

The (Proposed) Transposition Of The Digital Content Directive In The Netherlands

by **Marco B.M. Loos***

Abstract: The Dutch bill for the transposition of the Digital Content Directive, recently submitted to the Dutch parliament, will create a new Title in the Civil Code dealing with digital content and digital services contracts. In line with Dutch legislative tradition, the bill is closely aligned with Dutch (consumer) sales law, which is amended accordingly for the transposition of the Sale of Goods Directive. The most impor-

tant feature of the new title on digital content and digital services contracts is the 'open period' during which a lack of conformity may arise: as long as the consumer could reasonably expect that the digital content or service would remain to be in conformity, any lack thereof entitles the consumer to a remedy. In this paper, the Dutch system and the implementation of the directive will be explained.

Keywords: digital content; digital services; Dutch law; consumer sales law; conformity; remedies

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A. Introduction

1 The bill for the transposition of the Digital Content Directive (hereafter also: DCD)¹ has been submitted to the Dutch parliament by Royal Message of 16 February 2021.² Because of the general elections in The Netherlands, which were held from 15-17 March

2021, the bill has not yet been discussed in parliament. In this contribution, I will therefore primarily focus on the bill and the accompanying explanatory memorandum. I will refer to the provisions of the bill as Articles of the Dutch Civil Code (hereinafter: BW, as abbreviation of *Burgerlijk Wetboek*), followed by '(draft)'. The bill is almost a carbon copy of the preliminary draft, which was made available for consultation on the Internet on 20 December 2019.³ For this reason, where relevant, I will also refer to the responses to the consultation draft. Unfortunately, apart from the reactions from the side of businesses, the government has chosen to ignore all of these reactions in the explanatory memorandum to the bill.⁴ In addition, the opinions of the Dutch

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1 Directive (EU) 2019/770, OJ 2019, L 136/1.

2 *Kamerstukken II* 2020/21, 35 734, nos. 1 (Royal Message), 2 (bill) and 3 (explanatory memorandum). The parliamentary documents are available (in Dutch) via at <https://zoek.officielebekendmakingen.nl/dossier/35734>.

3 The consultation draft, as well as the consultation memorandum are available (in Dutch) via https://www.internetconsultatie.nl/verkoop_goederen_levering_digitale_inhoud (last accessed on 30 March 2021).

4 In the explanatory memorandum the government mentions it has received 28 reactions to the consultation draft,

Advisory Board on Regulatory Burden (*Adviescollege toetsing regeldruk*, ATR, which is an independent and external advisory body that advises government and Parliament on how to minimize regulatory burdens) and the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*, AP, the regulator dealing with personal data) have been published as an annex to the explanatory memorandum to the bill, as is the Implementation and Enforcement Test by the Authority for Consumers and Markets (*Autoriteit Consument en Markt*, ACM, the regulator in the area of consumer and competition law). Where relevant, I will also refer to these reactions.

- 2 Even though this paper focuses on the transposition of the Digital Content Directive into Dutch law, it also touches upon the parallel transposition of the Sale of Goods Directive.⁵ This is done for three separate reasons. First, the two directives have been discussed and adopted in parallel, and the texts of the two directives have been carefully aligned. Second, the bill makes clear that the two directives will be transposed into Dutch law by the same Act, and that the two legal instruments will be regulated in Book 7 BW, with the provisions transposing the Digital Content Directive placed directly after the provisions governing sales contracts. Thirdly, under the law predating the transposition of the two directives, the notion of consumer sales contracts includes some digital content contracts. A proper understanding of the transposition of the Digital Content Directive into Dutch law therefore requires that some attention is paid to the transposition of the Sale of Goods Directive as well.

B. Digital content contracts prior to the transposition of the Digital Content Directive

- 3 In Dutch law, contracts whereby the digital content is supplied to a consumer on a durable medium, such as a memory stick, a CD, or a DVD have since long been classified as consumer sales contracts. In 2012, in a business-to-business case, the Dutch Supreme Court confirmed that sales law could be applied by analogy to the supply of standardized software, irrespective whether that software was supplied on a durable medium.⁶

²⁰ of which (with permission of the person or institution that responded) have been published online, cf. *Kamerstukken II 2020/21*, 35 734, no. 3, p. 20-21.

⁵ Directive (EU) 2019/771, *OJ* 2019, L 136/28.

