of Electronic Consumer Contracts in Europe: Towards and Effective Legal Framework?* (2009) 14(2) *Lex Electronica*, 3-7.

Nevertheless at the turn of the millennium there were two directives that could be identified as forming the foundation of EU e-commerce contract regulation; the Distance Selling Directive of May 1997¹⁹ and the Electronic Commerce Directive of June 2000.²⁰ Whereas the Distance Selling Directive was designed to protect consumers as they interacted with businesses regardless of geography, the Electronic Commerce Directive had a considerably larger ambit and was created to regulate both consumer to business contracts as well as business to business contracts. The overall aim of EU legislation in e-commerce was to put consumers who purchase goods or services through electronic means into a comparable position with consumers who buy goods or services in the traditional shops of bricks and mortar.²¹

However it is proposed that while both directives were created with the clear objectives to foster consumer confidence and stabilize the internal market neither was designed to accommodate unimagined future developments. Both directives were implemented in the Member States in the early years of the new millennium, when consumers were still distinctly wary of the internet.²² In the United Kingdom for instance the Consumer Protection Regulations 2000 and the Electronic Commerce Regulations 2002 were the result of the direct effect of the new e-commerce directives and while these UK regulations provided the framework upon which further legislative developments were built, the practical application of them was desultory.²³ Aside from enforcement issues and definition issues, it is proposed that the concrete application of inflexible standards into an environment whose defining characteristic was a constant state of profoundly flexible and dynamic growth created not so much an undesirable level of state regulation as an ineffective one.²⁴

Nevertheless despite the Distance Selling Directive's unimaginative purview there were a number of significant regulations in relation to European e-commerce protection. While regulations 7 through 9 prescribed a standard minimum amount of information that must be supplied to consumers when distance selling, regulations 10 through 14 contained the rules pertaining to the right to cancel the contract.²⁵ However while these regulations provided a relatively straightforward, if inflexible, policy for protecting consumers, it was regulations 4 through 6 that caused the most amount of consternation in European courtrooms.²⁶

¹⁹ Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (EU Distance Selling Directive).

²⁰ Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2002] OJ L285/27.

²¹ Binding and Purnhagen (n 12) 191.

²² Riefa (n 17) 3-7.

²³ *Ibid.*

²⁴ Tomas Gongol, *Out-of-Court Dispute Resolution Policy in EU Electronic Commerce* (2005) Silesian University in Opava, 41-52.

²⁵ EU Distance Selling Directive (n 18).

²⁶ Case 336/03 *easyCar(UK) Limited v Office of Fair Trading* [2005] 2 CMLR 2; *Bundesgerichtshof* BGH NJW 2004, 53-56 (The German High Court).

Immediately inadequacies connected to this dichotomy of what the law was designed to govern versus what the law had to govern, began to emerge. A telling example of which could be seen in the way the Distance Selling Directive created a situation where consumers were afforded varying degrees of protection depending on which member state they were located.²⁷ Furthermore while regulations 7 & 8 of the Electronic Commerce Directive declared the creation of a legal framework that will foster consumer confidence, enhance legal certainty and ensure the free circulation of information society services, in reality the Commission opted for what a 'gap-filing' strategy that sought to simply allow for e-commerce contract rules to be placed in the same arena as existing contract law.²⁸

Essentially it could therefore be said European policymakers thought that if the round peg of existing contract law could fit into the round hole of national contract law systems then rationally the new square peg of e-commerce contract law should be whittled down to fit into the round hole of national contract law systems.

Consequently this approach to European consumer legislation that neglected to reform the regulatory landscape applicable to e-business contracts only created new discrepancies rather than addressing old ones.²⁹ With this flawed model as the decided architecture EU policymakers were then confronted with the rapid growth of e-commerce and the unparalleled expansion to new commercial platforms such as mobile e-business, online auction marketplaces and the widespread adoption of social networks. Given that promoting consumers rights, prosperity and wellbeing have been declared as 'core values of European Union law',³⁰ EU policymaker engagement in fostering consumer e-business benefits was as much an inevitability as it was a potential catastrophe.

Nevertheless it was agreed that by building consumer trust, eliminating barriers to access, reducing online fraud and unfair practices, and overall improving access to information policymakers, in the EU and elsewhere, policymakers could foster consumer trust in the environment and thereby increase e-commerce and market growth.³¹ Therefore it could be argued that it is not so much a question as to the desirable level of state regulation in contractual relations between businesses and consumers so much as it is a question as to the level of efficiency in such contractual relations.

