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Consumer Protection in the Digital Market & Trader Compliance: information provision and redress – final report

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1. Introduction

The Digital Agenda is one of seven initiatives of the Europe 2020 strategy, which sets objectives for smart, sustained and inclusive economic growth of the European Union by 2020.[1] One of its main objectives is the completion of the Digital Single Market, including promoting better online access to goods, services and digital content across Europe; and ensuring that the European economy and industry takes full advantage of the digital economy as a potential driver for growth.[2]

Despite the recent financial and economic crisis, consumer engagement with the online market has grown steadily, year on year. For example, in 2003, in the first major survey of its kind on B2C e-commerce, only 16% of EU15 citizens had ever bought anything on the Internet.[3] Within just over a decade, by 2014, purchases via the Internet had increased to 65% of EU28 citizens.[4] However, within this figure is a rather modest 19% cross-border sales; with the vast majority of online sales being home-based. The latest figures for 2017, show that 68% of internet users in the EU shopped online in the last 12 months but cross-border e-commerce remains stubbornly low at 22% (a 1% increased on the year before).[5]

To foster the growth of cross-border sales, over a period of 20 years, the EU has adopted a series of legislative measures, starting with Directive 97/7 on distance sales,[6] which places the provision of information at the core of the consumer protection agenda. Directive 97/7 sought to address the perceived 'information deficit' for consumers which characterises distance sales, including sales via

[1] This Strategy was designed to kick-start the European economy following the recent financial and economic crisis: see Communication from the Commission, *EUROPE 2020 A strategy for smart, sustainable and inclusive growth,* COM(2010) 2020. See also Commission Communication entitled *A Digital Agenda for Europe,* COM(2010) 245 final.

[2] See Commission Communication, *A Digital Single Market Strategy for Europe,* COM(2015) 192 final.

[3] Special Eurobarometer Report in issues relating to business to consumer e-commerce (2004) (EBS201) available at http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_201_executive_summary.pdf (last accessed 17 December 2018). In 2003, Internet sales in the UK were at 25%; while Irish Internet sales were at 17%.

[4] Eurobarometer Report on cross-border trade and consumer protection (2015) (FL397) available at http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2031 (last accessed 17 December 2018). In 2014, UK Internet sales were at 84%; while Internet sales in Ireland were at 75%.

[5] See Digital Economy and Society Index (DESI) 2018, available at http://ec.europa.eu/information_society/newsroom/image/document/2018-20/3_desi_report_use_of_internet_services_18E82700-A071-AF2B-16420BCE813AF9F0_52241.pdf (last accessed 17 December 2018).

[6] [1997] OJ L 144/19.

websites, by requiring the supplier of goods/services to provide specific information, about the contract (including the identify and address of the supplier; main characteristics of the goods/services; price and delivery costs, right of withdrawal; etc.) at specific times (pre-contract and post-contract) and in a specific manner (e.g. in a clear and comprehensible manner). This provision of information was supplemented by other rights, including the right to withdraw from the contract within a 7-day period without penalty and without giving a reason. As a minimum harmonisation directive, Directive 97/7 offered consumers minimum levels of protection but member states were free to maintain or introduce higher levels of consumer protection.[7] The minimum harmonisation nature of Directive 97/7 which allowed divergences in laws in member states came to be viewed as a barrier to trade, for both suppliers and consumers, in particular in a cross-border context.

Directive 97/7 has now been repealed and replaced by Directive 2011/83 on consumer rights,[8] a maximum harmonising directive which applies to the supply of goods, services, digital content and utility contracts, between traders and consumers, on-premises, off-premises and at a distance, including contracts formed via websites, the most common form of distance contract today.[9] As a maximum harmonising directive, divergences in national laws which were seen to act as a barrier to cross-border trade are prohibited, thus releasing greater potential for growth. From a business perspective, a single regulatory framework now applies through-out the EU; aimed at reducing compliance costs and encouraging traders, in particular SMEs, to engage more in cross-border trade. From a consumer perspective, it is intended that fully harmonised rules with added protections (such as the inclusion of digital content contracts; more information; a longer 14-day withdrawal period; etc.) should bolster consumer confidence in the cross-border digital market.

In addition, in the last decade, there is a new emphasis on consumer redress in the digital market and here too information provision plays a role. The legislative framework for consumer redress comprises two integrated measures: Directive 2013/11 on alternative dispute resolution (ADR Directive)[10] and Regulation (EU) No 524/2013 on online dispute resolution (ODR Regulation).[11] The ADR Directive sets out the required infrastructure for ADR schemes, as well as provisions on accessibility and availability, while the ODR Regulation establishes an EU ODR platform which allows consumers to access ADR schemes which comply with the ADR Directive. In term of information provision, both measures

[7] Directive 97/7, Art 14.
[8] [2011] OJ L304/64.
[9] Directive 2011/83, Art 4 and Recitals 5-7.
[10] [2013] OJ L 165/63.
[11] [2013] O.J. L165/1.

require traders to provide certain information about ADR entities and a link to the EU ODR platform on their websites.

Given the centrality of information provision to the development of the online market, in this Report we examine information based consumer protection in the context of the Digital Market. In particular, we seek to assess levels of compliance by traders in relation to pre-contract information requirements as they apply to websites that sell goods and digital content. This Report is the second of two Reports by the authors on information provision in the online market.[12] The first Report focused on the online sale of goods only. This final Report consolidates the findings from the first Report on the sale of goods with new findings in relation to digital content websites and presents a more comprehensive picture by providing the accumulated data in relation to 121 websites selling goods and digital content, as well as the individual data sets in relation to goods only (81 websites) and digital content only (a further 40 websites) for comparative purposes. Thus, this Report replaces and updates our first Report.

In term of the Report's structure, Part 2 of the Report maps and explores the legislative framework concerning information provision relevant to this Study. In Part 3, earlier empirical studies and findings are outlined for comparative purposes; while in Part 4 the research methodology of the Study is described. The Research Findings are set-out in Part 5 and an Analysis of these Research Findings is provided in the final Part, Part 6.

[12] Donnelly & White, *Consumer Protection in the Digital Market & Trader Compliance: information provision and redress,* (May 2018) available at http://hdl.handle.net/10468/6483

2. Current Legislative Framework

Directive 2011/83 on consumer rights

Building on the template of Directive 97/7, Directive 2011/83 on consumer rights requires that specified information is provided, by traders to consumers, at specific times, and in a specific manner, in relation to contracts which come within the scope of the directive (i.e. contracts for the sale of goods, services, digital content and utility services). The main provisions in this regard are Article 6 on information requirement for distance contracts; and Article 8 on formal requirements for distance contracts. The details of these provisions, relevant to this Study, are set-out below but a number of preliminary points are worth noting first.

The volume of information requirements has increased significantly with Directive 2011/83 when compared to Directive 97/7. Under Directive 97/7 the pre-contract information requirement were set-out in nine relatively concise paragraphs.[13] In contrast, the information requirements pursuant to Directive 2011/83 are set-out in twenty paragraphs, some lengthy, largely incorporating the Directive 97/7 information requirements and adding more.[14] That said, all 20 paragraphs of information requirements do not apply, all the time. For example, paras (r) and (s) only apply to the sale of digital content. Other information requirements are stated to apply only "where applicable", such as para (t) which requires the trader to provide information concerning:

> where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Thus, it is not mandatory for a trader to subject themselves to an out-of-court complaint and redress mechanism, under Directive 2011/83. Only where a trader has voluntary subjected himself to such a mechanism, or where under national law the trader is obliged to commit to such a mechanism, does this information obligation impact. Of the twenty paragraphs in Article 6, only four paragraphs have general application; twelve paragraphs have limited application (i.e. where applicable); and the remaining 4 paragraphs contain a mixture of both. To further emphasise the importance of this information provision, the Directive makes clear that this information forms an integral part of the contract and it cannot be unilaterally altered by the trader.[15]

Moreover, as noted by the Directive, these information requirements are additional to other information requirements such as those listed in the Directive 2006/123/EC on services; Directive

[13] Directive 97/7, Art 4, para (a) – (i).
[14] Directive 2011/83, Art 6 para (a) – (t).
[15] Art 6(5).

2000/31/EC on e-commerce,[16] as well as the ODR/ADR legislative framework There is a degree of overlap between some of these different information obligations, considered further below. It is questionable whether this overlap has a positive impact on trader compliance because some information obligations are mutually reinforcing or a negative impact because subtle differences between these information obligations result in incoherence and confusion.

As regards the timing and manner of information provision, Article 6 provides that the relevant information must be provided to the consumer, before the consumer is bound by any distance contract and the information must be provided in a clear and comprehensible manner. Further Article 8(1) provides that the trader must give the information provided for in Article 6(1) or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In relation to distance sales via a website, therefore, the relevant information must be accessible on the website before any contract is formed (whether on placing the order; on acknowledgment of the order by the trader, or typically at the latest, on despatch of the goods).

Sanctions and penalties for non-compliance are largely left to the discretion of member states,[17] although the Directive does include a number of relevant provisions. In particular, the burden of proof to show compliance with the information requirements rests with the trader.[18] Further, where the trader has not complied with the relevant information obligations around delivery costs and the cost of return (paras (e) and (i)), the trader must bear those costs.[19] And, where the trader has not complied with the relevant information obligation around withdrawal as per para (h), the withdrawal period can be extended up to 12 months after the end of the initial 14 days withdrawal period.[20]

Article 6(1) information requirements

The information required to be provided by traders to consumers is set-out in text boxes below, followed by commentary on the interpretation of each relevant provision, in light of EU law and the Commission Guidance Document on Directive 2011/83.[21]

[16] Art 6(8).
[17] Arts 23 and 24.
[18] Art 6(9).
[19] Art 6(6).
[20] Art 10.
[21] See Commission Guidance Document concerning Directive 2011/83 available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf (last accessed 17 December 2018).

(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

Para (a) – Although digital content is not expressly mentioned beside 'goods and services', the information requirements in Article 6(1) apply to all contracts within the scope of the Directive pursuant to Article 6(2), which includes digital services. More generally, it is recognised that the level of detail of information about the goods/digital content to be provided depends on the complexity of what is being offered for sale.[22] Also the presentation of this information should be appropriate to the medium of communication and the goods/digital content. In the context of goods/digital content being offered for sale via a website, information is commonly presented using images, video as well as text describing the goods/digital content and their features.

(b) the identity of the trader, such as his trading name; (c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting; (d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

Para (b) - The trading name is the more common means of identifying a trader, although additional forms of identification may be provided, including company registration numbers and VAT numbers.

Para (c) - The concept of 'establishment' in this information requirement is also used in the Services Directive 2006/123/EC where, in accordance with the case law of the Court of Justice, 'establishment' is defined '*the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of*

[22] See Commission Guidance Document concerning Directive 2011/83 p.22 available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf (last accessed 17 December 2018).

providing services is actually carried out'.[23] Moreover, this information requirement requires the provision of the geographical address of the trader's place of establishment and so a physical location (and not a P.O. box number, for example) is required.[24]

The trader is also required to provide contact details to enable the consumer to contact him quickly and communicate with him efficiently. According the Commission Guidance, the term 'where available' in Article 6(1)(c) should be interpreted as applicable to all three means of distance communication mentioned in this provision.[25] Therefore, the contact details can be a telephone number, and/or a fax number; and /or an e-mail address, or indeed any other means of communication where available (e.g. online messaging and online chat with the trader; however, users and community fora which are more prevalent on digital content websites would typically not fulfil this requirement). In addition, Article 5(1)(c) of Directive 2000/31/EC on e-commerce requires '*the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner*;[26] while Article 27 of Directive 2006/123/EC on services requires information about the service provider's telephone number for the purpose of sending complaints or requests for information about the service provided.

Where the trader is acting as agent for a principal trader, the geographical address and identity of the principal trader must also be provided.

Para (d) – this information requirement only applies where the trader's (or his principal's) place of business is different from the place of establishment in para (c). 'Place of business' means the place where the essential decisions concerning the trader's general management are taken and where the functions of its central administration are carried out.[27]

[23] Directive 2006/123/EC, Art 4; see further Recital 27.
[24] See Commission Guidance Document concerning Directive 2011/83 p.23 available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf (last accessed 17 December 2018).
[25] See Commission Guidance Document concerning Directive 2011/83 p.23 available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf (last accessed 17 December 2018).
[26] See further C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV.*
[27] See e.g. Case C‑73/06 *Planzer*, para 61.

(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;

(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;

Para (e) – where goods or digital content are being purchase via a website, this information obligation requires the provision of the total price, inclusive of taxes, as well as, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. This requirement typically applies where goods etc. are purchased on a once-off basis. Importantly, where a trader has not complied with the information requirements on additional charges or other costs, the consumer shall not bear those charges or costs.[28]

Some digital content may be offered 'for free' or, at least, not in return for a price. In these circumstances, digital content is more typically supplied in return for personal data, although there is no information requirement in Directive 2011/83, in this regard. And again, in relation to digital content, information requirements as to additional costs, such as freight and delivery charges, would not usually apply, because 'delivery' by downloading / streaming would be involve an 'additional cost'.

Where goods, services or digital content is supplied under a contract of indeterminate duration or a contract containing a subscription, the total price includes the total costs per billing period e.g. monthly, bi-monthly or quarterly. Where such contracts are charged at a fixed rate, the total price

[28] Art 6(6).

also means the total monthly costs. And, where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided.

Para (f) – has no application to sales over the Internet.

> (g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;

Para (g) – information in relation to the arrangements for payment includes the different means of payments (debit card; credit card, PayPal etc) and when the payment will be made. Payment can be once-off or periodic (as with subscriptions), with the latter being especially common for digital content; some payments follow a free trial period; whereas with goods for example, payment may be processed on placing the order; on acceptance of the order, on despatch or on delivery. Other related matters may include information about security of payment and protection against fraud and trader insolvency.

In relation to the arrangement for delivery of the goods or digital content / performance, relevant features would include the different delivery options, including options in relation to the physical delivery of goods and any tracking possibilities, or downloading or streaming of digital content.[29] The trader must also provide information about the time of delivery of goods. According to Commission Guidance, the trader does not necessarily have to indicate a specific calendar date, as this may not always be practically feasible. This information requirement would be satisfied if the trader indicates a time period for the delivery of goods, such as '3-5 days from placing the order'.[30]

All the above information obligations are mandatory, unlike the trader's obligation in relation to complaints handling. Only where the trader operates such a policy is he required to provide information about this policy. Ideally, the details of any such policy should be provided, including

[29] See Communication from the Commission "A roadmap for completing the single market for parcel delivery - Build trust in delivery services and encourage online sales", COM(2013) 886 final.
[30] See Commission Guidance Document concerning Directive 2011/83 p.26 available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf (last accessed 17 December 2018).

procedures (how to make a complaint; acknowledgement; time-limits) and complainant's rights during and after the process.[31]

> (h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);
>
> (i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;
>
> (j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);
>
> (k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;

Para (h) - seeks information about the conditions, time-limits and procedures for exercising the right of withdrawal in accordance with Art 11(1), where a right of withdrawal exists. Accordingly, before expiry of the withdrawal period, the consumer must inform the trader of his decision to withdraw from the contract by an unequivocal statement or the use of the Model Withdrawal Form in Annex 1B. Once this communication is sent within the withdrawal period, the withdrawal is effective. In relation to goods, unless the trader has offered to collect the goods himself, it is the consumer's duty to return the goods to the trader, without undue delay and in any event not later than 14 days from the day on which he has communicated his decision to withdraw from the contract to the trader.[32] The consumer bears the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them.[33] Moreover, the

[31] For detailed policy, see e.g. see very detailed example at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/about-deloitte/deloitte-au-about-complaints-management-policy-140518.pdf (last accessed 17 December 2018).

[32] Art 14(1).

[33] Art 14(1).

consumer may be liable for any diminished value of the goods resulting from the handling of the goods beyond that which is necessary to establish the nature, characteristics and functioning of the goods.[34]

Para (i) – this information obligation only applies where the cost of returning the goods is placed on the consumer.

Para (j) - not applicable to the sale of goods or digital content.

One of the innovative features of Directive 2011/83 is the use of a Model Withdrawal Form and Model Instructions on Withdrawal. The information concerning the right of withdrawal in paras (h) – (j) can be provided in the form of Model Instructions set-out in Annex1(A) provided the relevant details are filled-in correctly.[35]

Para (k) – where there is no right of withdrawal, as provided for in Article 16 (such as where the goods are made to the consumer's specifications or are clearly personalised; or where digital content is supplied online i.e. not on a tangible medium, and if the performance/delivery has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal) the consumer must be informed accordingly. Moreover, the consumer must be informed of the circumstances where the right to withdraw is lost (as where, for example, sealed audio, video recordings or computer software are unsealed after delivery).

> (l) a reminder of the existence of a legal guarantee of conformity for goods;
>
> (m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;
>
> (n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;

Para (l) – According to Commission Guidance, the trader is under the obligation to remind the consumer of the legal guarantee of conformity of goods, and so the trader should specify that, under EU law, he is liable for any lack of conformity that becomes apparent within a minimum of two years from delivery of the goods and that national laws may give the consumer additional rights. In a UK

[34] Art 14(2).
[35] Art 6(4).

and Irish context, these additional rights take the form of statutory implied terms[36]; and remedies including the right to reject the goods, and/or claim damages, within a 6 year limitation period. At the time of this survey, there was no legal guarantee of conformity and related rights for consumers of digital content.[37]

Para (m) and (n) – both these information obligations only apply, 'where applicable'.

> (o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
>
> (p) where applicable, the minimum duration of the consumer's obligations under the contract;
>
> (q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
>
> (r) where applicable, the functionality, including applicable technical protection measures, of digital content;
>
> (s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;

Paras (o) – According to Commission Guidance, information about the conditions of terminating indeterminate or automatically extended contracts should include information about any applicable charges and the termination procedures, in particular the prior notice period, any minimum period during which terminating the contract is not allowed and the means by which the termination should be notified (e.g., e-mail or postal address).

Paras (p) – In keeping with para (o), the trader must provide information about the minimum time period for which the consumer is expected to pay on the basis of the terms and conditions of the contract.

[36] See UK Consumer Rights Act 2015 and Irish Sale of Goods Act 1893 and 1980.

[37] See Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.

These two paragraphs only apply 'where applicable' and are not applicable to the once-off sale of goods.

Paras (q) – Requirements of deposits and financial guarantees are more commonly found in rental contracts (e.g. car rental) and not in sale of goods / digital content contracts.

Paras (r) & (s) – These two paragraphs apply to the supply of digital content only, whether in tangible form and supplied online. Recital 19 of Directive 2011/83 states: " …The notion of functionality should refer to the ways in which digital content can be used, for instance for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding. The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features …". The Commission Guidance on these two paragraphs notes that in view of the diversity of digital products, it is not possible to provide an exhaustive list of the functionality and interoperability requirements. In particular, traders should assess the need to provide this information according to a particular product's characteristics. However, as guidance to traders and consumers, the Commission does offer a non-exhaustive list of the main parameters for functionality and interoperability. We have used this non-exhaustive list in this Study, as a check-list of information which should be provided.