⁶ Hoge Raad 27 april 2012, ECLI:NL:HR:2012:BV1301 (Beeldbride).

- 4 That state of affairs was explicitly acknowledged by the legislator in 2013 when a bill transposing the Consumer Rights Directive⁷ was submitted to parliament.⁸ On that occasion, the government proposed to amend Art. 7:5 BW. That article contains the definition of a consumer sales contract and provides for explicit analogous application of consumer sales rules to some other types of contracts. In the bill, the government proposed to add digital content contracts in the list of contracts to which the analogous application of consumer sales law applies in order to codify the 2012 decision of the Supreme Court for consumer contracts.⁹ In the senate, this was met with opposition concerning streaming contracts, both for systematic reasons and because the inclusion of digital content contracts within the scope of consumer sales law was not required for a proper transposition of the Consumer Rights Directive.¹⁰ In response, the government argued that the Supreme Court's decision had already clarified that consumer sales law could be applied to digital content contracts, but only where this was proper for the contract in question. This implies that where the nature of the contract that is at stake does not lend itself for the application of consumer sales law, consumer sales rules do not apply.¹¹ According to the government, the amendment of Art. 7:5 BW only served to clarify that the analogous application of consumer sales rules would *not* apply to the obligation to supply the digital content itself, the remedies for a complete failure to supply, and the transfer of risk – as supposedly was required by the Consumer Rights Directive.¹² Apart from these specific provisions, nothing stands in the way of the application of consumer sales rules to digital content that is supplied to a consumer via a *download*. In the case of *streaming*, the provisions on conformity, remedies for lack of conformity, the duty to notify a lack of conformity, and the rules on prescription of a claim based on a lack of conformity lend themselves for analogous application in the case where at the moment of the consumer's first attempt to access the digital content the agreed digital content is not available.¹³ However, these provisions would not offer a proper solution for streaming contracts where after a period of time the consumer no *longer*

⁷ Directive 2011/83/EU, *OJ* 2011, L 304/64.

⁸ *Kamerstukken II 2012/13*, 33 520, no. 3, p. 19.

⁹ *Kamerstukken II 2012/13*, 33 520, no. 3, p. 57.

¹⁰ *Kamerstukken I 2013/14*, 33 520, no. B, p. 2-4.

¹¹ *Kamerstukken I 2013/14*, 33 520, no. C, p. 3.

¹² *Kamerstukken I 2013/14*, 33 520, no. C, p. 2.

¹³ *Kamerstukken I 2013/14*, 33 520, no. C, p. 4.

has proper access to the promised digital content. In such a case, the applicable remedies would have to be determined on the basis of general contract law.¹⁴ Because of the opposition in the senate, the government agreed to later restrict the application of the consumer sales provisions to sales-like digital content contracts. Streaming contracts would then again only be governed by general contract law, but according to the government this would not lead to a decrease in consumer protection for such contracts.¹⁵ The Act transposing the Consumer Rights Directive and expanding the application of consumer sales law to all digital content contracts was adopted on 12 March 2014¹⁶ and applied to contracts concluded as of 13 June 2014.¹⁷

- 5 The bill to restrict the application of consumer sales law to sales-like contracts was submitted to Parliament on 10 November 2014.¹⁸ In the Explanatory Memorandum, the government indicated that the analogous application of consumer sales law would be limited to contracts whereby digital content is not provided on a durable medium but is individualized in such a manner that the user of that digital content can exercise physical control. Streaming contracts would thus indeed be excluded from the scope of consumer sales law. However, the government noted, where the streaming contract also offers the possibility to download and store digital content on the consumer's computer, this constitutes individualized content and (temporary) physical control. Such a contract would then be considered a consumer sales contract.¹⁹
- 6 The government denied that the proposed restriction of the scope of consumer sales law would leave consumers out in the cold: consumer protection would be provided through, in particular, the provisions of Section 6.5.2B BW (the provisions implementing the Consumer Rights Directive) and of Section 6.5.3 BW (the provisions implementing the Unfair Contract Terms Directive²⁰)²¹ and the provisions of general contract law, for instance with

regard to the consequences of non-performance.²² The government was of the opinion that there was no reason to introduce specific provisions regulating streaming contracts as a nominated contract in the Dutch Civil Code as the Consumer Rights Directive did not call for such regulation and the provisions of general contract law (including the provisions implementing the directives mentioned) would suffice.²³ The act was adopted without controversy and applies as of 19 June 2015.²⁴