It was these concerns that led to the European Commission to launch a public consultation on the future of electronic commerce in the internal market and on the

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Gerald Spindler and Fritjof Borner, *E-Commerce Law in Europe and the USA* (Springer 2002) 490.

³⁰ Director General of Health and Consumer Protection, European Commission, *Consumer Protection in the European Union: Ten Basic Principles*

http://ec.europa.eu/consumers/cons_info/10principles/en.pdf, accessed 18/01/2014.

³¹ Trans-Atlantic Consumer Dialogue, *Resolution: The Consumer Perspective on addressing e-commerce within the Transatlantic Trade and Investment Partnership* Trans-Atlantic Consumer Dialogue Series, Doc No: INFOSOC 51/13/10/2013.

lessons learned from the implementation of the previous directives. It was thought that by striking an accord between consumers' rights and businesses' rights a new understanding of modern European e-business contracts could be achieved. While the Commission had first published an ambitious proposal for a 'maximum harmonization' that updated every consumer directive in October 2008, it proved to be too ambitious. Instead the scope was significantly reduced in order to have a greater chance of approval by the European Council. By February 2011 the curtailed ambition could be seen in language of former EU Telecoms and Media Commissioner Viviane Reding, who echoed the general sentiment of the time but coded it in distinctly limiting terms: 'The balanced approach favored by European Parliamentarians today will strengthen consumer rights and the functioning of Europe's internal market'.³²

The expectation that arose at the time was that intervention was to improve the legislative landscape by levelling the playing field for the e-commerce customer base. Aside from the square-peg into the round-hole incompatibility previously discussed, the approach was also justified under the theory that the fragmented nature of existing consumer protection legislation across EU member states had stunted the growth of cross-border trade.³³ Businesses that sought to export across Europe faced the cost of attempting to interpret up to 27 different legal regimes, each with their own particularities and market rules. Furthermore consumers, equally unaware of their rights within alternative member states, would conservatively remain with domestic retailers and therefore lose out on the potential for greater choice and lower prices of the wider EU e-business market.³⁴

Accordingly, the Consumer Rights Directive was formally adopted by the member states on October 10, 2011 with the deadline for transposition into national laws set at December 13, 2013 and to be applied in all member states by June 13, 2014. The regulations contained in it mostly apply to the sale of goods, services and digital content via distance selling, door-to-door sales and off-premises sales. While some goods and services (such as foodstuffs, gambling and financial services) are not encompassed in the Directive's scope, the directive does provide an interesting number of provisions for the future of European e-business, the most relevant to the present discussion being summarized as follows:³⁵

A. Digital Content

³² European Commission Press Release, *Statement by Vice President on the European Parliament's Internal Market Committee's Vote on the Consumer Rights Directive* Brussels, 1 February 2011 (Memo/11/61).

³³ Filip Lindahl, *The Consumer Rights Directive: Improved as a cross-border-only Regulation and toward a European Consumer Code influenced by the Common Frame of Reference?* (Master's thesis, Jonkoping International Business School 2013) 2-36.

³⁴ *Ibid.*

³⁵ European Commission Press Release, *'EC Citizen's Summary of Equal Consumer Rights Across the EU'* <http://ec.europa.eu/consumers/rights/docs/cons_rights_citizen_summary_en.pdf> accessed 18 January 2013; Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC [2011] OJ L304/64.

The regulations create a distinct 'digital content' category separate from the previous 'one-or-the-other' classifications of "goods & services". Given that courts as far back as 1996 were confounded with how to treat 'digital content'³⁶ it is proposed this distinction is a welcome, if not timely one. Furthermore 'digital content' also has its own cancellation regime and additional pre-contractual information standard applied on top of the more general pre-contractual requirements that was previously required under the Distance Selling Directive.

B. Information as to the Right to Withdraw

Under the new rules consumers are afforded the opportunity to receive a refund up to 14 days from the contract's conclusion, an extension on the previous period of 7 days. More importantly however a consumer's right to cancel when the contract involves services, which was not recognized under the previous regime, is now provided for. Businesses will also be required to provide consumers with a readily available and simply constructed withdrawal form. Finally if a business doesn't inform a consumer about their right to withdraw the refund period is automatically extended from 14 days to 12 months, an extension from the previous period of only 3 months.