(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Para (t) – not mandatory, but only applies 'where applicable'.

Article 8 formal requirements

Article 8 contains three further pre-order information requirements, in relation to the obligation to pay, payment means and delivery restrictions. First, in addition to the above, Article 8(2) states that if a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader must make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1). Moreover, the trader must ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay, such as by pressing a button marked 'order

with obligation to pay' or other unambiguous phrase. Failure to comply with this formal requirement means that the consumer will not be bound by the contract or order. Second, Article 8(3) requires that trading websites must indicate clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply. Third, Article 8(3) also requires that trading websites must indicate clearly and legibly, at the latest at the beginning of the ordering process, which means of payment are accepted. For the purpose of this survey, "at the latest at the beginning of the ordering process" was identified as the stage at which a consumer places their first item in a shopping basket or other facility, before moving onto later stages in the ordering / purchasing process, such as reviewing an order or placing an order/paying for the order.

The ODR/ADR legislative framework

As noted above, the ODR/ADR legislative framework comprises two measures: Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive),[38] and Regulation 524/2013 on online dispute resolution for consumer disputes (ODR Regulation).[39] In terms of information obligations, the ADR Directive provides that where a trader is committed to using, or obliged under national law to use, an ADR entity (or entities) to resolve disputes with consumers, the trader must inform consumers about the ADR entity (or entities), including the relevant websites address/es.[40] This information must be provided in a clear, comprehensible and easily accessible way on the trader's website, where one exists and, if applicable, in the trader's terms and conditions.[41]

Further, pursuant to the ODR Regulation, all traders established in the EU who engage in online sales or service contracts (including the supply of digital content), regardless of whether they use ODR or not, must provide an easily accessible electronic link to the ODR platform on their website and must state their e-mail address.[42] In addition, all such online traders committed to using, or obliged to use, ADR must inform consumers about the existence of the ODR platform and about the possibility of using it for resolving their disputes.[43] These traders must also provide an electronic link to the ODR platform on their websites and, if the offer is made by e-mail, in that e-mail. This information must also be provided in the general terms and conditions. [44] These requirements are stated to be in

[38] [2013] OJ L 165/63.
[39] [2013] OJ L 165/1.
[40] ADR Directive Art.13(1).
[41] ADR Directive Art.13(2).
[42] ODR Regulation Art.14(1).
[43] ODR Regulation Art.14(2).
[44] ODR Regulation Art.14(2).

addition to any other legislative requirements to provide information on out-of-court redress[45] and these different sets of information should, where possible, be provided together.[46]

[45] ODR Regulation art.14(3).
[46] ODR Regulation Art.14(7).

3. Earlier Studies

A number of studies at European and national levels have identified non-compliance by traders as a real issue for the development of the online market in Europe. Shortly after Directive 97/7 on distance selling was adopted and transposed in member states, in 2003, the European Consumer Centre Network (ECC) published a report "Realities of the European online marketplace" which found evidence of significant non-compliance with the provisions of the then Distance Selling Directive throughout Europe.[47] The report was based on a shopping exercise and an information survey of websites. The latter aspect of the report identified significant levels of non-compliance. For instance, 32% of websites failed to give information about the cooling-off (withdrawal) period; 13% contained no information about Terms and Conditions; and 7% failed to give full information about total cost. These levels of non-compliance were confirmed by a Study conducted by the authors of 80 Irish (.ie) websites in 2005.[48] This found that almost 50 per cent of websites failed to provide adequate information about payment, delivery or performance; over 30 per cent of websites failed to provide adequate information about the consumer's right of withdrawal; and almost 25 per cent of sites failed to comply with the requirement as to price.

More recent figures indicate that non-compliance with information obligations, pursuant to Directive 2011/83 on consumer rights, remains an issue. For example, in 2014, a 'Sweep' was carried out on guarantees for consumer electronics.[49] In the course of this Sweep, national authorities checked 437 websites selling consumer electronics. Of the websites surveyed, 54% were found to be non-compliant with EU consumer law regarding information obligations about the statutory and commercial guarantees. The lack of a reminder of the existence of the legal guarantee of conformity for goods before the consumer is bound by a distance contract – as required by Article 6(1)(l) of Directive 2011/83 on consumer rights - was found in 174 websites (about 40%).[50]

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[47] Available via https://cecluxembourg.lu/wp-content/uploads/2015/04/european_online_marketplace2003_en.pdf (last accessed 17 December 2018)

[48] Donnelly, Mulcahy and White, *Consumers in the Electronic Marketplace: an examination of information based consumer protection in the context of distance selling over the Internet* (University College Cork, 2005): see further, Donnelly and White, "Regulation and Consumer Protection: a study of the online market" (2006) 29 D.U.L.J. 27.

[49] Under the Consumer Protection Cooperation Regulation - Regulation (EC) No 2006/2004, known as the CPC Regulation – national enforcement authorities, in consultation with the European Commission, can coordinate their enforcement activities, such as by EU-wide screening of websites, called 'sweeps', followed by appropriate actions requiring traders to cease commercial practices contrary to EU consumer law.

[50] See Commission Staff Working Document, *Evaluation of the Consumer Rights Directive,* SWD(2017) 169 final p. 14.

More specifically, in 2015, national consumer agencies conducted another Sweep by examining 697 EU websites for compliance with pre-contractual information as required by Directive 2011/83 on consumer rights.[51] The Sweep revealed irregularities on 63% of websites examined, with websites missing or providing unclear or incomprehensible information on the right of withdrawal from a transaction. For example, websites did not contain a relevant withdrawal form, or did not inform the consumer about the exact number of days available to him/her to withdraw from an online transaction. Further, the Sweep found incomplete or unclear details about the trader in 34% of websites checked.[52]

The Commission Report on the Evaluation of Directive 2011/83, published in 2017, provides further insights into the operation of the Directive.[53] The Commission noted that the evaluation highlighted some factors that limited the effectiveness of the Directive 2011/83, including a lack of awareness by traders and consumers about their respective obligations and rights, and a lack of compliance by traders.[54] There is a clear link between awareness and compliance. A lack of awareness by traders enhances the risks of unintended non-compliance; while if consumers do not know their rights sufficiently well, they are unlikely to act as a discipline on the market by asserting their rights. Further details concerning awareness, trader compliance in relation to information requirements can be found in the accompanying Staff Working Document[55] and the related Fitness Check of EU consumer and marketing law.[56]

As part of the Evaluation of Directive 2011/83 in relation to *awareness*, a survey asked trade associations about the level of awareness by traders of their obligations under the Directive. Over 70% of respondents indicated either a high or a moderate level of awareness: with the right of withdrawal and pre-contractual information requirements being the provisions trade associations thought traders were most aware of. The provisions that trade associations considered traders to be least aware of were those concerning digital content.[57] At the same time, an online consumer survey found that

[51] See Commission Staff Working Document, *Evaluation of the Consumer Rights Directive,* SWD(2017) 169 final p. 14.
[52] See Commission Staff Working Document, *Evaluation of the Consumer Rights Directive,* SWD(2017) 169 final p. 30.
[53] Directive 2011/83, Art 30 requires the Commission to report on the application of the Directive by 13 December 2016: for Report see COM(2017) 259 (final).
[54] COM(2017) 259 (final) p. 6.
[55] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final.
[56] See SWD(2017) 209 final; see further http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 (last accessed 17 December 2018).
[57] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final p.24.

consumers showed a high/moderate level of awareness of the right of withdrawal. In contrast, the provisions for which there was the lowest level of consumer awareness was reported to include the pre-contractual information requirements on digital content, the rules on the right of withdrawal for digital content, and the exemptions from the right of withdrawal.[58] More generally, 47% of consumer respondents reported that they had experienced problems in dealing with traders in the past year: the most frequently reported problem was that the trader had not provided key information.[59]

In order to assess *compliance* with the different information requirements of Directive 2011/83, the consumer survey was supplemented by a mystery shopping exercise. The evaluation was that overall, the results of the consumer survey matched with the results of the mystery shopping study which found that consumers received a fair to a great amount of information about the characteristics of the product and the accepted means of payment, although with differences at country level. It was also found that, before placing their orders, almost all mystery shoppers were clearly informed about the total price of the product, while 54%-70% of mystery shoppers were informed about its main characteristics. However, consumers did not receive much information about accessing out of court complaint and redress mechanisms. Out of the consumers responding to the online survey, 38% stated that they did not receive much information about the trader. In relation to digital content, the mystery shopping exercise also found that consumers felt quite well informed about digital content interoperability and functionality and found the information clear, while they felt relatively less informed on other characteristics of the digital content, such as, for instance, whether an internet connection was required and software updates were available.[60]

As regards specific pre-contractual information requirements on the right of withdrawal, the results from the mystery shopping exercise showed that this information is often missing, with some differences depending on the type of contract. For example, in relation to goods, only about half of traders specified the right to withdraw from the contract within 14 days after delivery. However, consumers could easily find information on return procedures in case of sales contracts, and despite the lack of information they found the withdrawal procedures satisfactory. In relation to digital content, traders of digital content have to inform consumers that they have a right to withdraw from the contract before downloading the content and that they lose this right when the performance of

[58] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final p.24.
[59] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final p.28.
[60] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final pp.28-29.

the contract has begun with their express consent under Article 16(m). The mystery shopping exercise run within the Consumer market study for the Fitness check showed that only 23% of traders for music downloads, 33% of the traders offering one-off purchases of security software and 44% of the traders of security software subscriptions provided this information. The interviews with traders performed for the CRD study confirmed such finding, showing that 42% of consumers were not notified that they would lose their right of withdrawal if they started downloading or streaming digital content. The mystery shopping task also revealed that withdrawal forms were quite difficult to find and in 25% of all online shops tested for tangible goods, such information was not available. This was also reflected in the responses given by consumers to the online survey, where 59% of consumers stated they were not given access to a withdrawal form. This also applied to digital content: according to the mystery shopping exercise, half of all software traders (52%) did not provide withdrawal forms.[61]

As regards compliance with Article 8(2) of Directive 2011/83, whereby traders are required to make the consumer aware, in a clear and prominent manner, of the fact that his order implies an obligation to pay, the evaluation found that a dedicated order confirmation button was present in almost all mystery shopping cases, although with some differences at country level. The use of this visual tool was found to be effective, given that most mystery shoppers evaluated its use as (very) clear and indicated that they clearly understood that pressing the button would finalize the purchase.[62]

While the above findings illustrate that there remains an issue with trader and consumer awareness and trader compliance, the finding are often expressed in general terms in relation to the EU at large, thereby masking national discrepancies which may be significant. Moreover, the above findings are not a comprehensive assessment of all information obligations. This Study seeks to address that gap by providing a granular analysis of all relevant information requirements, and in doing so, provide up-to-date information about trader compliance, as it pertains to Ireland and the UK.

In relation to ODR/ADR, a recent website Sweep investigating trader compliance with the information requirements of the ADR/ODR legislative framework provides a first insight into market

[61] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final pp.29-30.
[62] Commission Staff Working Document on the Evaluation of the Consumer Rights Directive, SWD(2017) 169 final p.29.

practices (2017 Study) .[63] The 2017 Study involved web-scraping of 19,580 websites and a more in-depth mystery shopping exercise involving 1,005 traders from 10 EU Member States.[64] The web-scraping aspect of the study found that just 28% of websites included the platform link on their website.[65] There was a clear link between the size of the trader and compliance levels, with bigger traders and marketplaces being much more likely to include the link.[66] German traders were most compliant (66% compliance rate) while traders in Malta and Latvia were least compliant (1%).[67] Traders in Ireland and the UK had identical rates of compliance (14%).[68] In sectoral terms, financial services providers[69] were the most compliant while telecoms and computer gaming were among the least compliant.[70] There was a much higher level of compliance with the requirement to provide an e-mail address, with 85% of traders doing so.[71]

The mystery shopping exercise allowed for a more detailed analysis of the 1,005 websites investigated. This included a judgment-based investigation the accessibility of the ODR link. Most traders websites (58%) placed the link in their terms and conditions, with only 14% placing this in their complaint handling section.[72] Seventy five percent of mystery shoppers found it easy or very easy to find the link (although it should be noted that these shoppers knew what they were looking for and so this finding may not accurately reflect the experience of the average consumer or, even more so, the vulnerable consumer). The link was generally (91% of cases) accompanied by some introductory information.[73] Just under half of the websites (49%) included a statement by the trader regarding whether the trader would use the ODR platform.[74] Of these, 68% of traders stated that they would use the platform if required and 18% said that they would not do so.[75] In interesting contrast to their high level of compliance with the legal obligation to provide the link, German traders were especially unwilling to agree to ADR.[76]

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[63] European Commission, *Online Dispute Resolution: Web-Scraping of EU Traders' Websites*, JUST/2016/CONS/FW/C003/0104 (1 December 2017).
[64] *Ibid*., p. 10. The States were: Denmark; France; Germany; Italy; the Netherlands; Poland; Slovakia; Spain; Sweden and the UK: *ibid*., 20.
[65] *Ibid*., 28.
[66] 42% of large traders and 48% of marketplaces provided the link but just 14% of smaller traders did so: *Ibid.*
[67] *Ibid*., 29.
[68] *Ibid*.
[69] 54% of insurers and 46% of payment service providers provided the link while only 23% of computer games and telecom services did so: *ibid*., 31.
[70] *Ibid*., 30.
[71] *Ibid*., 32.
[72] *Ibid*., 34.
[73] *Ibid*., 37.
[74] *Ibid*., 37.
[75] *Ibid*., 37. The remaining 14% were neutral in this regard.
[76] *Ibid*., 37. 92% of German traders said that they would not submit to ADR.

4. Research Methodology

Although Directive 2011/83 applies to distance contracts in relation to goods, services, digital content and utility contracts, the website surveys which forms the basis of this report were limited to websites offering goods and digital content for sale (thereby excluding services and utility contracts).[77] Goods (defined as "any tangible movable items"[78]) remain the most commonly purchased item online[79], and so represent the most significant product purchased at a distance. Digital content (defined as "data which are produced and supplied in digital form") whether supplied in tangible form or intangible form, such as by downloading or streaming, is regulated for the first time in Directive 2011/83 and thus presents an interesting point of contrast with goods which have been regulated since Directive 97/7.

A total of 121 websites were surveyed and these websites were selected with a number of criteria in mind, in terms of geography; size; and the types of goods/digital content sold, with a view to providing a representative sample of websites.[80] First, websites were divided evenly between .uk and .ie websites on the basis that, for many traders, the UK and Ireland are treated as a single trading territory, with consumers in both the UK, and more especially Ireland, evidencing a willingness to shop online both "at home" and "cross-border".[81] Second, the websites selected were a combination of well know larger "names" or "multiples", as well as some less well known SMEs. Third, websites were selected on the basis of the types of goods/digital content sold so that sample would reflect the types of goods/digital content commonly bought online. Therefore, in relation to goods, a large number of websites (30) selling clothing and footwear were selected, as well as websites selling hard copy books,

[77] The Website Survey is available in Appendix A.
[78] Directive 2011/83, Art 2(3).
[79] In 2017, for example, the most popular categories of goods purchased online in the EU were clothes and sport goods (64 % of online buyers), household goods (46 %), books, magazines and newspapers (34 %) and computer hardware (28%); in contrast, the most popular categories of services (excluding financial services) purchased online in the EU were travel and holiday accommodation (53 %), tickets for events (39 %) and telecommunications services (29%): see Digital Economy and Society Index (DESI) 2018, available at http://ec.europa.eu/information_society/newsroom/image/document/2018-20/3_desi_report_use_of_internet_services_18E82700-A071-AF2B-16420BCE813AF9F0_52241.pdf (last accessed 17 December 2018).
[80] The full list of websites surveyed is available in Appendix B.
[81] For example, in 2014, when the EU(28) average for domestic sales was at 65% of those who used the Internet to purchase online for private purposes, the respective Irish and UK figures were 75% and 84%: and when the EU(28) average for cross-borders sales was at 19%, the respective Irish and UK figures were 49% and 23%: see Eurobarometer report on cross-border trade and consumer protection (FL397, 2015).

magazine, cosmetics, white goods, food and drinks; furniture, toys and other miscellaneous goods.[82] In relation to digital content, the websites surveyed included websites offering film and video, music, games, books, magazine & newspapers, software, and educational resources.

The size of the survey was relatively modest. A broader sample of websites would need to be examined to enable us to draw more definitive conclusions. However, along with earlier studies, we believe that this new data, based on the examination of 121 Irish and UK websites, is sufficient to indicate general levels of compliance in relation to information obligations among traders in these jurisdictions.

The Survey Form was drafted to correspond with the information requirements of the relevant legislative measures, with some supplemental questions included. The website survey focussed on whether the different types of information were provided or not, and no findings were made in relation to the quality or accessibility of the information provided.

The survey was piloted on 10 websites. Minor revisions were made to the survey form and Instructions on Completing the Survey were prepared for the research assistant to ensure accuracy and consistency in the collection of the data. The data collection in relation to goods was completed in 2017 and the data was analysed using SSPS software in early 2018. The data collection in relation to digital content was completed and analysed using SSPS software in mid-late 2018.

Relevant information was sought from various aspects of the websites surveyed. All information available via links such as, "About Us"; "Contact Us"; "Terms & Condition"; "Legal"; "Delivery"; "Returns" and "FAQs" was reviewed. A mock purchasing exercise, in relation to one random product per website was completed up to the point of "placing an order/payment" to identify other relevant pre-contract information. The mock purchasing exercise was undertaken on a PC.

No ethical approval or consent was needed for the collection of the data. All data collected was pre-existing and in the public domain; no personal data was collected. Copies of the completed survey forms and associated statistical data will be held for 10 years after completion of the survey, in compliance with UCC Code of Research Conduct.[83]

[82] See note 13 above; see further https://www.statista.com/statistics/275973/types-of-goods-purchased-online-in-great-britain/ (last accessed 17 December 2018)
[83] See https://www.ucc.ie/en/research/support/integrity/ (last accessed 17 December 2018).