- 7 The provisions on consumer sales currently do not apply to the supply of 'free' digital content as a sales contract presupposes the payment of a price *in money*.²⁵ The same is true for the provisions transposing the Consumer Rights Directive, as the notion of a consumer sales contract requires, once again, payment of a price in money,²⁶ and so does the definition of a services contract, which expressly refers to any other contract than a consumer sales contract, whereby the trader undertakes to provide a service and the consumer to pay a price.²⁷ The consultation draft of the Act transposing the recently adopted Modernization Directive²⁸ will expressly extend the scope of this section to include also contracts whereby the trader provides or undertakes to provide digital content or digital services and the consumer provides or undertakes to provide personal data.²⁹ Until this bill and the bill transposing the Digital Content Directive have been adopted, only general contract law applies to free digital content and free digital services. This includes the application of the provisions implementing the Unfair Contract Terms Directive in Section 6.5.3 BW, which is not restricted to contracts whereby a payment in money is agreed upon. In my view, the same is true for the provisions transposing the Unfair

14 *Kamerstukken I* 2013/14, 33 520, no. C, p. 4-5.

15 *Kamerstukken I* 2013/14, 33 520, no. E, p. 2.

16 Wet van 12 maart 2014, *Stb.* 2014, 140.

17 See Art. X of this Act.

18 *Kamerstukken II* 2014/15, 34 071, nos. 1 and 2.

19 *Kamerstukken II* 2014/15, 34 071, no. 3, p. 3.

20 Directive 1993/13/EEC, *OJ* 1993, L 95/29.

21 *Kamerstukken II* 2014/15, 34 071, no. 3, p. 3.

22 *Kamerstukken II* 2014/15, 34 071, no. 5, p. 4-5.

23 *Kamerstukken II* 2014/15, 34 071, no. 5, p. 6.

24 Act of 4 June 2015, *Stb.* 2015, 220.

25 See Art. 7:1 BW; see also Asser/Hijma 7-I (2019) no. 393.

26 See Art. 6:230g under (c) BW.

27 See Art. 6:230g under (d) BW.

28 Directive (EU) 2019/2161, *OJ* 2019, L 328/7.

29 See Art. I under F of the consultation draft of the bill transposing the Modernization Directive, amending Art. 6:230h (1) BW. The consultation draft of this bill is available (in Dutch) via https://www.internetconsultatie.nl/modernisering_consumentenbescherming (last accessed on 30 March 2021).

Commercial Practices Directive,³⁰ as that directive applies to all commercial transactions in relation to a product, including advertising and marketing, by a trader, ‘directly connected with the promotion, sale or supply of a product to consumers’.³¹ The fact that the Digital Content Directive also applies when the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, indicates that from the position of the trader the supply of the digital content consists of a commercial transaction. After the transposition of both the Digital Content Directive and the Modernization Directive, all cornerstones of European consumer law that could be relevant for digital content and digital services would then indeed also be applicable to ‘free’ digital content and ‘free’ digital services.

C. Transposition of the Digital Content Directive into Dutch law

- 8 The consultation draft was published online on 20 December 2019; the Internet consultation closed on 31 January 2020. In all, 28 reactions to the consultation draft were received, of which 20 were made public.³² Apart from my own reaction (which is reflected in this paper), none of these addressed the transposition of the Digital Content Directive. The responses of the ACM and the AP, published as annexes to the explanatory memorandum of the bill, do go into the transposition of the Digital Content Directive and will be addressed in this paper.
- 9 The Dutch legislator has chosen to align the transposition of both the Digital Content Directive and the Sale of Goods Directive as much as possible with the system of the Dutch Civil Code. This approach is in line with both the Dutch Constitution and legislative tradition. According to Article 107 of

the Dutch Constitution, civil law is to be codified in the Civil Code, although the legislator is allowed to regulate specific matters, e.g. matters of consumer protection law, also in specific legislation. As Article 120 of the Constitution forbids the courts to test the constitutionality of the laws – this is seen as an exclusive task of the two Chambers of Parliament – the legislator appears to be free how to implement European Directives. However, the Dutch government is required to take the so-called *Aanwijzingen voor de regelgeving* (hereinafter referred to as *Aanwijzingen*, or as *Aanwijzing* in case a specific instruction is meant)³³ into account.³⁴ Formally, these instructions for regulation are not a binding instrument, but Ministers, Secretaries of State and their staff at the Ministries are nevertheless required to follow them or to explain when and why they derogate from them. Parliament and the Council of State (that advises the government and Parliament with regard to legislation) are not bound by the *Aanwijzingen*, but tend to follow them where possible as well. *Aanwijzing 9.7* requires the government to incorporate Directives as much as possible in existing legislation in order to prevent delay in transposition of a Directive.³⁵ As Dutch law does not have a separate Consumer Code, this implies that European consumer law Directives are normally implemented in the Civil Code.