C. Refunds

Businesses do not have to make refunds available until the goods have been returned. This requirement clarifies a latent ambiguity in the previous law in which consumers and businesses were unclear about the timing of refund obligations.

D. Disclosure of Costs

Businesses are now required to provide consumers upfront with a total rendering of all costs including taxes. Furthermore a consumer can only be bound by a contract when they have given their express acknowledgment of all total costs via specifically labelled means. Additionally consumers can only have additional costs added to their total by explicitly ticking a box rather the previous method of 'unticking' a box. Any 'unticked' box that carries a payment obligation is not considered valid.

E. Surcharges

Any payment beyond the stated total cost due to the use of debit or credit cards is not permitted under the new rules nor is the use of charges for 'Premium Hotline Rates' for consumer inquiries.

³⁶ *Beta Computers v Adobe* 1996 FSR 367.

While the foregoing may undoubtedly appear as a distinct advancement for e-commerce contracts and will undoubtedly provide greater protection of consumers in the future, it does not adequately address issues previously discussed. As previously mentioned the relevant directives of the previous decade were designed with a distinctly similar architecture. Granted the extensions and prohibitions the new Consumer Rights Directive creates are in no way to be directly criticised themselves, instead any criticism should be focused on how policymakers aim to be proactive in ensuring compliance whilst simultaneously allowing for natural growth and innovation in e-commerce.

In line with this theory is the recent considerable opposition that met current plans for further development of an EU contract law system known as the Common European Sales Law. The law as it is proposed would oversee the terms under which products are bought and sold in the EU market, including those by e-business means, however would allegedly be 'optional' traders.³⁷ However due to the proposed law being parallel to applicable national laws, and therefore create different rules and safeguards for the same products, many web-trader and consumer organisations have strongly opposed the plans. In a joint letter published in June 2013 from Ecommerce Europe and the European Consumer Organisation, Peter Vicay-Smith and François Momboisse commented:

'...the Common European Sales Law proposal will not provide added value neither to consumers nor online retailers. In fact it will instead have a negative impact on the development of the Digital Single Market and on the confidence of both consumers and companies when engaging in e-Commerce transactions.'³⁸

Furthermore, commenting on the joint letter Monique Goyens, Director General of the European Consumer Organisation, added:

*The drive to create a parallel EU law for cross-border e-commerce defies common sense. The Commission claims the target beneficiaries are Europe's consumers and traders, but we are reiterating in unison that it would merely result in greater legal complexity and confusion for both.*³⁹

It is proposed that in the light of the recent proposals and the previous directives, policymakers should adopt a more practical approach when confronting businesses about adhering to the new regulations. By reviewing the current web-ordering processes, terms and conditions, communication channels and delivery modules an approach could potentially be formed that treads softly over areas that might foster

³⁷ Ecommerce Europe Press Release, *Europe's Online Traders & Consumers jointly reject EU Contract Law* (Ecommerce Europe, 7 February 2013) <http://www.ecommerce-europe.eu/press/2013/06/press-release-europes-online-traders-consumers-jointly-reject-eu-contract-law> accessed 18 /01/2013.

³⁸ Ecommerce Europe Press Release, 'Joint Call by Consumers' Organisations and E-commerce businesses to reject the Commission's Proposal for a Common European Sales Law Regulation' (Brussels, 12/06/2013).

³⁹ Ecommerce Europe Press Release (n 36).

innovation while remaining relatively robust about the fundamental obligations to consumers.

3) *Fostering Innovation alongside the Law*

In October 2010 EU Parliament member Sirpa Pietikäinen issued a report in which she claimed that not only did the Consumer Rights Directive not offer enough protection for consumers but that the directive offered no recognition of the state of twenty-first century technological expansion and innovation:

'...the proposal for a directive does not take account of new products arising as a result of changing product development and innovation, such as digital products. More and more often a product, particularly in the field of entertainment or consumer electronics, contains in addition to the physical product a combination of programs or other intangible products and services. Where a matter is not covered by this directive, there is a fear that it will be necessary to legislate separately on that matter later, which would cause an excessive administrative burden...⁴⁰

Without doubt e-commerce regulation is necessary for e-commerce to flourish. In 2003 for instance a study by Debreceny, Putterill, Tung and Gilbert⁴¹ found that lack of consumer trust in the security of the transactions done over the internet was a considerable inhibitor for e-commerce at the time. However with the introduction of greater intergovernmental e-commerce frameworks and legislative protections for consumers then public opinion as to the relative security of an e-business transaction began to change.⁴² Logically therefore the conclusion can be reached that there is a desirable level of state regulation in contractual relations between businesses and consumers that must be reached in order to encourage further development of e-business practices. However the more interesting determination is to ask at which point this level of regulation begins to hinder technological growth and innovation.