5. Research Findings

As noted above, Article 6(1) of Directive 2011/83 on consumer rights requires that before a consumer is bound by a distance contract, such as one formed via a website, the trader must provide the consumer with various information in a clear and comprehensible manner. As noted in the Methodology section, the website survey focussed on whether the different types of information were provided or not, and not the quality of the information provided. The volume of information required has increased significantly with Directive 2011/83 (when compared with Directive 97/7 on distance sales) and, Article 6(1) specifies the particular information under 20 paragraphs (paras (a) - (t)). Further information requirements in relation to consumer redress are required pursuant to Regulation 524/2013 on ODR and Directive 2013/11/EU on ADR. Therefore, for ease of analysis, all these information requirements, as they relate to the sale of goods and digital content, have been grouped together under seven different headings:

1. The Goods/Digital Content and the Trader (Directive 2011/83, Art 6(1) paras (a) – (d));
2. Price, Payment and Delivery; (Directive 2011/83, Art 6(1) paras (e) and (g));
3. Withdrawal (Directive 2011/83, Art 6(1) paras (h), (i) and (k));
4. Guarantees, After-sales and Duration (Directive 2011/83, Art 6(1) paras (l) - (p));
5. Digital Content Functionality and Interoperability (Directive 2011/83, Art 6(1) paras (r) - (s));
6. Formal Requirements (Directive 2011/83, Art 8(2) and (3));
7. Redress (Directive 2011/83, Art 6(1) para (t); Regulation 524/2013, Art 14; Directive 2013/11, Art 13).

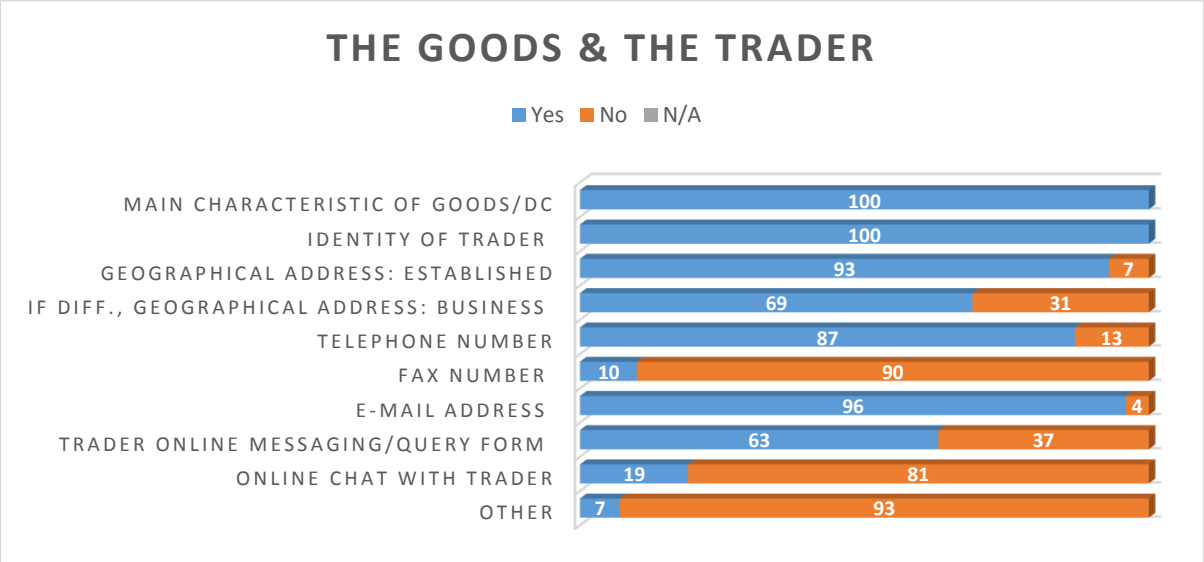
5.1 The Goods/Digital Content and the Trader

Article 6(1)(a) refers to information about the main characteristics of the goods/digital content, to the extent appropriate to the medium and to the goods/digital content; while paras (b), (c) and (d) refer to information which identifies the trader, such as his trading name, and the trader's contact details, including the geographical address where the trader (and where applicable, his principal) is established, and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently. The geographical address of the place of business of the trader (and where applicable, his principal) may also be required.

The website survey (of 121 sites selling goods and digital content) identified that one of the most clearly presented and accessible types of information provided by traders relates to the goods/digital

content being offered for sale, with 100% of website complying with this requirement (see Table 1.1 below). Equally, the identity of the trader, such as a trading name, was also provided on 100% of the websites surveyed with this information commonly found by following links such as "About Us" and "Contact Us".

Table 1.1 – Goods and Digital Content combined



Levels of compliance in relation to contact details were also very high with 93% of websites providing information about the geographical address where the trader is established (i.e. day to day economic activity); while 69% of websites provided information about the geographical address of the place of business of the trader to enable the consumer to address any complaints (but this information is only required where this address is different from the trader's place of establishment).

The trader is also required to provide contact details to enable the consumer to contact him quickly and communicate with him efficiently. Typically, this information was readily identifiable by following a link on the website such as, "Contact Us". The trader has some flexibility in this regard to choose a suitable means of communication. The most common forms of communication provided by the websites surveyed are e-mail address(es) (96% of websites); telephone number(s) (87%); and pre-forma online messaging or query forms (63%). The percentage of websites using online chat was relatively low at 19%, although this might be expected to grow. In contrast, the number of websites which provided a fax number was only 10%, perhaps reflecting the obsolete nature of communication by fax, particularly C2B. The 'Other' category in Table 1.1 above, at 7% of the 121 websites surveyed, relates to facilities on digital content website only whereby users could communicate with other users

via user fora and support networks (including social media) but not directly with the trader. Accordingly, such facilities would probably not meet the requirements of Directive 2011/83.

When the total number of websites surveyed is broken down between goods (see Table 1.2 below) and digital content (see Table 1.3 below) websites, it is notable that there is a high degree of consistency in terms of some of the findings: i.e., in relation to the main characteristics of the goods/digital content (100% each); the identity of the trader (100% each); and the use of e-mail (96% and 95% respectively) and online chat facilities (62% and 65% respectively) to communicate with the trader. This high degree of consistency is despite the fact that digital content websites have only been included in the regulatory framework more recently.

Table 1.2 – Goods only

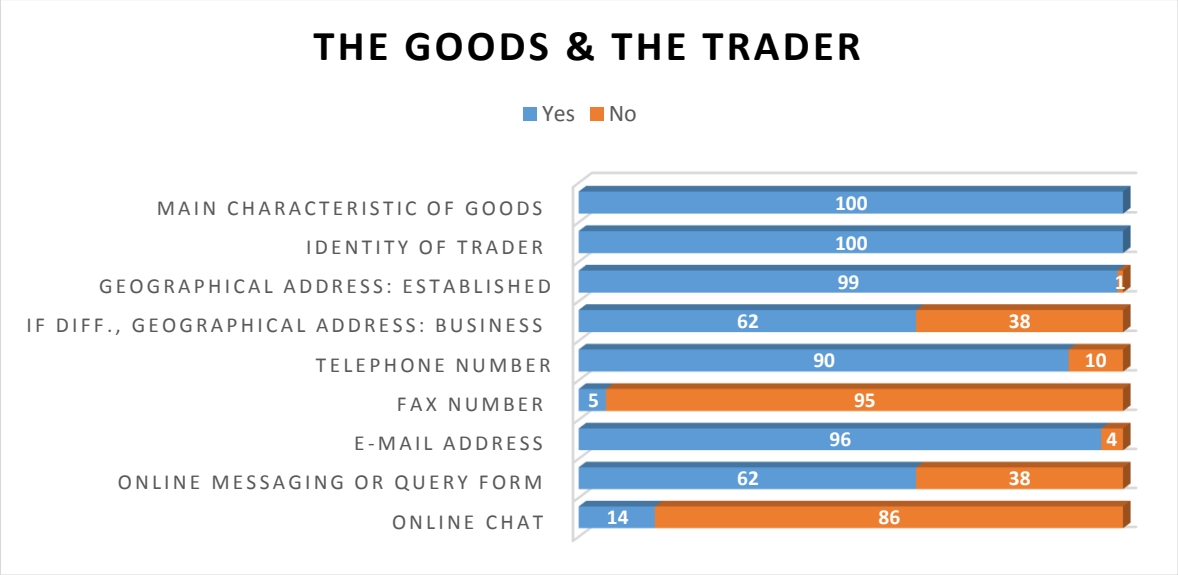
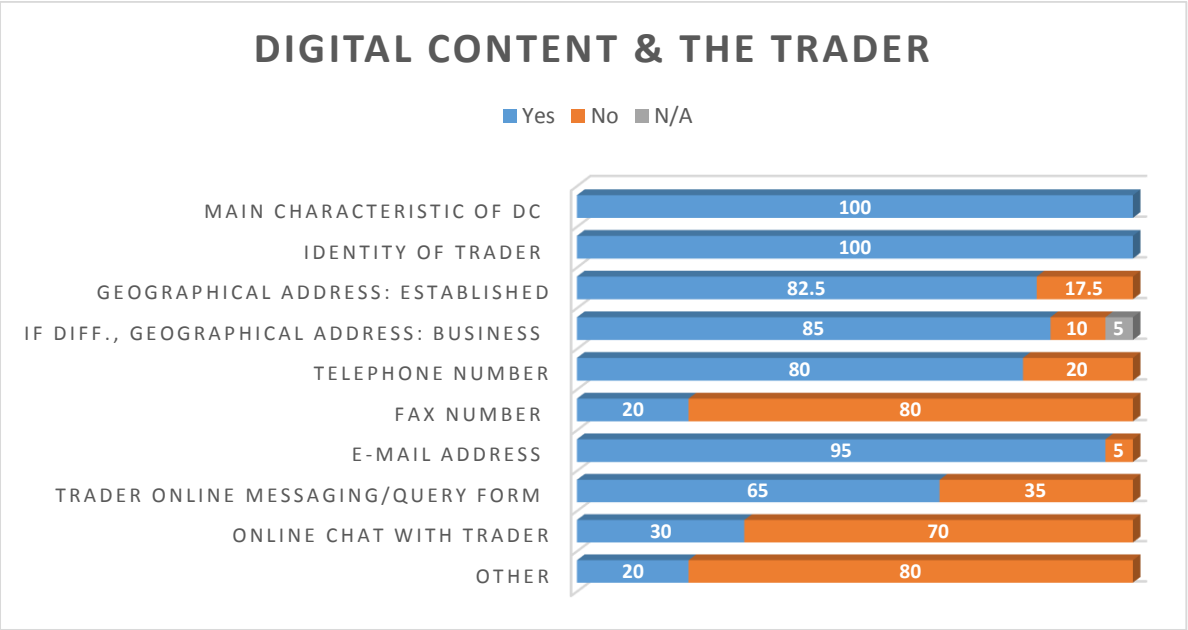


Table 1.3 Digital Content only



There are a number of other aspects of information provision where there are more marked differences between goods and digital content websites. For example, only 82.5% of digital content websites provided information about the geographical address where the trader is established (in comparison with 99% of goods websites) and 85% of digital content websites provided information about the geographical address of the place of business of the trader, which is only required if it is different from the trader's place of established (in comparison with 62% of goods websites). The distinction between place of business and place of establishment is potentially confusing and this confusion may be reflected in the statistics on addresses provided. For this reason, it is not possible, on this data, to reach a definitive conclusion on the percentage of digital content website which provide no information about address (geographical or place of business). Perhaps predictably, online chat with the trader was more well established on digital content websites (at 30%) when compared with goods only websites (at 14%); whereas surprisingly, fax machines were more commonly used on digital content websites (at 20%) than goods only websites (at 5%).

5.2 Price, Payment and Delivery

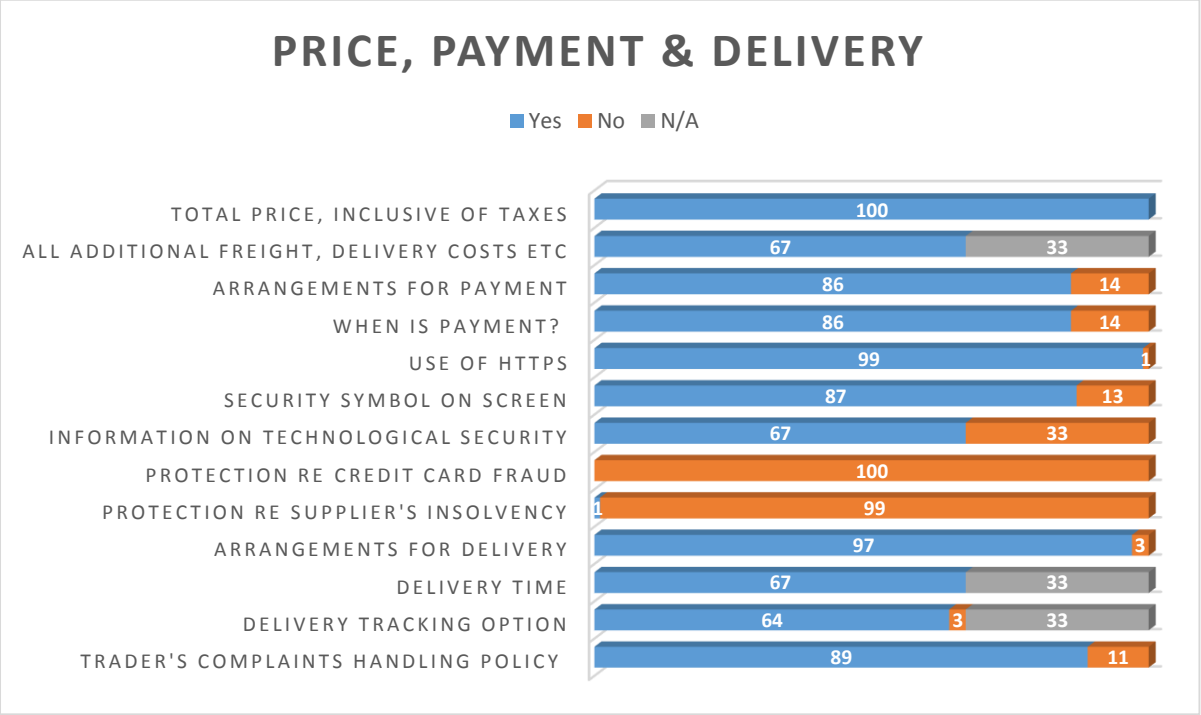
Article 6(1)(e) requires that information about the total price of the goods, inclusive of taxes, as well as, where applicable, all additional freight, delivery or postal charges or any other costs be provided by the trader. [84] In addition, para (g) refers to information about the arrangements for payment,

[84] Para (f) is not relevant to online sales as it refers to the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.

delivery, performance, the time by which the trader undertakes to deliver the goods, and, where applicable, the trader's complaint handling policy.[85]

As illustrated in Table 2.1 below, there was 100% compliance of the 121 websites surveyed in relation to the provision of information concerning the total price inclusive of taxes; and where applicable, there was 100% compliance in relation to information about all additional freight, delivery, postal or other charges (the 67% finding of compliance here related to goods only websites (81 in total) where the information was provided by all such websites; whereas the 33% not applicable finding relates to digital content sites (40 in total) where no freight, delivery, postal charges or other costs applied) (see also Tables 2.2 and 2.3).

Table 2.1 Goods and Digital Content combined



Moreover, information about arrangements for delivery was provided on 97% of websites surveyed: the delivery time was provided by 100% of websites selling goods (i.e. 67% of the total, with digital content websites representing the other 33% of sites) and 95% of websites selling goods offered the facility to track your delivery in real time (i.e. 64% of the total, with digital content websites representing the other 33% of sites) (see also Tables 2.2 and 2.3 below).

[85] On trader's complaints handling policy see also Redress below.

Table 2.2 Goods only

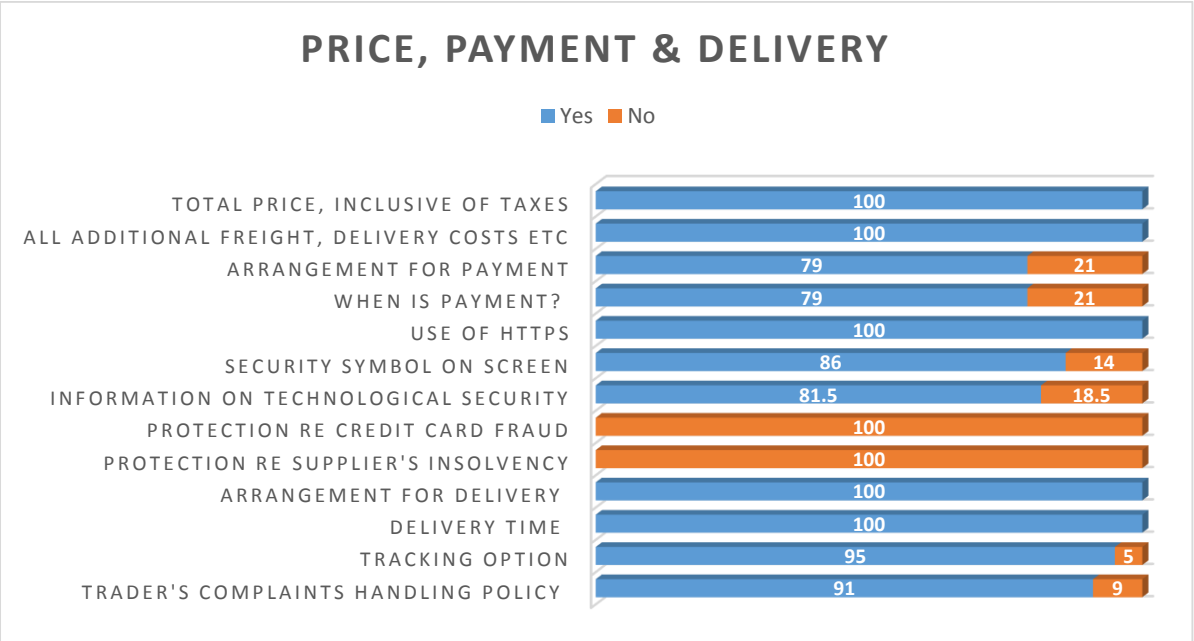
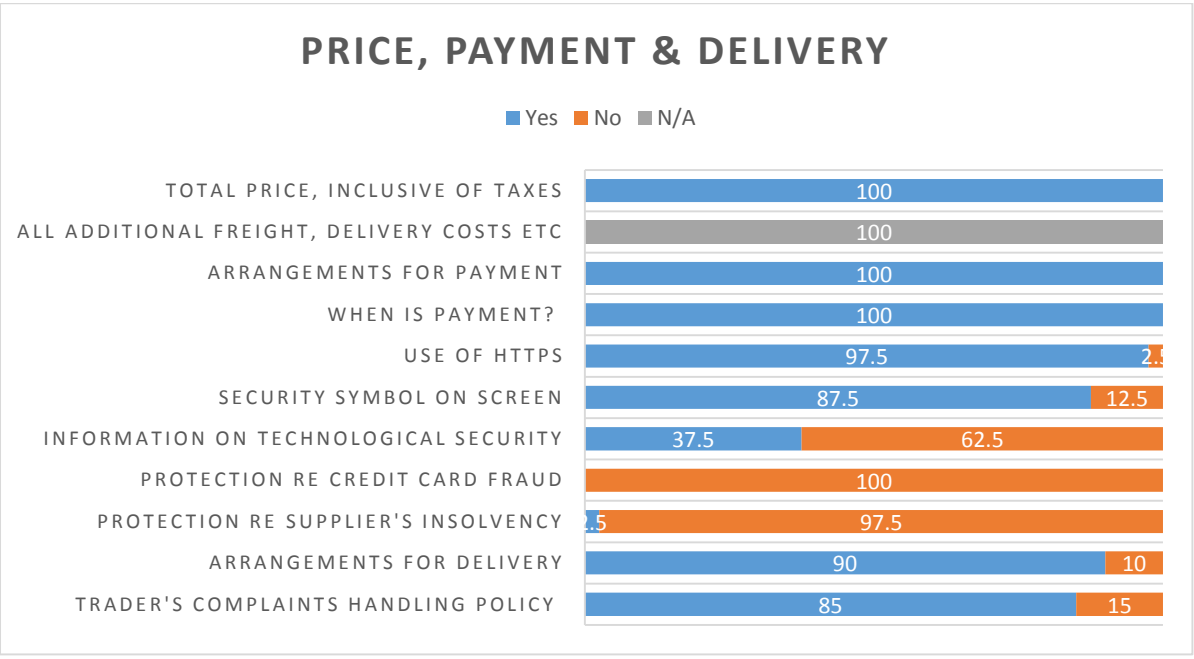


Table 2.3 Digital Content only



High levels of compliance (86%) were also evidenced in relation to the 121 websites surveyed and the information concerning arrangements for payment (see Table 2.1 above). Typically, websites offered a range of payment options, including debit and credit cards; in-store cards and payment via PayPal. All orders required the provision of payment details (type of payment card / account; consumer's name and unique identifier, such as card numbers) in advance of purchase however, payments are not always processed by the trader at the same time. While 86% of the 121 websites surveyed

provided information about the time payment; 14% of websites did not. In relation to websites selling goods there were a number of options in relation to the time of payment. The most common time for payment was on despatch of the goods (at 47%); other times for payment were on placing the order (at 22%), on accepting the order (at 9%) and at delivery (only 1%); with 21% of websites selling goods providing no information about the time of payment, as illustrated in Table 3 below. In contrast, in relation to digital content websites, 100% of websites provided information about the time of payment (see Table 2.3 below). Accordingly, the time of payment could be broken-down under three headings with 45% of websites providing for a once-off payment; 35% of websites involved periodic payments; and the remaining 20% involved periodic payment following a free-trial period (see Table 4 below).