- 10 Since the Sale of Goods Directive is largely a modernization of the Consumer Sales Directive and that

30 Directive 2005/29/EC, OJ 2005, L149/22.

31 See art. 3(1) and 2 under (d) Unfair Commercial Practices Directive.

32 The 20 reactions are published on https://www.internet-consultatie.nl/verkoop_goederen_levering_digitale_inhoud/reacties (last visited on 30 March 2021). One response was from a political party that does not have a seat in parliament (the Pirate Party), two from academics (prof. Pavillon from Groningen and myself from Amsterdam), one from the ATR, 5 from business organizations (INRetail, VNO-NCW, Techniek Nederland, Detailhandel Nederland; Raad Nederlandse Detailhandel) and 11 from individual consumers or businessmen (of which two were submitted by the same person). The response from the ATR is also published as annex to the explanatory memorandum.

33 The first version of the *Aanwijzingen* was published on 18 November 1992, *Staatscourant* 1992, 230. The *Aanwijzingen* were last amended by the regulation of the Prime Minister of 22 December 2017, No. 3215945, *houdende vaststelling van de tiende wijziging van de Aanwijzingen voor de regelgeving*, *Staatscourant* 2017, 69426. Both the *Aanwijzingen* themselves (in consolidated form) and the official commentary are available on wetten.overheid.nl (last accessed on 31 March 2021).

34 The remarks in this paper pertaining to the *Aanwijzingen* reflect standing Dutch legislative policy, and therefore are an almost literal copy of the corresponding text in my paper ‘Consumer sales in The Netherlands after the Implementation of the Consumer Rights Directive’, in: G. De Cristofaro, A. De Franceschi (eds.), *Consumer Sales in Europe*, Cambridge: Intersentia, 2016, p. 109-130. However, the numbering of the *Aanwijzingen* and the official commentary to the *Aanwijzingen* have been amended since that paper was published. Of course, the current texts are presented here.

35 *Aanwijzing 9.7* reads as follows: ‘Bij implementatie wordt zoveel mogelijk aangesloten bij instrumenten waarin de bestaande regelgeving reeds voorziet’ (In so far as possible, implementation takes place by amending of or adhering to existing legislation). The argument that this should prevent delays in transposition of the Directive is mentioned in the accompanying official commentary.

Directive had already been implemented in Title 7.1 BW, the choice of implementing the Sale of Goods Directive by amending Title 7.1 BW is obvious. The scope of this Directive is – even though the Directive does not say so in so many words – limited to contracts in which the consumer undertakes to pay a price in money. This excludes donation contracts from the scope of the Directive, but also barter contracts, i.e. contracts in which the buyer does not pay in money, but by delivery of other goods. With the introduction of the New Dutch Civil Code in 1992, it was decided to include barter agreements in Title 7.1 BW, and to stipulate that the provisions on sales contracts apply by analogy, on the understanding that the parties will be regarded as buyers in respect of the performance they receive, and as sellers in respect of the performance they provide (Art. 7:50 BW). The layered system of the Dutch Civil Code implies that insofar as a consumer and a professional party are involved in a barter contract, the mandatory rules of consumer sales law will also apply with regard to the goods to be delivered to the consumer. In my view this is the right solution, since there are no valid reasons why different rules should apply to contracts in which a consumer pays an amount in money than to contracts in which the buyer ‘pays’ by delivery of other goods. This is all the more true now that, in practice, there are often mixed forms between sales contracts and barter contracts. For example, many consumers buy a new or second-hand car and undertake to provide their old car to the trader in exchange and to pay an additional price in money. The choice of the Dutch legislator makes the application of consumer sales law to such hybrid forms considerably simpler than would otherwise have been the case. For the same reason, I consider it appropriate that the legislative changes to be introduced with the transposition of the Sale of Goods Directive will also apply to these ‘consumer barter contracts’ and mixed consumer sales-barter contracts.