Traditionally innovation and regulation were regarded as oil and water,⁴³ with regulated industries such as law, medicine and public utilities traditionally operating outside the more market-based systems. In such regulated arenas competition was often prohibited and occasionally criminalized.⁴⁴ Accordingly the innovation of technology, with its characteristic boundless possibilities being constantly and often ruthlessly pursued by competing businesses in an infinite number of fields, would

⁴⁰ Sirpa Pietikäinen, *Opinion of the Committee on Economic and Monetary Affairs for the Committee on the Internal Market and Consumer Protection on the Proposal for a Directive of the European Parliament and of the Council on Consumer Right*, 2008/0196 (COD) (Brussels, 01/10/2011) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-439.439+02+DOC+PDF+V0//EN&language=E/> accessed 19/01/2014.

⁴¹ Roger Stephen Debreceny, Martin Surtees Putterill, Tung Lai Lai, A. Lee Gilbert, *New Tools for The Determination of E-commerce Inhibitors* (2003) 34(2) *Decision Support Systems* 177-195.

⁴² *Ibid.*

⁴³ Elizabeth E. Bailey, *Innovation and Regulation* (1974) 3(3) *Journal of Public Economics* 285-295.

⁴⁴ *Ibid.*

seem to be in direct disparity with the traditional concepts of 'regulating' industry. Previously in such traditional formats companies would exchange the freedom to actively compete and innovate against each other for public interest concessions such as guaranteed access and price controls. However with removal of competitive pressures came the absence of market dynamics; namely that with no incentives to innovate there was not much innovation.⁴⁵

Consequently it is submitted that the theories on regulation and innovation that informed the industrial development of the twentieth century industries simply cannot be applied to the dynamics of twenty-first century internet technology. As Lynn St. Amour recently commented:

'The Internet is perhaps the greatest enabler of innovation linkages among individuals, communities, businesses, the public sector, and the myriad of new structures—such as social and professional networks that shape the way innovation occurs and is perpetuated around the globe today.'⁴⁶

However any hopeful recognition of the internet's inherent dynamism should be aligned with the acknowledgment that it also presents an unprecedented market challenge. Undoubtedly the internet has emerged as a triumphant redefinition of the open market theory but it also has defined itself by its failure to conform to normal predictions of said market theory. Whereas markets would traditionally revolve through a pattern of failure and distortion with monopolies and cartels emerging as side-effects, how such cycles could possibly manifest in the digital market remain unknown due to lack of precedent. While the digital volume economics can certainly be said to lead to potential massive monopolies, the greater concern for innovation is market ossification as attempting to extend a baseline of service to billions of users cannot also support growth and expansion into new fields.⁴⁷

Arguably the possible result from such a cooling of innovation through monopoly and ossification would be for the internet, and by extension e-business, to be dominated solely by a handful of major companies that could effectively set their own regulatory standards for consumer protection. Instead, as Huston points out, innovation must be guaranteed by its former adversary:

'True salvation...is going to come from the regulatory sector, but we're asking an awful lot...what we're asking for is that a very delicate, light touch that keeps the incumbents to the level where innovation is still possible...where your bright idea actually has the ability to redefine tomorrow's businesses.'⁴⁸

⁴⁵ *ibid.*

⁴⁶ Lynn St, Amour, 'The Internet: An Unprecedented and Unparalleled Platform for Innovation and Change' (2012) World Intellectual Property Office, *The Global Innovation Index: Chapter 10*, 157

⁴⁷ *ibid.*

⁴⁸ *ibid.*

The obvious difficulty however is how to measure the 'light touch' that Huston identifies; too strong a touch would create excessive administrative hurdles while too soft a touch would allow for excessive monopolistic domination and less consumer protection by existing businesses. It is proposed that this concern should be primary in any future consideration of e-business contract regulation.