Table 3 – Goods only

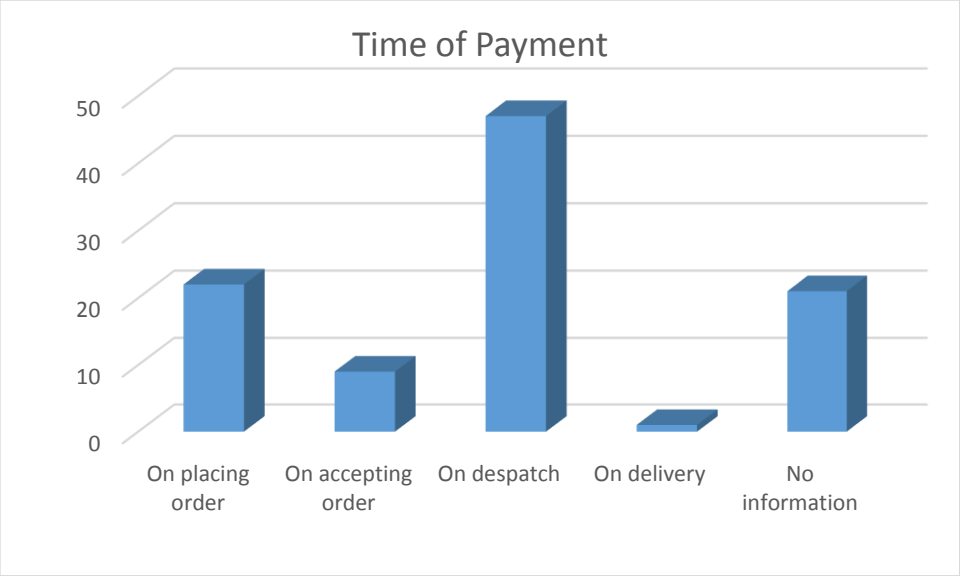
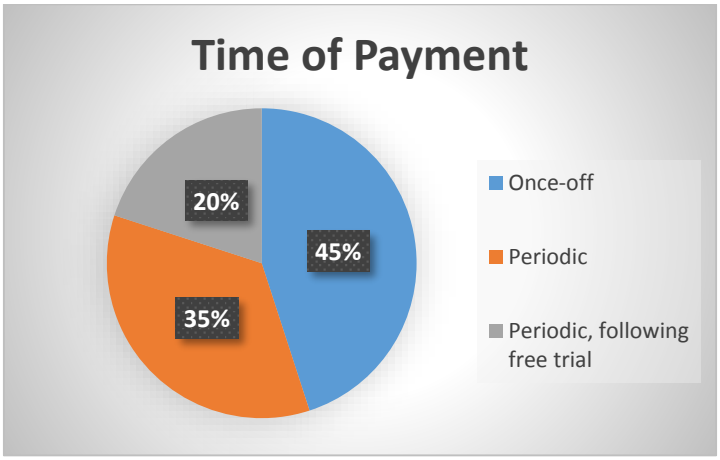


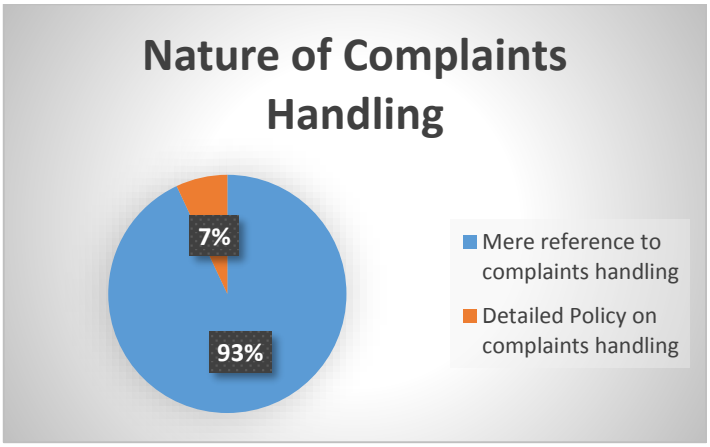
Table 4 – Digital Content only



A persistent concern for consumers about purchasing online relates to security of payment and fears of fraud and trader insolvency.[86] In that regard, and in relation to information about arrangements for payment, 99% of the 121 websites surveyed used the secure hypertext transfer protocol (i.e. https:) to process payment details, and in addition, 87% of websites survey used a security symbol (such as the "padlock" symbol); while 67% of websites provided information of technical security measures (see Table 2.1 above). However, there is a notable difference between websites selling goods and websites selling digital content in this regard: with 81.5% of goods websites and 37.5% of digital content websites providing information about technical security measures (see Tables 2.2 and 2.3 above). In stark contrast to the above levels of compliance, none of the 121 websites surveyed provided information about consumer protection in relation to credit card fraud and only 1% of websites provided information about the financial implication of trader insolvency where the goods/digital content are pre-paid before delivery.

Lastly, Directive 2011/83 does not require that traders have a complaints handling policy but if a trader does have such a policy, information about that policy should be provided. Of the websites surveyed, 89% of websites made reference to complaints handling (91% of goods websites; and 85% of digital content websites). However, in the vast majority of cases (93%) where complaints handling was mentioned on the website, no further details were provided beyond the standard contact details; in only 7% of those websites was a detailed complaints handling policy provided (see Table 5 below).

Table 5



[86] See e.g. Special Eurobarometer Report 464a, *Europeans' Attitudes towards Cybersecurity* (September 2017).

5.3 Withdrawal

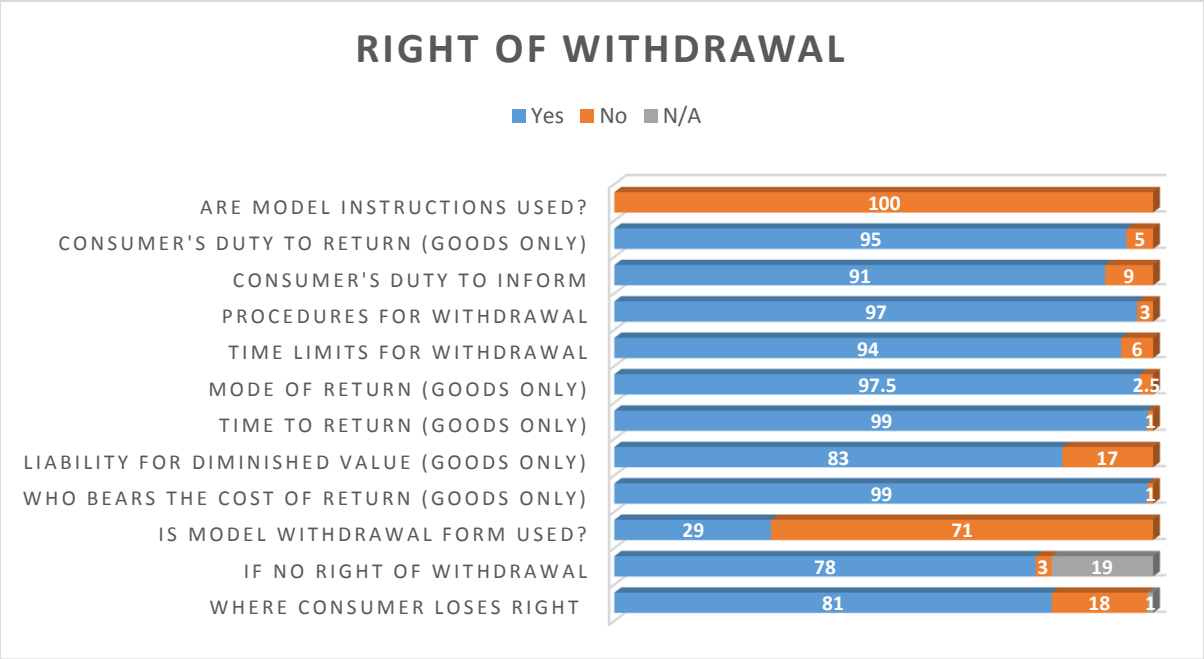
Article 6(1)(h) requires that where the right of withdrawal exists, information about the right - conditions, time-limits and procedures – must be provided, as well as the Model Withdrawal Form. In accordance with para (i) where the cost of withdrawal is placed on the consumer, this information must also be provided.[87] Moreover, pursuant to para (k), where there is no right of withdrawal or where the right of withdraw may be lost, such information must be provided to the consumer.

In broad terms, the survey of 121 websites evidenced high levels of compliance in relation to many aspects of the consumer's right of withdrawal, as illustrated by Table 6.1 below. Of the 121 websites surveyed, 97% of websites included information about the procedures of withdrawal; 94% about the time limit for withdrawal; and 91% contained information about the consumer's duty to inform the trader that he intends to exercise the right of withdrawal. Slightly lower levels of compliance in relation to the consumer's right of withdrawal can be noted in relation to two matters: the non-availability of the right to withdraw and the loss of the right to withdraw (see Table 6.1 below). Of the websites surveyed, 78% provided information about the non-availability of the right to withdraw in certain circumstances, and 81% of websites surveyed provided information about circumstances where the right to withdraw may be lost.

One of the innovations of Directive 2011/83 is the use of the Model Instructions and the Model Withdrawal Form. Where the Model Instructions are used and correctly filled-in, it is assumed that the information in paras (h) – (j) has been provided.[88] However, despite this, and in sharp contrast to the compliance levels noted above, none of the websites surveyed used the Model Instructions and only 29% of websites surveyed used the Model Withdrawal Form (see Table 6.1 below).

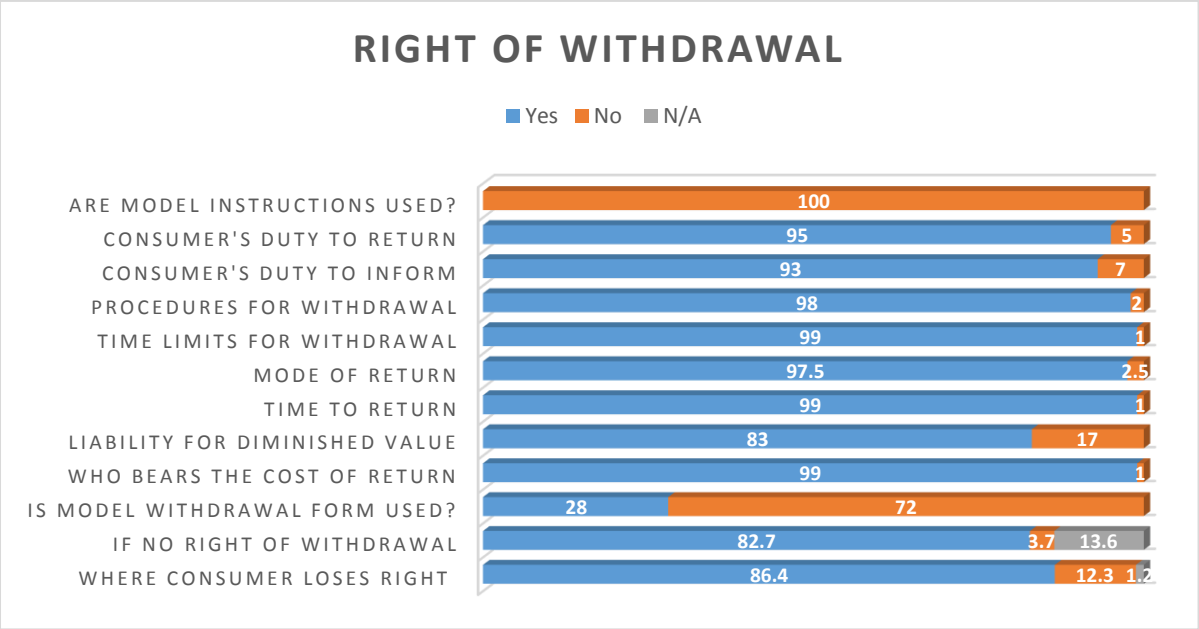
[87] Para (j) covers the impact of withdrawal on services contract requiring the consumer to pay a reasonable cost for services provided before withdrawal, and thus has no application to sale of goods/digital content contracts.
[88] Directive 2011/83, Art 6(4).

Table 6.1 - Goods and Digital Content combined



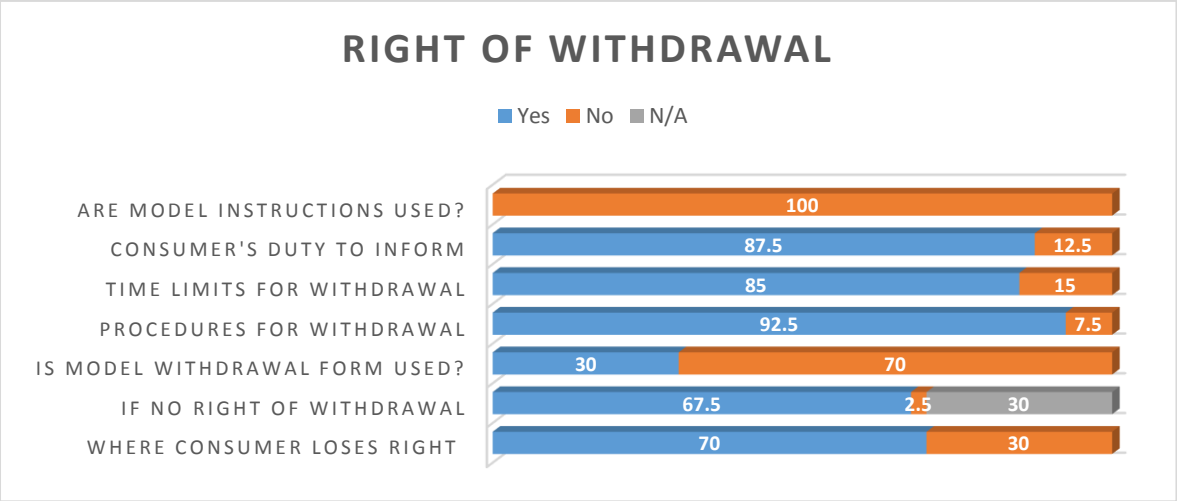
A number of the items of information apply only in relation to goods (as opposed to digital content) and again the compliance rate is relatively high in this regard (see Table 6.1 above and Table 6.2 below). Thus, of the 81 websites selling goods that were surveyed, 99% contained information about the time of return; 99% about who bears the cost of return (whereby consumers bear the cost in 76% of websites surveyed; and traders bear the cost in 24% of websites surveyed); 97.5% about the mode of return; 95% about the consumer's duty to return the goods; and 83% about the consumer's potential liability for diminished value.