- 11 From this, it would not have been a giant leap to also introduce digital content contracts and digital services contracts as a contract to which (consumer) sales law would be applied by analogy as well, as is currently already the case with digital content contracts whereby the digital content is not provided on a durable medium but is individualized in such a manner that the user of that digital content can exercise physical control. In the explanatory memorandum to the bill, the government has argued that this would not be a feasible solution as the Digital Content Directive applies also to digital services, and since services are not ‘goods’ within the meaning of Art. 7:1 BW it would be unworkable to fit the implementation of the Digital Content Directive in Title 7.1 BW.³⁶ Obviously, this is circular reasoning. Nevertheless, combined with the fact

that the Digital Content Directive also applies to contracts whereby the consumer only undertakes to provide personal data and not to pay in money,³⁷ this was reason enough for the government not to incorporate the provisions of this Directive in the sales title. Instead, the government has chosen to transpose the Digital Content Delivery Directive by inserting the new articles 7:50aa-50ap BW in a new title of Book 7, numbered as Title 7.1AA BW. The title is to be placed before Title 7.1A (art. 7:50a-50i BW), which contains the provisions transposing the 2008 Timeshare Directive.³⁸ Although I consider the insertion of these provisions directly after Title 7.1 BW correct in itself given the close interwovenness between the rules for consumer sales contracts and those for digital content contracts, I find the numbering to be extremely unfortunate: both the title numbering and the article numbering would suggest that the rules applicable to digital content and digital services follow (instead of precede) the provisions on timeshare, thus making it even harder for the ‘average consumer’ to find the rules applicable to the digital content contract she has concluded – let alone for the ordinary consumer that would need to find out her legal position. For this reason, in my response to the consultation draft I have suggested to rename the current ‘Title 7.1A BW’ to ‘Title 7.1B BW’, and to place the new provisions for the supply of digital content and digital services in a new Title 7.1A BW. With regard to the numbering of the articles, I have proposed to renumber articles 7:49 (which contains the definition of the barter contract) and 7:50 BW (which provides for the analogous application of sales provisions) to art. 7:48a and 7:48b BW, as the former content of those provisions has been withdrawn after the transposition of the 2008 Timeshare Directive, and as the renumbering would not cause any problems for legal practice since a search on www.rechtspraak.nl, the public registry of court decisions, with the search terms ‘7:49 BW’ and ‘7:50 BW’ together yield only 10 hits since the year 2000.³⁹ The provisions transposing the Digital Content Directive could then be placed in the new articles 7:49-49o BW. In my view, this is likely to prevent many incorrect legal designations. Moreover, this offers the possibility to fit future additions to this new title more easily. The fact that such additions will prove necessary is obvious in view

37 Ibidem.

38 Directive 2008/122/EC, OJ 2009, L 33/10.

39 Search conducted on 31 March 2021; on the same date, a search with the term ‘ruilovereenkomst’ (barter contract), without reference to the relevant legal provisions in the Dutch Civil Code yielded 113 hits in the area of private law. This suggests that courts may deal with barter contracts to some extent, but do not find it necessary to refer to the existing provisions in the Dutch Civil Code expressly.

36 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 6.

of the rapid technological and legal developments with respect to digital content and digital services. It is conceivable, for example, that the new Digital Services Act package will lead to the adoption of substantive rules on the contractual relationship between consumers and platforms. These could then simply be inserted in the reserved articles. Unfortunately, in the bill submitted to parliament the government has ignored this suggestion.

D. Regulatory choices in the bill

I. Starting point: no use of options

12 The Digital Content Directive contains several options and choices for the Member States to decide on. Here, again, the *Aanwijzingen* offer guidance as to the question whether the legislator should make use of these options. *Aanwijzing 9.4* suggests that the legislator should not make use of the options in a Directive offered to the Member States to derogate from the Directive or to provide for specified additional rules.⁴⁰ In an earlier version of the *Aanwijzingen* this default option was explained by the fact that when the legislator abstains from such additional measures it is easier to meet the deadlines set by the European legislator, as the preparatory work for the ministerial staff is much more limited and, for instance, impact studies on the costs of the additional measures need not be undertaken.⁴¹ The current official commentary, however, points to the delay in transposition that may be caused by a referendum: whereas acts that exclusively aim to execute international treaties or decisions of organizations of public international law, such as the EU, are excluded from the range of acts that may be subjected to a referendum; this is not the case where the act includes provisions that are not necessary for the transposition. Whenever the government makes use of an option offered to the Member States, the whole act may be the subject of a referendum. As a result, the act may not enter into force, unless the act itself provides otherwise in case a delay is not possible and such is motivated in the explanatory memorandum of the act.⁴² Nevertheless, this does