4) Determining a Light Touch

In late 2013, Chris Fletcher, a research director at Gartner Inc., an American technology advisory firm stated:

'Getting into data, analytics, or mobile isn't even a decision anymore, so we should stop calling it e-commerce and call it just commerce...It's happening and you have to deal with it. But companies are just getting used to the idea that it's all one experience.'⁴⁹

Accordingly if such a redefinition were to be accepted, then the need to improve the current situation becomes immediately more acute. As discussed in Part II and Part III of this article there are a substantial number of concerns that EU policymakers should consider when attempting to protect consumers and foster innovation. The recent Consumer Rights Directive is now the latest component in a significant architectural framework of other directives that deal with consumer protection, including the Data Protection Directive⁵⁰, the E-Privacy Directive⁵¹, the Distance Selling Directive⁵² and the Unfair Contract Terms Directive⁵³. While each directive covers a different and distinct field, the concern as to how to balance innovation with such large consumer protection architecture is a reoccurring concern. As such given the advantages and protections now afforded to consumers summarized in Part II, it is submitted that the Consumer Rights Directive is a welcome enhancement. However cordiality aside, the most pressing question is whether the Directive and its predecessors possess the 'light touch' discussed in Part III and furthermore whether in addition to the aforementioned consumer protections, the legislation allows for the protection of innovation. What these proposals do have however is an overall aim for maximum harmonization to address the current issues that act as barrier to the further growth of cross-border e-commerce. Nevertheless, even the concept of further harmonization has potential drawbacks; particularly the concern that a 'race to the

⁴⁹ Antonio Regalado, *It's All E-Commerce Now MIT Technology Review* (Boston, 04/11/2013)

<http://www.technologyreview.com/news/520786/its-all-e-commerce-now> accessed 18/01/2014.

⁵⁰ Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2005] OJ L281/31.

⁵¹ Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] L201/37.

⁵² EU Distance Selling Directive (n 18).

⁵³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2003] OJ L95/29.

bottom' could emerge that drives consumer protection standards across the developed world to meet a baseline consensus point.⁵⁴

As innovation, by its very nature, remains for the most part a transitory ineffable concept ensuring that it remains free to develop naturally is profoundly more difficult to measure than ensuring e-business consumers are protected. Cases and complaints are rarely taken in which plaintiffs claim that their dreams were curtailed due to excessive regulatory standards. Nevertheless, this balance, perhaps now more than in previous decades, needs to at the very least be attempted.

Therefore the convergence of regulation and consumer protection in a digital environment, while undoubtedly a difficult task, is also not an impossible one. If EU policymakers were to encourage investment in high speed networks to make a basic stage of internet technology universally available and accessible to each member state citizen, then they could also promote e-business by creating a universal framework upon that basic stage. Such a proposal could foster reliable and efficient electronic payment mechanisms that incorporated the consumer protections promised by the recent Consumer Rights Directive while also maintaining a relatively secure arena for innovation to develop. Granted such a scenario would require an unprecedented cross-border effort and convergence of resources, but given the dynamic and unfurling nature of the internet it's logical an attempt of considerable magnitude is the only possibility when dealing with an environment of seeming infinite depth.

In conclusion it is proposed that while the question of the desirable level of state regulation in contractual relations between businesses and consumers may indeed be a perennial one, when applied to the digital environment of the twenty-first century internet it also becomes a relatively inconceivable one. Though it is submitted that the adoption of law such as the Consumer Rights Directive and other similar instruments are undoubtedly necessary, both for the continued existence of consumer protection and innovation growth, what remains unquantifiable due to lack of precedent is the level of force with which these instruments should be applied.

Given what has been discussed in this article it is submitted that at the time of writing, the current level of regulation in e-business contractual relations could be deemed adequate. Such regulations provide a relatively robust system of protection to European consumers for e-business transactions while also not excessively hampering the growth and innovation. However it is simultaneously proposed that given the profound depth and possibility of the digital environment and the relative lack of knowledge and experience on the part of policymakers, deeming something adequate for the current situation is improvident. Instead, regulations in the EU and elsewhere should be designed with a flexible architecture that can accommodate not just the principal concerns of the current era but also hold enough complaisance to engage with future e-business concerns as they arise.

⁵⁴ Martin Wubben, Bart W. Schermen and Deniece Teterissa, *Legal Aspects of the Digital Single Market: Current Framework Barriers and Developments* The Ministry of Economic Affairs, Agriculture and Innovation of the Netherlands, January 2012.