Table 6.2 - Goods only



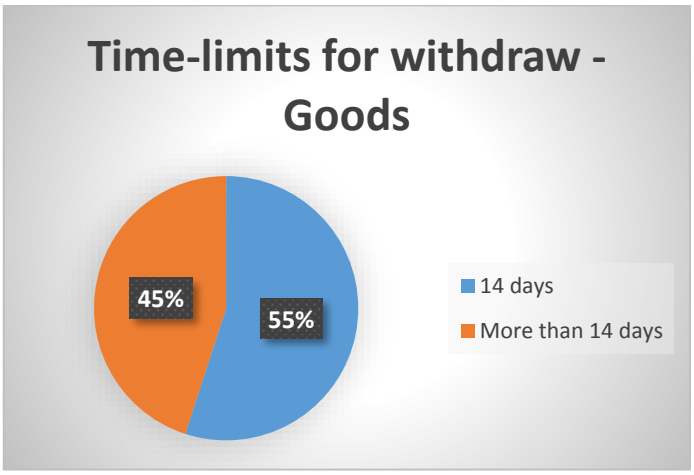
When the findings in relation to goods are contrasted with those in relation to digital content, there is a significant level of convergence, although digital content website performed a little less well in terms of compliance. So for example, in relation to information about the consumer's duty to inform the trader of his intent to withdraw: 93% of goods websites conformed, while 87.5 % of digital content websites conformed. Again, in relation to time limits for withdrawal: 99% of goods websites conformed, while 85% of digital content websites conformed. In relation to procedures for withdrawal: 98% of goods websites conformed, while 92.5% of digital content websites conformed. Similar findings relate to information about where no right of withdrawal exists – 82.7% for goods and 67.5% for digital content- and information about where the right of withdrawal is lost – 86.4% for goods and 70% for digital content. The only one area where digital content websites outperformed goods websites, albeit marginally, relates to the use of the Model Withdrawal Form on 30% of digital content websites and 28% of goods websites (see Table 6.2 above and Table 6.3 below)

Table 6.3 - Digital Content only



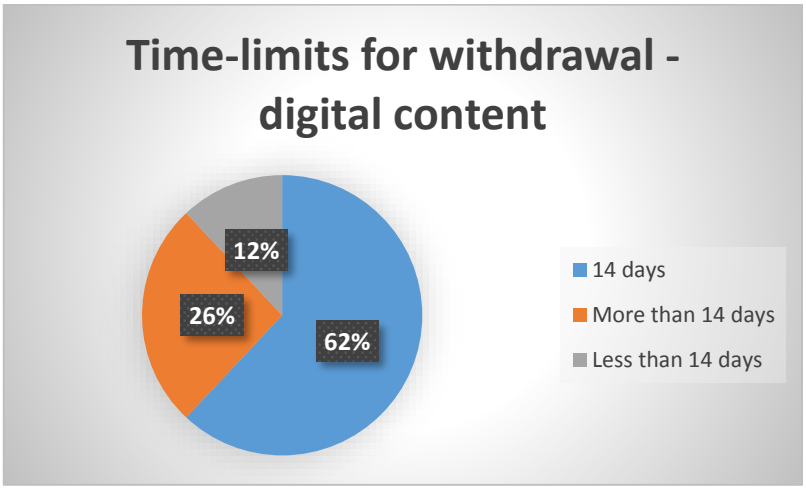
Directive 2011/83 increased the time-limit for withdrawal from 7 days to 14 days. Of the 81 goods websites which provided clear information about this time limit, 55% offered a withdrawal period of 14 days; while 45% of websites offered a withdrawal period of more than 14 days (see Table 7 below). The most common extended period for withdrawal from the contract/return of the goods was 28 days, with 19 websites offering this time period; 11 websites offered a withdrawal period of 30 days; 3 websites offered a withdrawal period of 60 days; 2 websites offered a withdrawal period of 90 days; and 1 website offered a withdrawal period of 365 days (a website selling sports clothing).

Table 7



Of the 40 digital content websites which provided clear information about this time limit, 62% offered a withdrawal period of 14 days; 26% of websites offered a withdrawal period of more than 14 days; while 12% of websites offered a withdrawal period of less than 14 days and hence were in breach of Directive 2011/83 (see Table 8 below).

Table 8

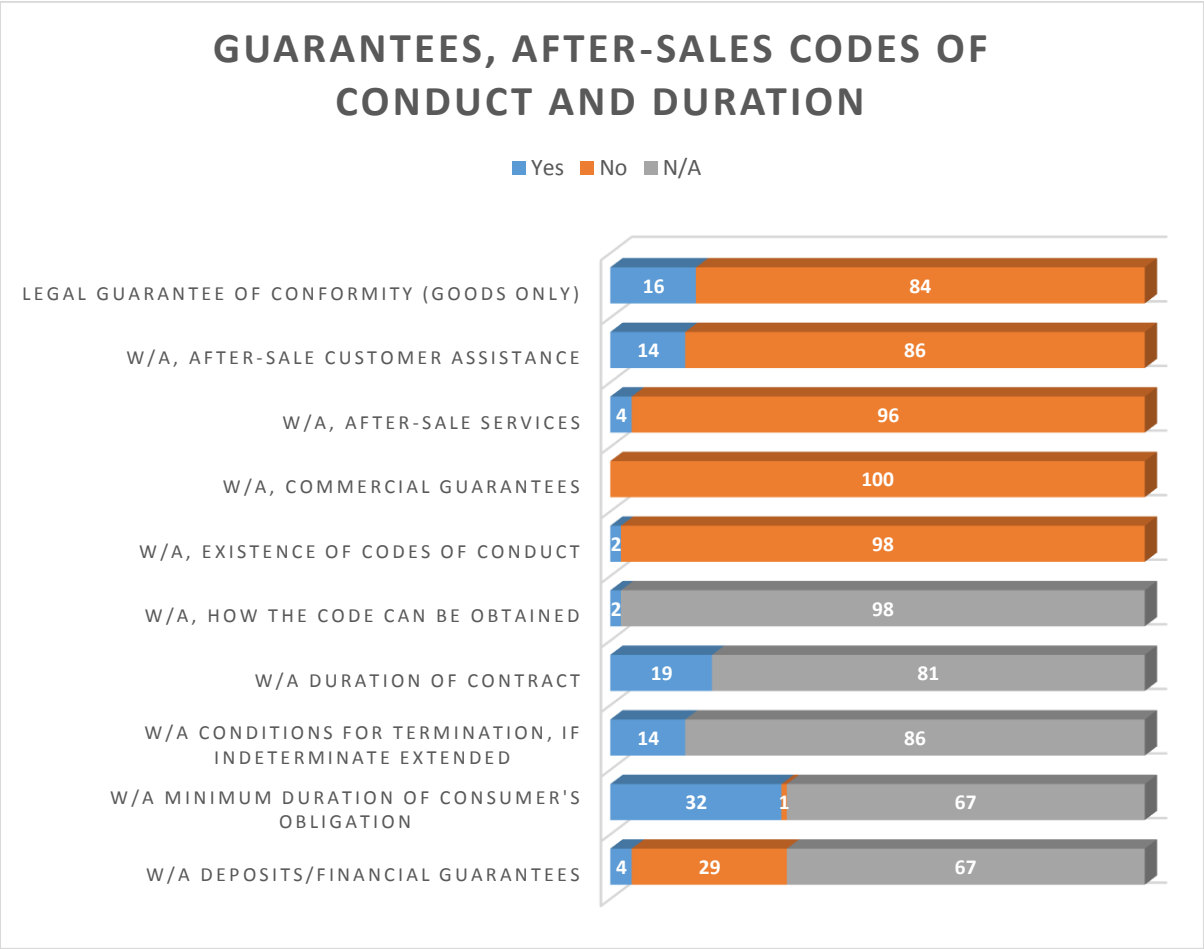


5.4 Guarantees, After-sales, Codes of Conduct and Duration

Article 6(1), paras (l) - (p), require information to remind the consumer of the legal guarantee of conformity; the existence and condition of any after sale customer assistance; services; and commercial guarantees; codes of conduct; and information about the contract duration, but only where applicable. And so, for example, information about the legal guarantee of conformity only applies to sale of goods contracts; while information about the duration of the contract is generally more applicable to service and digital content contracts and has no application to once-off sale of goods contracts.

As indicated in Table 9 below, levels of information in this regard are poor but that does not necessary reflect low levels of compliance. Only 16 % of goods websites surveyed reminded the consumer about the legal guarantee of conformity, and in this regard, lack of such information is non-compliance as the legal guarantee of conformity is mandatory in relation to contracts for the sale of goods. However, based on the survey of 121 websites, the low levels of information about after-sales assistance (provided by 14% of websites); after-sale services (provided by 4% of websites) and commercial guarantees (provided by none of the websites surveyed) may reflect non-compliance or the reality that such assistance, services and guarantees are not made available to the consumer (or some combination of both) in relation to the websites surveyed.

Table 9 – Goods and Digital Content combined



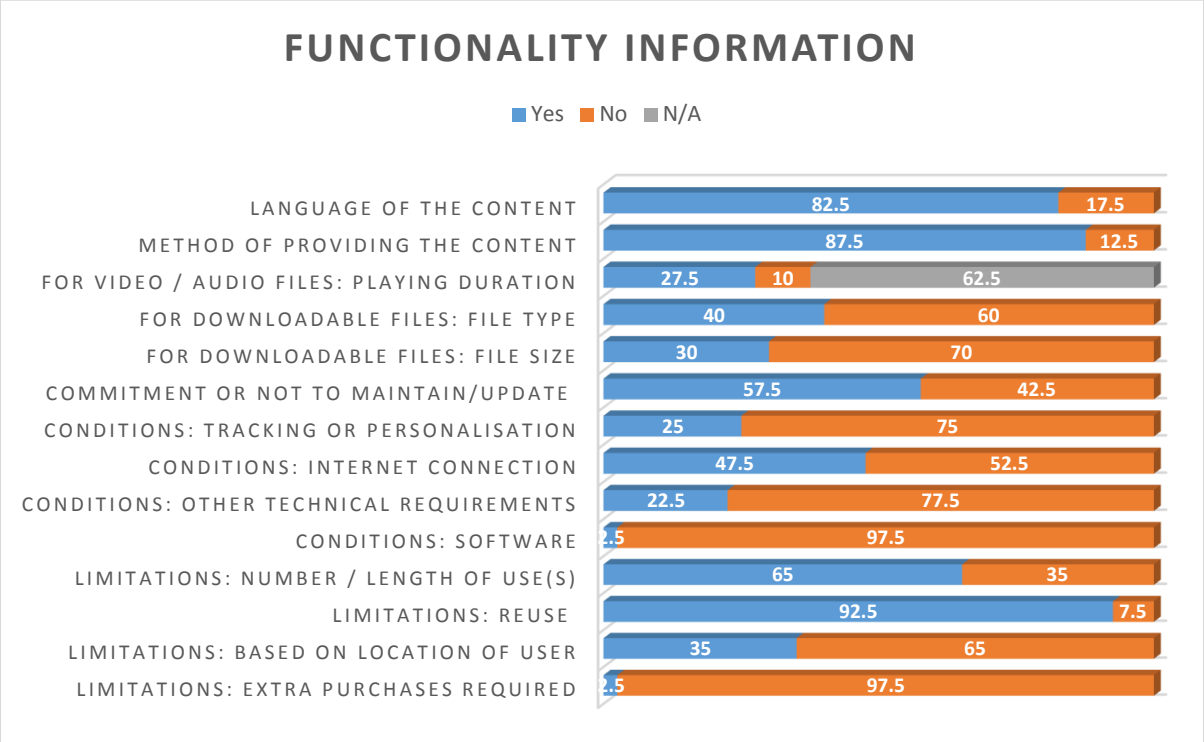
Of the 121 websites surveyed, only 2% referred to codes of practice and all of these sites explained how to access copies of the code. The survey indicated slightly higher levels of compliance in relation to the duration of the contract with 19% of websites providing information about duration, although this issue was not relevant to a large proportion (81%) of websites surveyed, including all goods websites surveyed and 42.5% of digital content websites surveyed. Similar findings related to information about the conditions for termination where an indeterminate contract was extended (14% of 121 websites surveyed); the minimum duration of the consumer's obligations (32% of 121 websites surveyed) and deposition and financial guarantees (4% of 121 websites surveyed).

5.5. Digital Content Functionality and Interoperability

Art 6(1) paras (r) and (s) are another innovative feature of Directive 2011/83 requiring information about the functionality and interoperability of digital content. The Commission Guidance on these two paragraphs offers a non-exhaustive list of the main parameters for functionality and interoperability which we used in this Study as a check-list of information which should be provided.

In relation to functionality, described in Recital 19 of the Directive as referring to: "… the ways in which digital content can be used, for instance for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding". When the specifics of functionality were explored, in line with the Commission's Guidance, very differing levels of information provision emerged (see Table 10 below). At the higher end of the information provision spectrum was information about limitations on reuse (92.5%); the method of providing the content (87.5%) and the language of the content (82.5%). At the lower end of the spectrum of information provision was information about the need for extra purchases (2.5%); about conditions relating to software (2.5%); about tracking or personalisation (25%); and about other technical requirements (22.5%).

Table 10

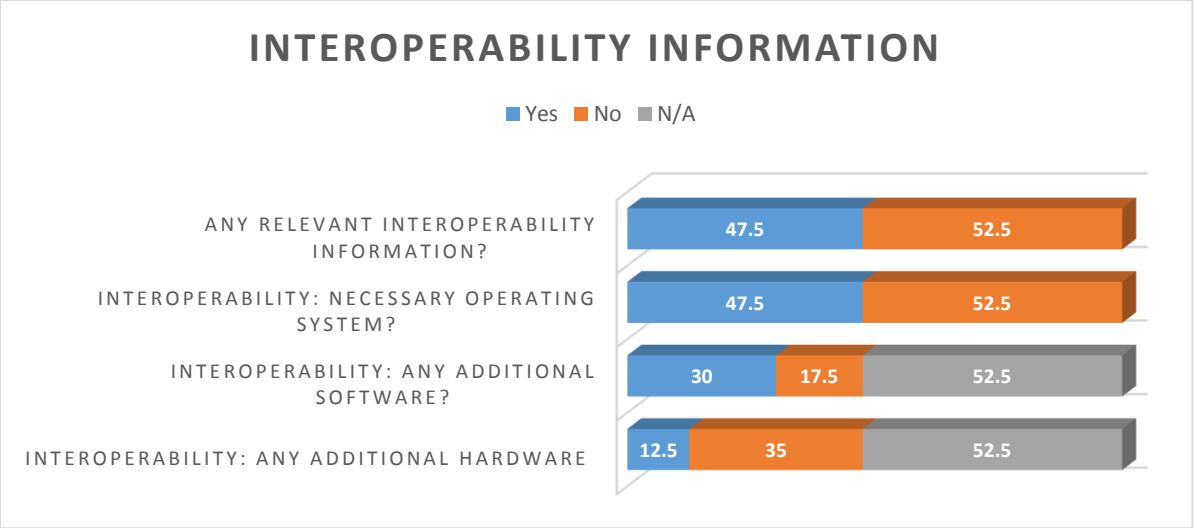


This left an amount of information in the middle-ground including information about limitations concerning the number or length of times of use (65%); commitments or not to maintain or update (57.5%); conditions concerning internet connection (47.5%); for downloadable files, file type (40%); limitation based on location of user (35%); and for downloadable files, file size (30%).

In relation to interoperability, described in Recital 19 of the Directive in the following terms: "The notion of relevant interoperability is meant to describe the information regarding the standard

hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features …". Less than half of the websites surveyed (47.5%) contain information about the necessary operating system; 30% of websites provided information about any additional software; and only 12.5% of websites provided information about additional hardware requirements (see Table 11 below).

Table 11



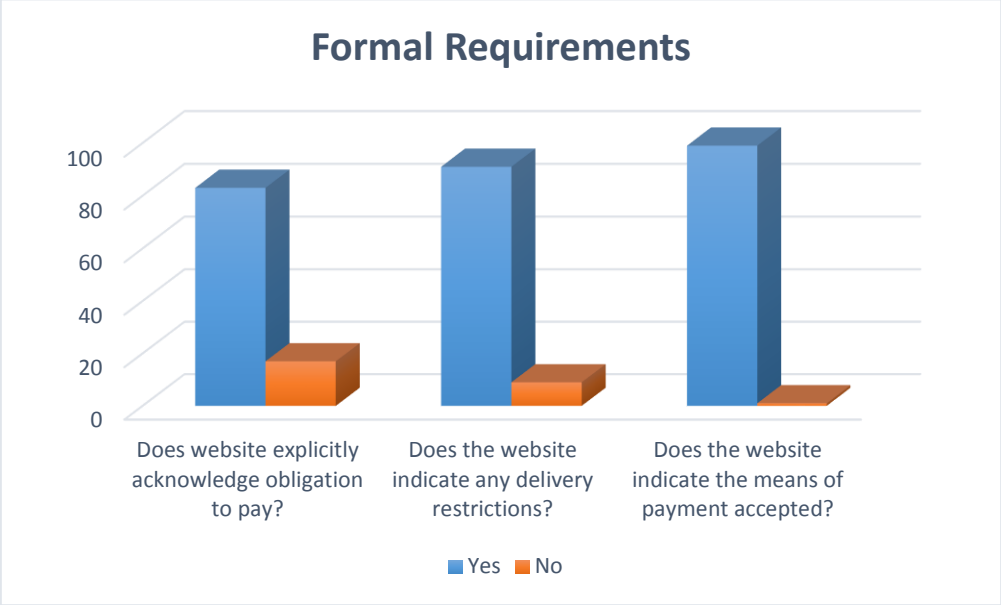
5.6 Formal Requirements

Further pre-contractual information requirements can be found in Article 8 which deals with Formal Requirements for Distance Contracts. Three of these formal requirements were tested in the website survey. First, under Article 8(2) where a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader must ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. Second, pursuant to Article 8(3), trading websites must indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply, and third, also further to Article 8(3), trading websites must indicate clearly and legibly at the latest at the beginning of the ordering process which means of payment are accepted.

As illustrated in Table 12 below, there was a high level of compliance in relation to these formal requirements. Of the 121 websites surveyed, 83% explicitly acknowledged an obligation to pay. Common phrases used which explicitly acknowledged the obligation to pay included: "Pay"; "Pay

Now"; "Pay Securely Now"; "Order and Pay"; "Proceed to Payment"; "Confirm Payment"; and "Make Payment". In contrast, phrases used which failed to explicitly acknowledge the obligation to pay included: "Continue"; "Complete Order"; "Proceed"; "Check-out Securely"; and "Place your order". Even higher levels of information provision were evidenced in the websites surveyed in relation to information about delivery restrictions (91%), and information about the means of payment accepted (99%).

Table 12: Goods and Digital Content combined



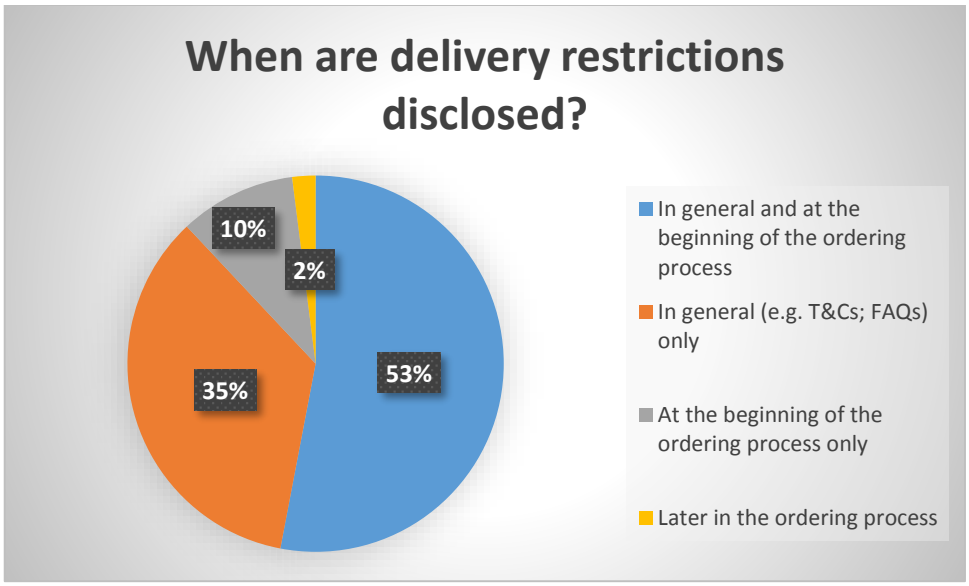
When goods websites are compared to digital content websites, the findings are very consistent in relation to the requirement for an explicit acknowledgement of the obligation to pay (83% for goods websites; and 82.5% for digital content websites); and the requirement to indicate the means of payment accepted (99% for goods websites; and 100% for digital content websites) but there is some divergence in relation to information about delivery restrictions (97.5% for goods websites; and 77.5% for digital content websites).