lead the Dutch legislator to be reluctant to make use of regulatory options in European directives. For this reason, the Netherlands have not made use of the option offered to the Member States in Art. 10 DCD to allow for termination or nullity of the contract in case third party rights impair conformity. Instead, Art. 7:50af(2) BW (draft) merely entitles the consumer to invoke the ordinary remedies for lack of conformity under Art. 7:50ai BW (draft), which copies the hierarchy of remedies under Art. 14 DCD.

II. Period for liability for lack of conformity

13 On the other hand, where the use of an option implies that existing legislation need not be amended, *Aanwijzing 9.7* actually points in the direction of making use of that option. Both *Aanwijzing 9.4* and *Aanwijzing 9.7* play a role with regard to the options offered in Art. 11(2) and (3) DCD pertaining to the possibility to set a fixed period within which a trader is liable for a lack of conformity, and/or to provide for a prescription period in respect of the remedies which the consumer can bring against the trader.

14 Under Art. 7:17 BW, which applies to both B2C and B2B sales contracts, the seller is liable for any lack of conformity that existed or originated at the time of delivery, irrespective of the amount of time that has passed since delivery. The basic idea under Dutch law is that as long as the buyer could still reasonably expect the goods to function properly, the seller is liable if in fact the goods do not function properly. In practice, this means that in the case of durable consumer goods, in case of hidden defects, the period for liability may be considerably longer than two years after delivery.⁴³ The Sale of Goods Directive provides that the seller is liable only for a period of 2 years after delivery, but Member States are free to introduce or maintain a longer period for liability. In line with *Aanwijzing 9.7*, the Dutch legislator has chosen to indeed maintain its more buyer-friendly approach,⁴⁴ but to almost literally reproduce the wording of Art. 6-8 Sale of Goods Directive in the redrafted Art. 7:18 and the new Art. 7:18a BW (draft). In order to bring the supply of digital content and digital services as closely as possible into line with the existing sales rules, the Art. 7:50ag(2) BW (draft) follows the same approach and also opts for this consumer-friendly approach.⁴⁵ This is also in line

40 *Aanwijzing 9.4* reads as follows: 'Bij implementatie worden in de implementatieregeling geen andere regels opgenomen dan voor de implementatie noodzakelijk zijn' (In case of implementation, the implementing act will not include any other rules than are required for the implementation).

41 See the official commentary to *Aanwijzing 331* in the version of the *Aanwijzingen* applicable as of 2011.

42 See the official commentary to *Aanwijzing 9.4* and the text of *Aanwijzing 4.18*.

43 Cf. M.B.M. Loos, *Consumentenkoop*, Monografie BW B65b, Deventer: Wolters Kluwer, 4th ed., 2019, no. 30 (p. 69).

44 Cf. *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 62-63, where this is mentioned in a transposition table.

45 Cf. *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 9.

with *Aanwijzing 9.7*, as currently consumer sales provisions apply to many digital content contracts, as was explained in section B above, and copying the approach taken for consumer sales contracts for digital content contracts therefore also means that the number of substantive changes to the law is limited as much as is allowed by the Digital Content Directive. The government further argues that this approach also fits best with the current rules on VAT for the sale of goods.⁴⁶

- 15 The buyer-friendly rule as regards hidden defects is mitigated by the fact that once a defect is discovered (or, for a B2B contract, should have been discovered), the buyer is under a duty to notify a lack of conformity under Art. 7:23(1) BW, and by the fact that under Art. 7:23(2) BW any remedy for lack of conformity prescribed after two years have elapsed since the lack of conformity was notified to the seller. These seller-friendly rules have also been maintained.⁴⁷ As under the Digital Content Directive it is not allowed to maintain or introduce a duty to notify a lack of conformity, Art. 7:50ap(2) BW (draft) disapplies the duty to notify for digital content contracts.⁴⁸ However, in line with *Aanwijzing 9.7*, the prescription period of two years after the lack of conformity is discovered is taken over.⁴⁹ The ACM's suggestion to also disapply the duty to notify also for consumer sales contracts,⁵⁰ is not taken over as this is considered to be an important pillar for the Dutch system on conformity as it seen as necessary for a proper balance between the rights and obligations of sellers and consumers.⁵¹