Both of these latter items of information (delivery restrictions and means of payment) must be provided not just before a consumer is bound by the contract but more specifically "at the latest at the beginning of the ordering process".

Of the websites which provided information about delivery restrictions, as per Table 13.1 below, the majority of those websites (a little over half, at 53%) provided this information both in general, such

as in the T&Cs and/or the FAQs, and again at the beginning of the ordering process, maximising the potential impact of the information for consumers. Also in compliance with the legislation were 35% of websites surveyed which provided the information in general (e.g. T&Cs and/or the FAQs) only; as well as 10% of websites which provided the information at the beginning of the ordering process only. However, 2% of websites only provided the information about delivery restriction later than at the beginning of the ordering process and so were in breach of Directive 2011/83.

Table 13.1 – Goods and Digital Content combined



When goods and digital content sites are compared there are some notable differences (see Table 13.2 and Table 13.3) but most significant perhaps is the finding that all goods sites were fully compliant with Directive 2011/83; whereas 6% of digital content websites were in breach of Directive 2011/83 by providing information about delivery restrictions later than at the beginning of the ordering process.

Table 13.2 – Goods only

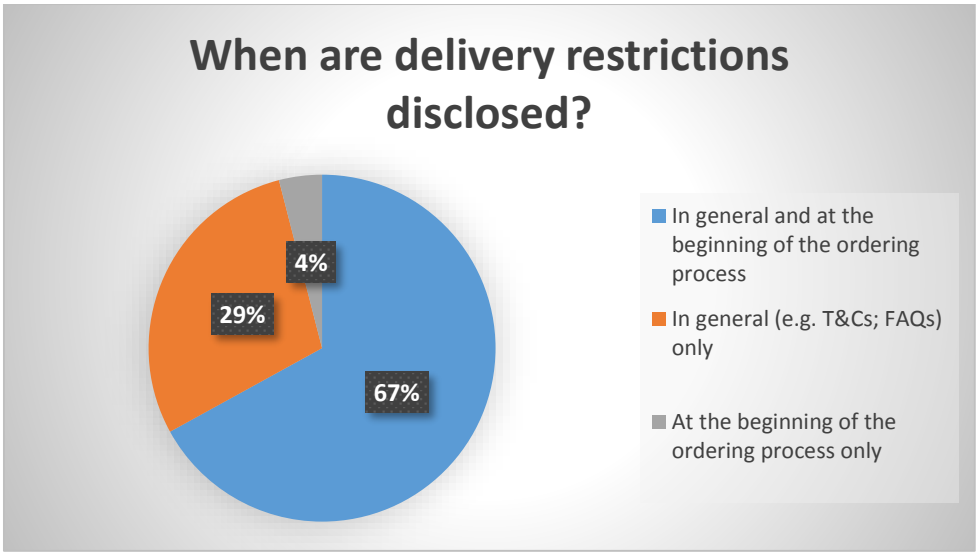
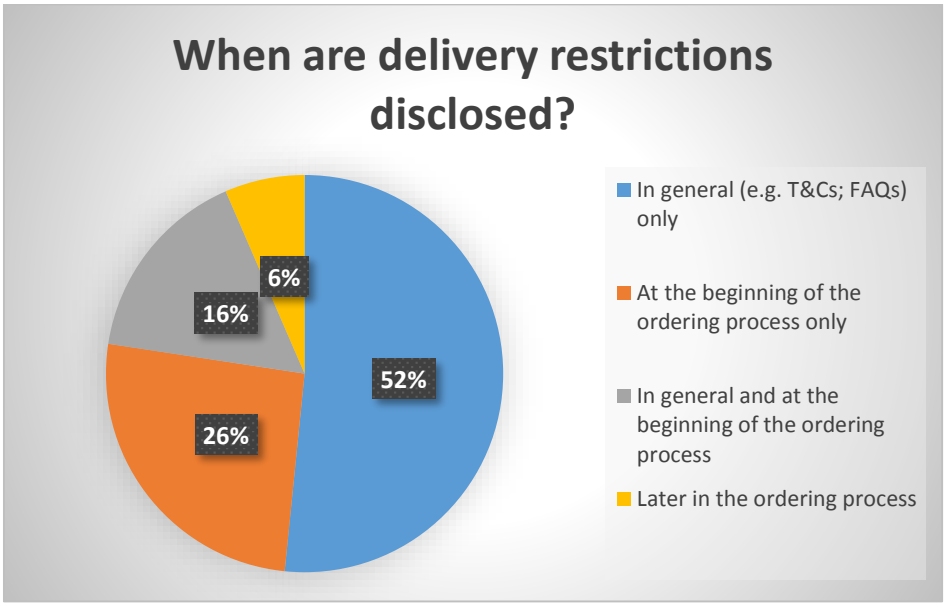
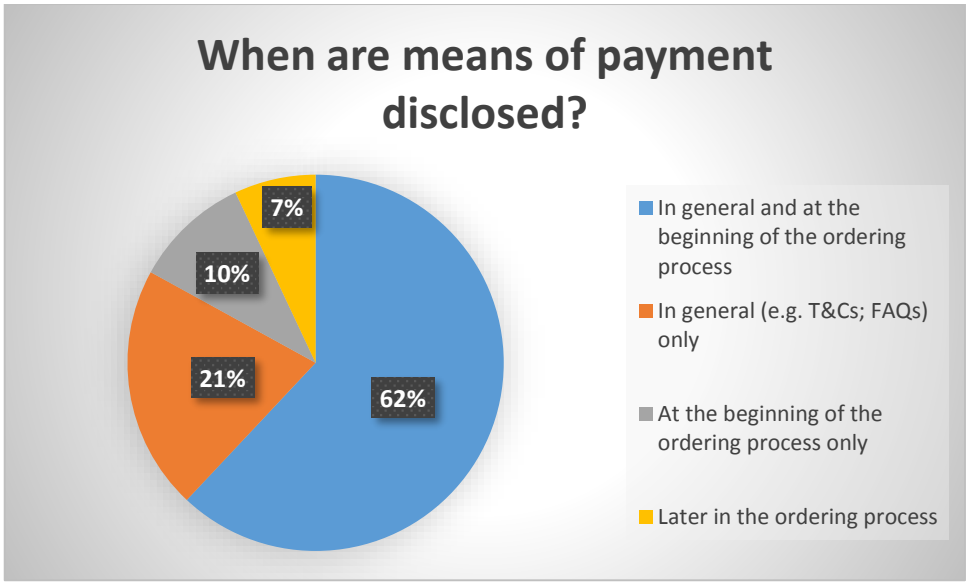


Table 13.3 - Digital Content only



In relation to the provision of information about the means of payment, and the 120 websites surveyed which provided this information, as per Table 14.1 below, 62% of websites provided this information in general and again at the beginning of the ordering process; 21% of websites provided the information in general only (in T&Cs and/or FAQs); another 10% of websites provided the information at the beginning of the ordering process only; while 7% of websites were non-complaint providing the information after the beginning of the ordering process.

Table 14.1 – Goods and Digital Content combined



When goods and digital content sites are compared there are some notable differences (see Table 14.2 and Table 14.3 below) but most significant perhaps is the finding that only 1% of goods sites were non-compliant; whereas 20% of digital content websites were non-compliant by providing information about the means of payment later than at the beginning of the ordering process.

Table 14.2– Goods only

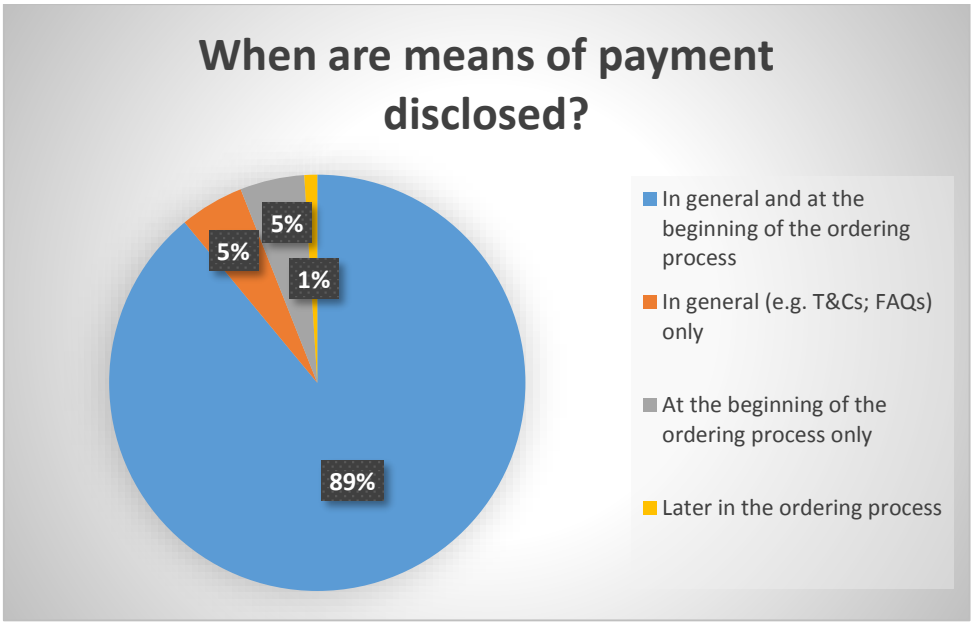
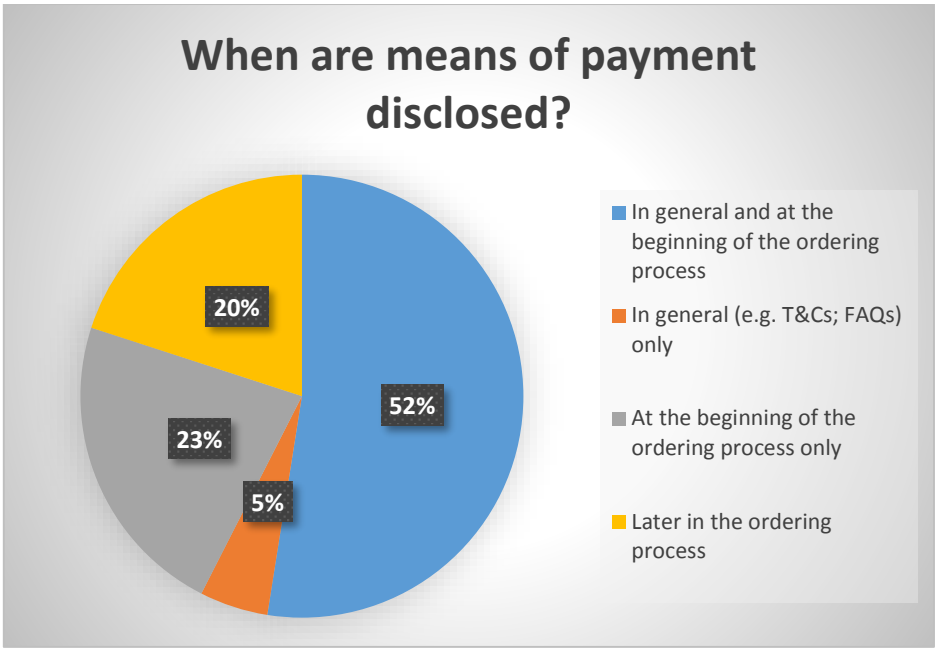


Table 14.3 –Digital Content only



5.7 Redress

Information concerning redress is a requirement of Directive 2011/83 on consumer rights, and also of Directive 2013/11 on ADR and Regulation 524/2013 on ODR.

First, Directive 2011/83 requires the trader to provide three types of specific redress information, but only where applicable: information about the trader's complaint handling policy (para (g)); information about the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject (para (t)); and, information about the methods for having access to that mechanism (para (t)).

Second, further to Directive 2013/11 on ADR, where a trader is committed to using or is obliged to use an ADR entity (or entities) to resolve disputes with consumers, the trader must inform consumers about the ADR entity (or entities), including the relevant websites address/es.[89] This information must be provided in a clear, comprehensible and easily accessible way on the trader's website, where one exists and, if applicable, in the trader's terms and conditions.[90]

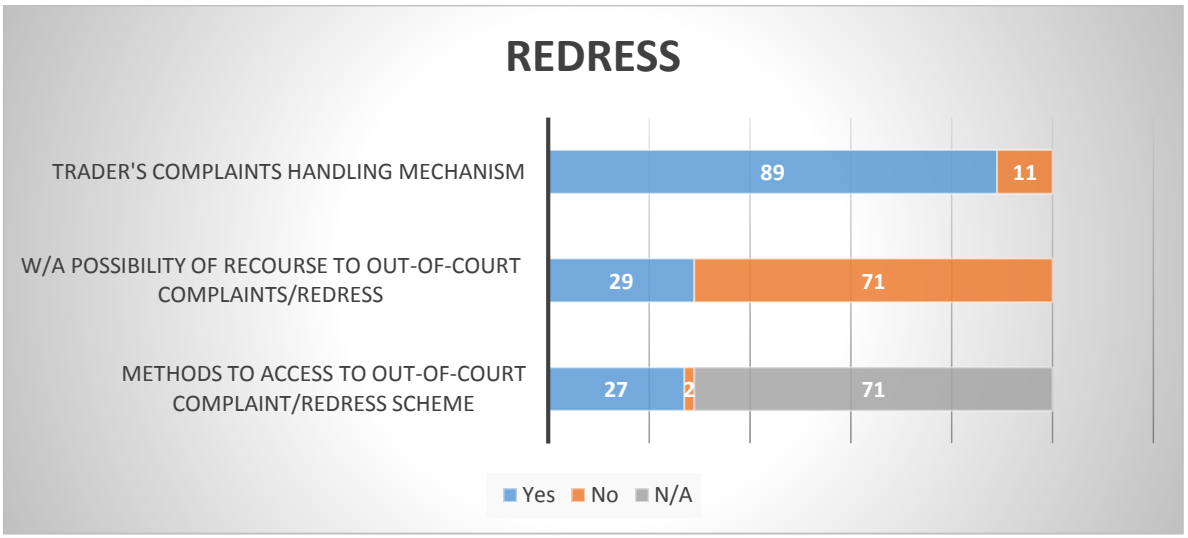
Third, pursuant to Regulation 524/2013 on ODR, all online traders, regardless of whether they use ODR, must provide an easily accessible electronic link to the ODR platform and must state their e-mail

[89] Directive 2013/11 on ADR, Art.13(1).
[90] Directive 2013/11 on ADR, Art.13(2).

address.[91] Moreover, all online traders committed to using or obliged to use ADR must inform consumers about the existence of the ODR platform and about the possibility of using it for resolving their disputes.[92] These traders must also provide an electronic link to the ODR platform on their websites and, if the offer is made by e-mail, in that e-mail. This information must also be provided in the general terms and conditions provided online. [93]

As noted above in relation to Directive 2011/83, of the websites surveyed, 89% of websites made reference to complaints handling. However, in the vast majority of cases (93%) where complaints handling is mentioned on the website, no further details are provided beyond the standard contact details; in only 7% of those websites is a detailed complaints handling policy provided. In relation to out-of-court complaint and redress mechanisms, Table 15.1 below shows, 29% of websites surveyed provided information about the possibility of recourse to out-of-court complaints/ redress schemes; and of the websites surveyed, 27% provided information about the methods for access to an out-of-court scheme; with 2% not providing the relevant information (the remaining 71% of websites did not make reference to an out-of-court scheme in the first place).

Table 15.1 – Goods and Digital Content combined



When goods and digital content websites are compared in relation to the provision of information about redress (see Tables 15.2 and 15.3 below), it is notable that digital content websites performed less well than goods websites, in particular in relation to information about the possibility of recourse

[91] Regulation 524/2013 on ODR, Art.14(1).
[92] Regulation 524/2013 on ODR, Art.14(2).
[93] Regulation 524/2013 on ODR, Art.14(2).

to out-of-court complaints / redress schemes (39.5% for goods; and 7.5% for digital content) and the method to access such schemes (37% for goods and 7.5% for digital content websites).

Table 15.2 – Goods only

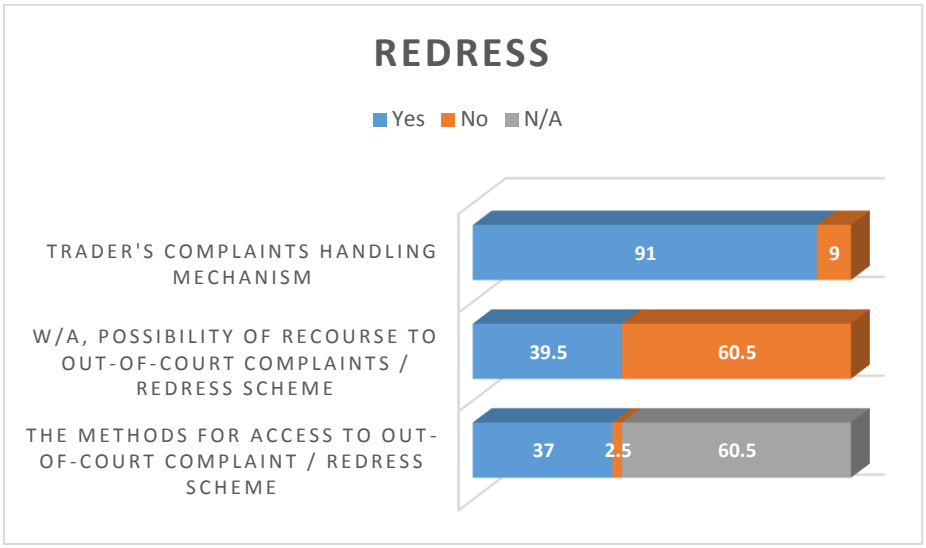
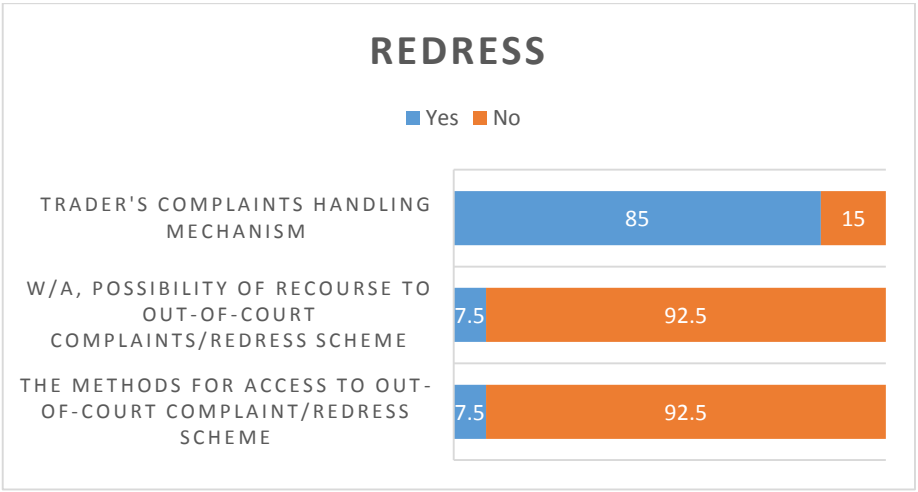


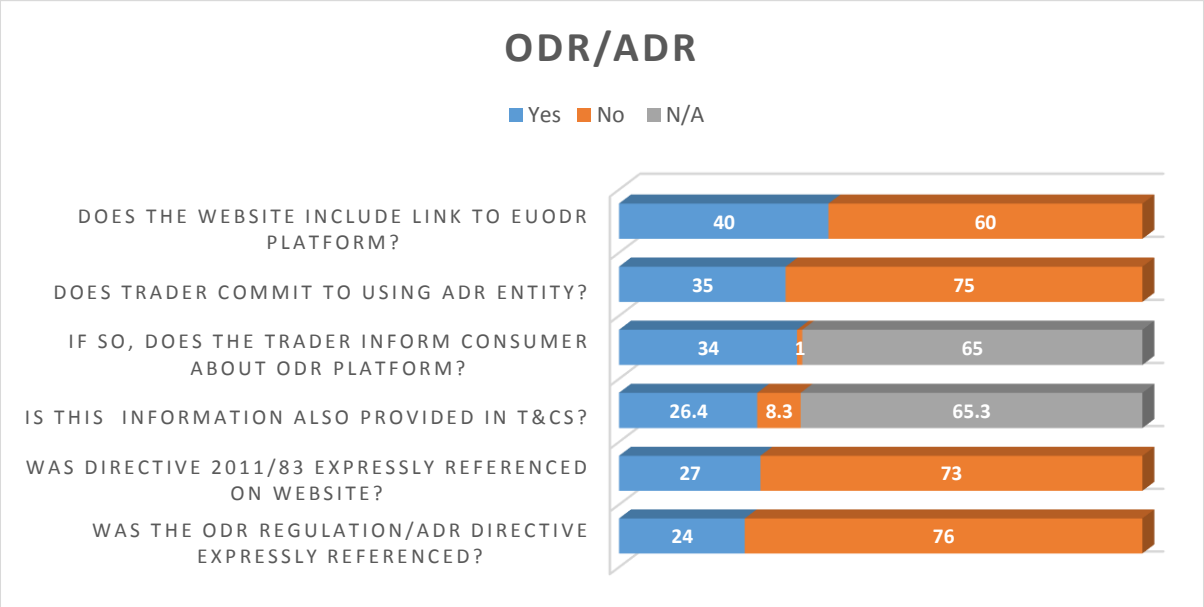
Table 15.2 – Digital Content only



Turning to the information requirements of the ODR/ADR legislative framework, as illustrated in Table 16.1 below, less than half of websites (40%) provide the link to the ODR platform; leaving a significant majority (60%) of websites that do not comply with this legal requirement. Of the websites surveyed, just over one-third (35%) of traders surveyed committed to using ADR, and of those who committed to using ADR, almost all (34%) provided the link to the ODR platform. However, only 26.4% of website surveyed provided this information in their T&Cs, leaving 8.3% of websites failing to comply with the

relevant legislation. It is also interesting to note the number of websites which expressly referred to the relevant legislation. While this is not mandated by the legislation it is a useful means of informing consumers of their legal rights and remedies, and, promoting consumer protection more generally. Of the websites surveyed, 27% of websites expressed referred to Directive 2011/83; while slightly less at 24% of websites referred to the ODR Regulation/ADR Directive.

Table 16.1 – Goods and Digital Content combined



Again, when goods and digital content websites are compared in relation to the provision of information about redress (see Tables 16.2 and 16.3 below), it is notable that digital content websites consistently performed less well than goods websites. For example, in relation to including the link to the EUODR platform: 60.5% of goods websites complied, whereas only 42.5% of digital content websites complied. Again, as regards the trader committing to using ADR: 43% of goods websites gave such a commitment, whereas only 17.5% of digital content websites gave such a commitment. Express reference to relevant legal measures was also more evident on sales websites when compared with digital content websites: Directive 2011/83 was expressly referenced on 39.5% of goods websites and only 2.5% of digital content websites; and similarly, the ODR Regulation/ADR Directive were expressly referenced on 35% of goods websites and only 2.5% of digital content websites.

Table 16.2 – Goods only

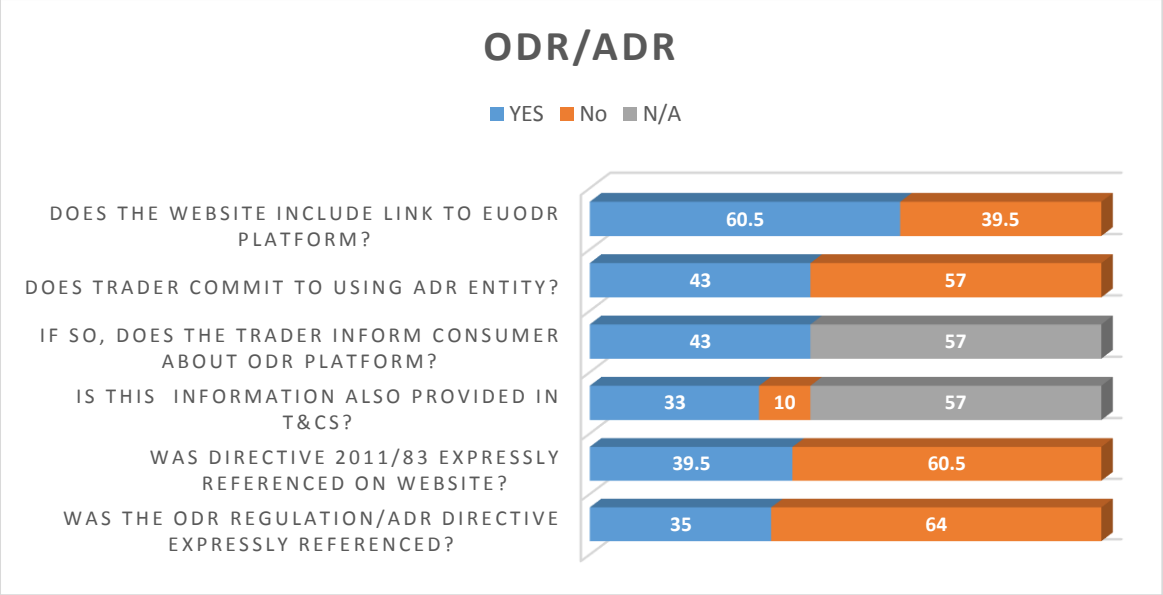
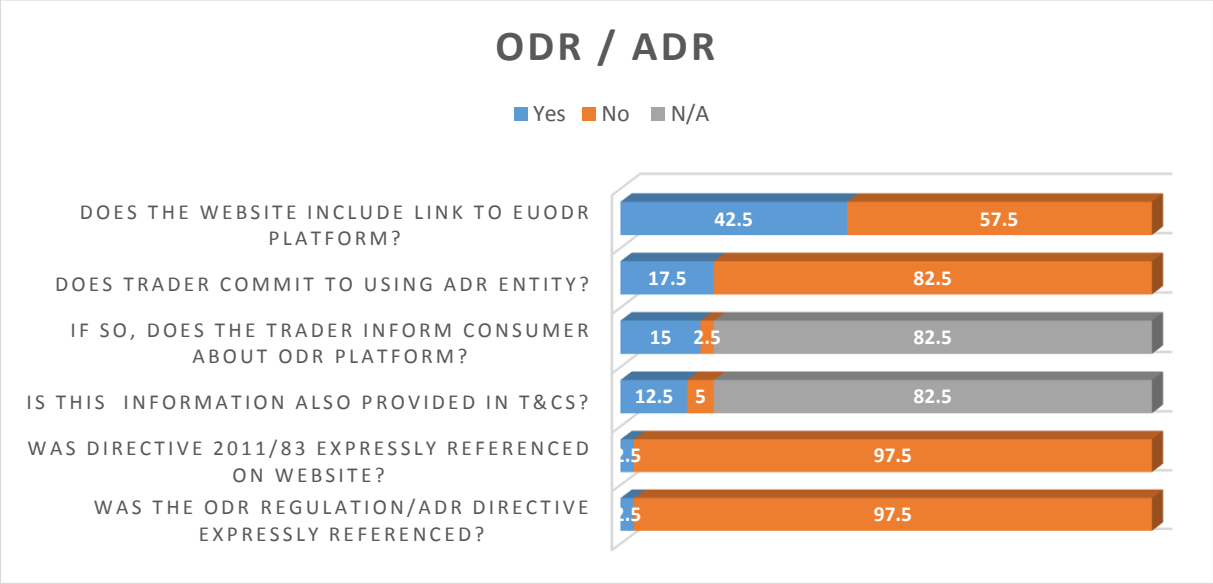


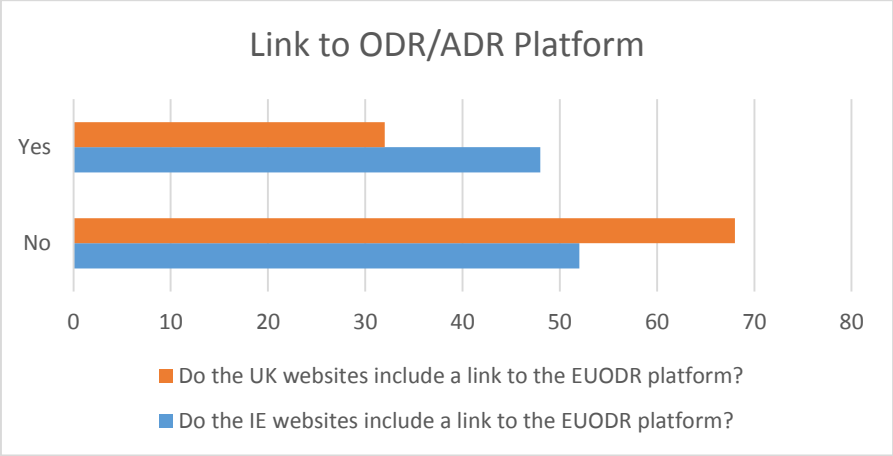
Table 16.3 – Digital Content only



Lastly, we compared some of the findings in relation to redress on a jurisdictional basis, comparing the UK and Irish websites. These jurisdictions adopt quite distinctive approaches in terms of availability of ADR/ODR. In the UK, there are 44 ADR entities across a wide range of sectors available through the ODR platform, while in Ireland there are just 2: Netneutrals.eu is the residual provider (required under the ODR Regulations) while second entity, the Commission for Regulation of Utilities, relates only to the energy sector. They therefore facilitate an analysis of the extent and operation of trader participation in two very different and still EU law compliant legal contexts**.** In relation to providing the EU ODR link on the 121 websites surveyed (whether a trader is committed or required to use ADR or not), 48% of .ie websites provided the link compared to 32% of .uk websites; leaving

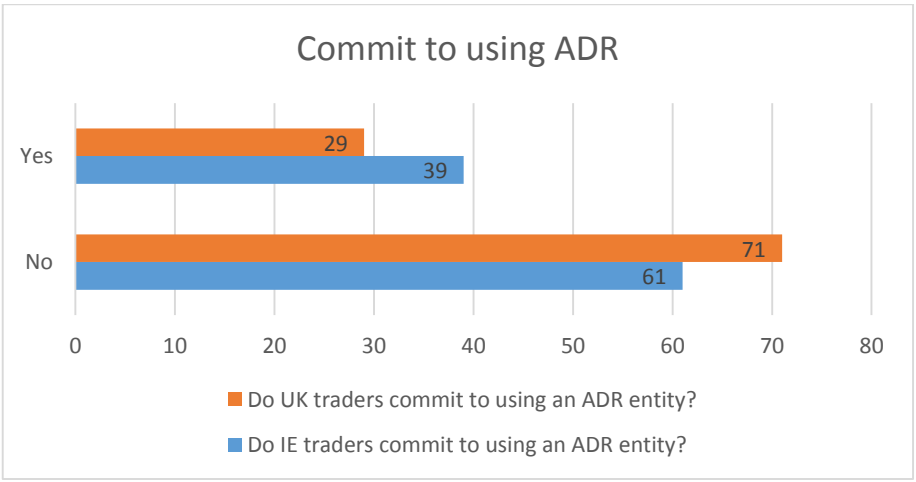
52% of i.e websites and 68% of .uk websites in breach of this information requirement. In this regard, almost half of .ie websites surveyed are compliant with the relevant information requirements when compared with about one-third of .uk websites surveyed (see Table 14 below). Moreover, there was no real difference between the findings in relation to goods websites and digital content websites in this regard.

Table 17 –Goods and Digital Content combined



In terms of whether traders committed on their websites to using ADR, 39% of .ie websites and 29% of .uk websites committed to using ADR; while the majority of website (61% of .ie websites and 71% of .uk websites) did not make such a commitment. Again, the ie. websites perform better than their .uk counterparts, in this regard (see Table 18.1 below). Moreover, of those traders who committed to using ADR, all .ie and .uk traders (100%) provided the link to the EU ODR platform.

Table 18.1 - Goods and Digital Content combined



When goods and digital content websites are compared in relation to a commitment to using ADR (see Tables 18.2 and 18.3 below), there is a significant divergence in findings. In relation to the 81 goods websites surveyed, 46% of .ie websites and 37.5% of .uk websites commit to using ADR; whereas in relation to the 40 digital content websites surveyed, 24% of .ie websites and 10.5% of .uk websites commit to using ADR.

Table 18.2 - Goods only

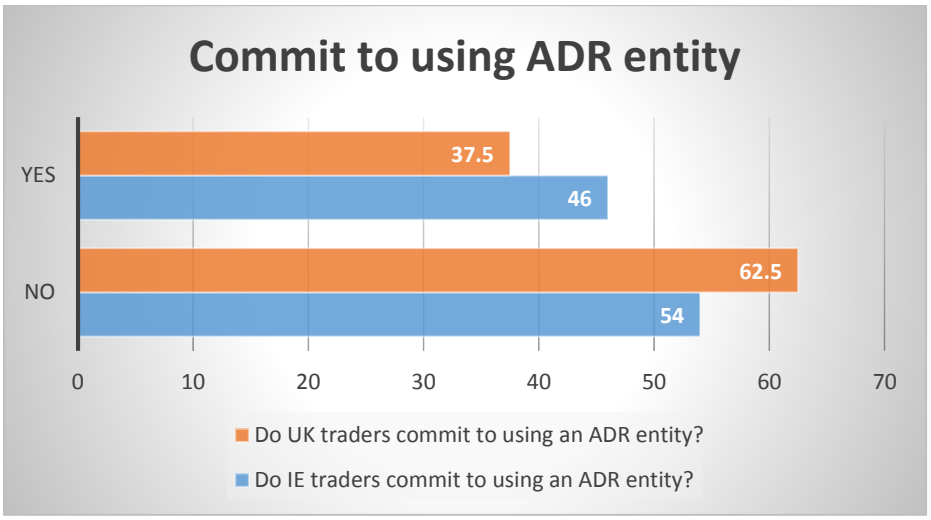
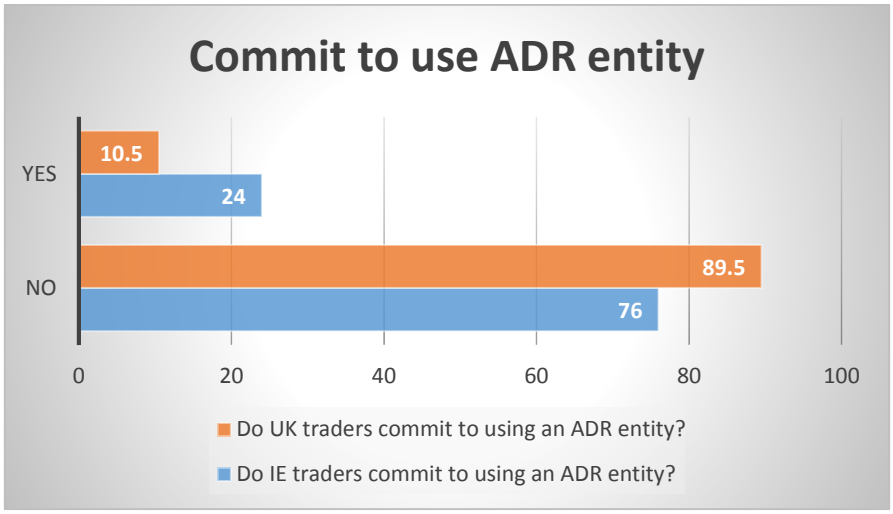


Table 18.1 - Digital Content only



6. Analysis of Research Findings

6.1 Preliminary points

In reviewing the findings outlined here, some preliminary points should be noted. First, the research methodology for this study differs in some respects from other studies presented in Part 3. For this reason, it is important to be careful in drawing comparisons with other studies. The 2005 Study conducted by the authors is methodologically the closest to the Study reported here. Although this study related to Directive 97/7; was restricted to .ie websites; related to goods only; and, is now more than a decade old, it is nonetheless useful in tracing change in the field. Second, the Study compares websites in terms of their compliance with each individual information obligation of the relevant measure; it does not make an assessment of each website in terms of its overall level of compliance. Further, because a number of the information obligations only apply 'where relevant', a lack of information concerning a particular information obligation may not be indicative of non-compliance.

6.2 Lessons in the Detail

One clear finding which emerges from the Study reported here is that many of the CRD legal requirements are uniformly the subject of very high (and in some cases full) compliance. The Study reported here found that 100% of websites provided information to consumers about the characteristics of the goods/digital content. The replicates the authors' earlier (2005) Study and is in line with the CRD Evaluation where a mystery shopping study which found that consumers received a fair to a great amount of information about the characteristics of the product, although there were differences at individual Member State level. Information about the means of payment was also very high at 99% of all websites surveyed. The provision of this information is of course in the trader's (as well as the consumer's) interest. Without this basic information, consumers will not engage in online commerce. Thus, it is probably more accurate to regard these high levels of compliance as market (rather than regulation) driven.

Compliance levels with information in respect of the trader and contact information is also very high, with this Study recording 87-100% compliance levels across the different information requirements. This is largely in line with the findings of the authors' 2005 Study of .ie websites although far higher than the 2015 website sweep which found incomplete or unclear details about the trader in 34% of websites checked and the Commission's CRD Evaluation where 38% of consumer did not get much information about the trader. This would suggest that there is a wide variation in compliance levels across member states. In terms of contact, a positive feature which this Study identifies is the

development of new / better forms of communication with consumers e.g. online query forms; online chat forums. This might be expected to increase in the future and should, hopefully, reduce the need for consumers to have to engage in redress processes. Once again, the market is likely to be an important driver in terms of whether/how quickly this happens.

The Study also found 100% compliance with the requirement to provide information about price and all additional freight, delivery, etc. costs, where applicable, as well as high levels of compliance around arrangement for payment and delivery (from 86% - 97%). Again, this reflects similar high levels of compliance in the Commission's CRD Evaluation. As with details of the characteristics of the goods/digital content, the provision of this kind of information provision is market driven; consumers demand to know the price before they purchase. The provision of information was noticeably absent in respect of less attractive information, such as what might happen in the event of supplier insolvency or loss through fraud/hacking. There are currently no legal obligations in respect of this kind of information; however, it is important for consumers to know and the lack of such information raises the question of whether legal obligations to provide this information should be imposed on traders.

This Study found high levels of compliance across a range of information obligations relating to withdrawal, with a majority of information obligation concerning withdrawal ranging between 91-99% compliance. This is in contrast to European-wide studies, with the 2015 Website Sweep finding irregularities on 63% of websites examined, with websites missing or providing unclear or incomprehensible information on the right of withdrawal from a transaction and the Commission's CRD Evaluation also finding information on withdrawal to often be missing (e.g. only about half of traders provided information on the 14-day period for withdrawal in respect of goods). Given the relative sizes of the studies and the different methodologies it is not clear whether this Study indicates higher compliance levels in the UK and Ireland or indeed that compliance levels are rising more generally. One notable feature of this Study, however, is that it indicated no trader take-up whatever on the Model Instructions and limited (29%) usage of the Model Form which were first introduced in Directive 2011/83 on consumer rights. The aim of these model instructions and form had been to make compliance easier for traders by setting out all the elements of the withdrawal right in one place but clearly it has not impacted significantly, in practice.

In contrast to the low uptake on the Model Form, the information obligations around the Article 8 formal requirements, also first introduced in Directive 2011/83, elicited a more compliant response from traders with compliance levels ranging from 83- 99% of websites. Such findings are in line with

the CDR Evaluation which found in relation to the obligation to explicitly acknowledges that an order implies an obligation to pay that 'almost all' websites examined were found to be complaint.

While compliance was generally very high, especially when driven by market reality, as well as legal forces, compliance is much lower with respect of two aspects of the legal framework. First, there were low levels of compliance with the requirement in respect of legal guarantees and goods websites, with only 16% of websites providing the necessary information. Second, compliance levels around complaints and redress mechanisms are low. Although 89% of websites included a reference to complaint handling mechanisms, only 7% provided detail on this. This is line with the Commission's CRD Evaluation which found consumers did not receive much information about accessing out of court complaint and redress mechanisms. Compliance levels were much lower in respect of information regarding out-of-court redress and ODR (26.4% - 40%). This reflects also the findings of the Commission's 2017 Website Study. The low compliance rate may reflect the fact that these obligations derive from the ODR Regulations rather than the CRD, with which traders (and their advisors) may be less familiar. It may also reflect a lack of market impetus to encourage the provision of this kind of information.

Digital Content

A couple of points in relation to digital content are worthy of separate mention. First, specific information requirements around functionality and interoperability of digital content were introduced in Directive 2011/83 and became operative from 13 June 2014.[94] When the details of functionality were examined a wide range of results were discovered. Compliance levels were high in relation to limitations on reuse (92.5%); the method of providing the content (87.5%) and the language of the content (82.5%), but were very low in relation to the need for extra purchases (2.5%); and information about tracking or personalisation (25%). A lot of information about functionality occupied a more middle ground between 30 – 65% compliance. Similarly, information about interoperability occupied the middle ground, with the highest level of compliance reaching 47.5% of websites surveyed in relation to information about the operating system. And so, the higher levels of compliance were to be found around those areas where arguably the traders have a commercial interest in disclosing the information (e.g. limitations on reuse being the highest at 92.5%) but otherwise, there is significant room for improvement.

[94] Directive 2011/83, Art 28.

Second, when goods websites are compared with digital content websites it is interesting to note where the findings converge (both in relation to high and low levels of compliance) and diverge. For example, there is a high degree of convergence between goods and digital content websites in relation to high levels of compliance around information about the goods/digital content (both 100%); the identity of the trader (both 100%); aspects of price, payment, and delivery (e.g. both 100% compliant re the total price; 79% of goods websites and 100% of digital content websites were compliant re arrangements for payment; 100% of goods websites and 90% of digital content websites were compliant re arrangements for delivery); and the right of withdrawal (goods websites ranged in compliance from 82.7% - 99% of websites, and digital content websites ranged in compliance from 67.5% - 92.5%). At the same time, there is a high degree of convergence between goods and digital content websites in relation to lower levels of compliance around the use of the Model Withdrawal Form (30% of digital content websites and 28% of goods websites used the Form). The Model Withdrawal Form is a novel feature of Directive 2011/83 for both goods and digital content websites and so this may explain, in part, the lower levels of compliance however, the reasons for the convergence around high levels of compliance are not so obvious.

The findings in relation to goods and digital content diverge in a number of areas, with goods websites generally performing better than digital content websites. In particular, as noted above, while compliance levels in relation to redress are generally poor across the board, digital content websites are notably less complaint and less engaged with ADR than goods websites. For example, while 60.5% of goods websites provide the link to the ODR platform, only 42.5% of digital content websites do the same.

Final Remarks

It is important to be aware of the limitation of this Study: the sample size is small; its focus is on two jurisdictions; and the survey examined websites selling goods and digital content only: service contracts and utility contracts were excluded. Nonetheless, it would seem that compliance levels with information obligations are improving in all but a small number of areas. This might be attributable, in part, to the fact that pre-contract information obligations have been part of the EU legal landscapes for the best part of twenty years in relation to the distance selling of goods. This conclusion may be supported by our findings of lower compliance levels in relation to information about functionality and interoperability of digital content under Directive 2011/83, and information about complaints and redress, including those imposed by the ADR/ODR framework, all of which are newer additions to the regulatory framework. A similar response may be seen in relation to the underwhelming trader

engagement with some of the more innovative features of Directive 2011/83, such as the Model Withdrawal Form and Model Instructions.

Appendix A

Website Survey Form – Part 2

No: _____

E-Commerce, Distance Contract & ADR Information Website Survey

1. Date of Survey: _____

   - Duration of survey

2. URL Address of the website: _____

3. Does the website sell:

Goods	☐
Digital content – once-off	☐
Digital Content – on-going/services	☐

Comment: (i.e. type of product – in accordance with list)

What item was ordered?

	Yes	No	N/A
4. Are contract terms and conditions made available?	☐	☐	
If yes: are they accessible from:			
Home page	☐		
Every page	☐		
At point of placing order	☐		
Are T&C incorporated by:			
Click wrap	☐		
Browse wrap	☐		

	Yes	No	N/A
Directive 2011/83 - Art 6			
5. Is the following information provided on the website:			
(a) the main characteristics of the goods or digital content	☐	☐	
(b) the identity of the trader	☐	☐	
(c) the geographical address at which the trader is *established* and	☐	☐	
• the trader's telephone number,	☐	☐	
• fax number and	☐	☐	
• e-mail address,	☐	☐	
• online messaging/query form	☐	☐	
• online chat	☐	☐	
• Other: specify:	☐	☐	
where applicable, the geographical address and identity of the trader on whose behalf the trader is acting	☐	☐	☐
(d) if different from the address provided in accordance with 5(c), the geographical address of the *place of business* of the trader	☐	☐	☐
Where applicable, the geographical address of the *place of business* of the trader on whose behalf the trader is acting	☐	☐	☐
(e)			
(i) the total price of the goods or services inclusive of taxes, or	☐	☐	☐
where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated,	☐	☐	☐
(ii) where applicable, all additional freight, delivery or postal charges and any other costs	☐	☐	☐
or			
where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable	☐	☐	☐
(f) …			
(g1) arrangements for payment			
• information as to time of payment	☐	☐	
Goods only: on placing order ☐			
Goods only: On accepting order ☐			
Goods only: On despatch ☐			

	Yes	No	N/A
Goods only: on delivery ☐ Digital Content only: periodic, follow free trial ☐ Digital Content only: periodic, ☐ Digital Content only: once-off ☐			
• use of https domain	☐	☐	
• presence of a security symbol on screen	☐	☐	
• information on the technological security of payment	☐	☐	
• information as to consumer's legal protection should credit card fraud occur	☐	☐	
• information as to consumer protection in the case of supplier insolvency	☐	☐	
(g2) arrangements for delivery			
Goods only: Trader's undertaking as to time of delivery	☐	☐	
Goods only: Tracking option	☐	☐	
Digital Content only: e.g. streaming / down-loading	☐	☐	
Comment:			
(g3) trader's complaint handling policy	☐	☐	
If so is there: A detailed complaint handling policy ☐ or Are customers simply told to refer complaints to trader ☐			
(h) where a right of withdrawal exists			
Does the website use the Model Instructions on Withdraw (Annex 1(a))?	☐	☐	
If no, does website provide information on the following:			
• the conditions consumer's duty to inform consumer's duty to return (goods only) consumer's liability for diminished value(goods only)	☐ ☐	☐ ☐	
• time limit	☐	☐	
State time in days:			
Less than 14 days ☐ ` (Within) 14 days ☐ More than 14 days ☐			
If more than 14 days, how many days: _____			

	Yes	No	N/A
• procedures for withdrawal	☐	☐	
In particular, does the website provide information on:			
Unequivocal statement of withdrawal ☐ Mode of return (goods only) ☐ Time of return (goods only) ☐ Other procedural requirements ☐			
Does website use Model Withdrawal Form (Annex 1(b))?	☐	☐	
(i1) who bears the cost of returning the goods in case of withdrawal	☐	☐	
Trader's cost ☐ Consumer's cost ☐			
Comment on any variation:			
(i2) the cost of returning the goods where the goods by their nature cannot normally be returned by post	☐	☐	☐
(j) …..			
(k1) the circumstances under which the consumer loses his right of withdrawal (under Art. 16)	☐	☐	☐
(K2) where there is no right to withdraw (see Art 16) a statement that the consumer will not benefit from a right of withdrawal	☐	☐	
(l) the existence of a legal guarantee of conformity (goods only)		☐	☐
(m) the existence and the conditions of:			
after sale customer assistance	☐	☐	
after-sales services	☐	☐	
commercial guarantees	☐	☐	
(n1) the existence of codes of conduct	☐	☐	
(n2) how copies of code can be obtained	☐	☐	☐
(o) the duration of the contract or if the contract is of indeterminate duration or is to be extended automatically, conditions for terminating the contract	☐	☐	☐
(p) the minimum duration of the consumer's obligations under the contract	☐	☐	☐

	Yes	No	N/A
(q) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader	☐	☐	☐
(t1) the possibility of having recourse to an out-of-court complaint and redress mechanism	☐	☐	
Is the recourse internal to the trader ? ☐ Or, is an external body utilised? ☐			
(t2) the methods for having access to the out-of-court complaint mechanism	☐	☐	☐

For digital content only

(r) the functionality, including applicable technical protection measures,

1) The language of the content	☐	☐	
2) The method of providing the content(e.g. streaming, online, one-off downloading, access to download for a specified time)	☐	☐	
3) For video or audio files: the playing duration ;	☐	☐	☐
4) For downloadable files: the file type	☐	☐	☐
and file size;	☐	☐	☐
5) Commitment or no commitment (by the trader or third party) to maintain or update the product;	☐	☐	
6) Any conditions (excluding interoperability), such as:			
a. tracking / personalisation;	☐	☐	☐
b. the need for an internet connection to use the product	☐	☐	☐
c. other technical requirements (such as minimum download and upload speed);	☐	☐	☐
d. the need for other users to have specific software installed (e.g. for communication software).	☐	☐	☐
7) Any limitations on the use of the product:			
a. limits on the number of times, or the length of time in which a digital product can be watched, read or used;	☐	☐	☐
b. limits on the reuse of content, for purposes such as private copies;	☐	☐	☐
c. restrictions based on the location of the consumer's device;	☐	☐	☐
d. any functionalities that are conditional on additional purchases, such as paid content, club memberships or additional hardware or software.	☐	☐	☐

	Yes	No	N/A
(s) any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of			
Interoperability can be described by giving information on devices that the content can be used with; **where applicable** this should include information about:			
• the necessary operating system (incl version)	☐	☐	☐
• and additional software, (incl version number)	☐	☐	☐
• and hardware (e.g. processor speed /graphics card).	☐	☐	☐

Directive 2011/83 - Art 8

6. At the point when consumer is placing his order, does the website explicitly acknowledge that the order implies an obligation to pay (such as statement 'order with obligation to pay' or 'order and pay now) ? ☐ ☐

What phrase is used:

Further Coimment:

7. Does the website indicate whether any delivery restrictions apply ☐ ☐

If yes, at what stage:

- general website ☐
- before/at beginning of ordering process ☐
- at a later stage in ordering process ☐

Does the website indicate which means of payment are accepted? ☐ ☐

If yes, at what stage:

- general website ☐
- before/at beginning of ordering process ☐
- at a later stage in ordering process ☐

ODR Regulation

8. Does the website include **a link** to the EU ODR Platform? ☐ ☐

9. Does the trader commit to using an ADR entity? ☐ ☐

If so: does trader inform consumers about the ODR platform and the possibility of using the ODR platform for resolving their disputes. ☐ ☐

Is this information also provided in the general terms and conditions? ☐ ☐

10. Was the following legislation expressly referenced?
    - Directive 2011/83 ☐ ☐
    - ODR Regulation/ ADR Directive ☐ ☐

Appendix B

List of Websites Surveyed

Goods (81 websites in total)

30 websites: clothing + footwear, etc

1. www.brownthomas.com
2. www.harveynichols.com
3. www.selfridges.com
4. www.elverys.ie
5. www.jdsports.ie
6. www.asos.com
7. www.riverisland.com
8. www.topshop.com
9. http://www2.hm.com/en_ie/index.html
10. http://www.boohoo.com/
11. https://www.missguided.eu/
12. http://vavavoom.ie/
13. https://www.prettylittlething.com/
14. www.oasis.com
15. www.newlook.com
16. www.office.co.uk
17. www.thetiestore.co.uk
18. www.store.manutd.com
19. www.tmlewin.co.uk
20. www.premiersport.co.uk
21. www.dunelondon.com
22. https://www.skechers.com/en-gb/
23. www.houseoffraser.col.uk
24. www.grenson.com
25. www.arnotts.ie
26. www.shop.irishrugby.ie
27. http://www.clarks.co.uk/
28. www.dunnestores.com
29. ie.sportsdirect.com
30. https://www.carraigdonn.com

10 websites: books, magazines (hard copy)

31. www.waterstones.com
32. www.nationalgeographic.com
33. www.dauntbooks.com
34. www.foyles.co.uk
35. www.betterworldbooks.co.uk
36. www.poolbeg.com
37. www.schoolbook.ie
38. www.highstreetbooks.ie
39. www.whsmith.co.uk
40. www.kennys.ie

10 websites: cosmetics

41. www.beautybay.com
42. www.feelunique.com
43. www.boots.co.uk
44. www.fragrancedirect.co.uk
45. www.costeticsfairy.co.uk
46. www.inglot.ie
47. www.makeupshop.ie
48. https://pharmacystore.ie/
49. www.lloydspharmacy.ie
50. www.magees.ie

8 websites: white goods

51. www.appliancesdirect.ie
52. www.harveynorman.ie
53. www.soundstore.ie
54. www.currys.ie
55. www.did.ie
56. www.maplin.co.uk
57. www.electricaldiscountuk.co.uk
58. www.hughes.co.uk/

9 websites: food and drink

59. www.harrods.com
60. www.fortnumandmason.com
61. www.asda.com
62. https://www.sainsburys.co.uk/
63. www.veenas.com
64. www.groceries.ie
65. www.tesco.ie
66. www.shopsupervalu.ie
67. https://www.organicsupermarket.ie/
68. https://www.evergreen.ie

13 sites furniture / toys / miscellaneous

69. www.dfs.ie
70. www.debenhams.ie
71. https://www.caseys.ie/
72. www.lauraashley.com
73. www.next.co.uk
74. www.habitat.co.uk
75. http://www.smythstoys.com/ie/en-ie/
76. https://www.bargainmax.co.uk/ *(e-commerce award winner!!!)*
77. www.vjhomefitness.com
78. www.hsamuel.co.uk
79. http://www.pennylaneflowers.co.uk/
80. http://www.richmondsilver.co.uk/
81. http://www.rose&grey.co.uk/

Digital Content

Film and video

82. www.netflix.com/ie
83. https://www.talktalktv.co.uk/#/
84. https://www.nowtv.com/ie
85. https://www.curzonhomecinema.com/
86. https://www.skystore.com/

Music

87. www.spotify.com/ie
88. https://ie.napster.com/
89. https://bleep.com/
90. https://www.deezer.com/en/
91. https://soundcloud.com/
92. ie.7digital.com

Games

93. https://www.smythstoys.com/ie/en-ie/video-games-and-tablets/digital-downloads/c/SM060440
94. www.game.co.uk
95. https://store.playstation.com/en-ie/home/games
96. https://www.nintendo.co.uk/
97. www.gamestop.ie
98. www.g2a.com

Books

99. www.amazon.co.uk
100. https://www.kobo.com/ie/en/category/ireland
101. https://www.hive.co.uk/
102. https://www.booksireland.org.uk/
103. https://www.oxfordowl.co.uk/

Newspapers and magazines

104. https://www.irishtimes.com/
105. https://www.telegraph.co.uk/subscriptions/
106. http://guardian.newspaperdirect.com/epaper/viewer.aspx
107. https://subscription.prospectmagazine.co.uk/FULLMUG/prospect-magazine
108. www.newstatesman.com/new-statesman-pdf-edition
109. https://www.thephoenix.ie/product/online-subscription-2/

Software (OS, anti-virus)

110. https://www.microsoft.com/en-gb/store/b/home
111. https://www.apple.com/ie/
112. ie.mcafeestore.com/
113. https://www.eset.ie/
114. https://ie.norton.com/
115. http://www.avg.com/en-gb/homepage#pc

Educational resources

116. https://www.123maths.co.uk/
117. https://www.focus-education.co.uk/

118. https://www.prim-ed.com/
119. https://www.earlylearninghq.org.uk/
120. https://www.teachitscience.co.uk
121. https://www.interactive-resources.co.uk