III. Expansion of the scope of the Digital Content Directives to 'non-consumers'?

- 16 According to Art. 3(1) DCD, the Digital Content Directive applies only if a trader provides or undertakes to provide digital content to a consumer. The notion of 'consumer' is defined in Art. 2 under (6) DCD as meaning 'any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession'. From this definition, which is in line with the definition in other European directives, it follows that a consumer can only be a natural person, and that natural person may not be acting for a purpose related to that person's trade or profession.
- 17 This definition causes problems, in particular, with regard to mixed purpose contracts. For instance, imagine I want to purchase antivirus software for the desktop computer on which I write this paper. Clearly, this means that I use the desktop computer, and thus also the antivirus software, for professional purposes. Still, it is *my* desktop computer, which I bought from my own money, and which I choose to use for my personal reasons (instead of the laptop computer my employer has made available to me). Moreover, I have also stored music files, photos and other digital content on my desktop computer, and the antivirus software is also meant to protect such files from becoming infected by a computer virus. So am I acting for purposes *outside* my profession when purchasing the antivirus software or not? According to recital (17) of the preamble to the Digital Content Directives, Member States are free to extend the protection offered by the Directive to persons that do not qualify as 'consumer' within the meaning of the Directive. However, the formulation of the definition of the notion of 'consumer' in the proposed Art. 7:50aa under (e) BW (draft) more or less follows the wording of Art. 2 under (6) of the Directive, and does not in any way reflect whether a person purchasing digital content for mixed purposes may be regarded as consumers. It is therefore up to the courts to determine whether contracts concluded for such mixed purposes are governed by consumer law. In my view, they should: when purchasing antivirus software (or, for that matter, the desktop computer itself) my bargaining power is not in any way different from that of any other natural person purchasing the antivirus software that I now want to install on that computer. For this reason, a natural person should be regarded as a consumer unless there are clear indications that this person has primarily acted for professional purposes.⁵² Such an extensive interpretation of the

46 Ibidem.

47 Cf. Kamerstukken II, 2020/21, 35 734, no. 3, p. 62-63, where this is mentioned in a transposition table.

48 Cf. Kamerstukken II, 2020/21, 35 734, no. 3, p. 9.

49 Cf. Art. 7:50ag(2) BW (draft).

50 Cf. ACM, Implementation and Enforcement Test of 30 January 2020, *Kamerstukken II*, 2020/21, 35 734, annex to no. 3, p. 5.

51 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 20.

52 See extensively M.B.M. Loos, *Algemene voorwaarden*, Boom

definition of the notion of ‘consumer’ would be in line with the prevailing interpretation of that notion in Germany⁵³ and Belgium⁵⁴ and recital (17) of the Consumer Rights Directive, and is supported in The Netherlands by Schaub.⁵⁵ Unfortunately, the explanatory memorandum is silent on this matter.

- 18 The explanatory memorandum is also silent regarding another potential extension of the scope of the provisions transposing the Digital Content Directive: nothing is said about the possibility to apply these provisions to NGOs, start-ups or SMEs, as was suggested by recital (16) DCD. Of course this does not mean that courts cannot find inspiration in these rules when deciding a case where a natural person acts for both professional and private purposes when purchasing digital content, or where an SME concludes a digital content contract with a professional supplier thereof: general contract law offers the possibility to disapply otherwise applicable rules of a contract or of contract law if these would be unacceptable in the circumstances of the case (Art. 6:248(2) BW), and also provides that courts may apply rules to a contract which follow from the requirements of good faith and fair dealing (Art. 6:248(1) BW). Both provisions allow for, what is called in Dutch *reflexwerking* (‘mirror application’, in German: *Indizwirkung*).⁵⁶ Whether courts will indeed

juridische uitgevers, 3rd edition, 2018, nos. 26-27b (p. 41-43) and M.B.M. Loos, *Consumentenkoop*, Monografie BW B65b, Deventer: Wolters Kluwer, 4th ed., 2019, no. 11 (p. 23-24).

- 53 Cf. the German Supreme Court for civil law cases, the *Bundesgerichtshof*, in a case of 30 September 2009, case number VIII ZR 7/09, *Neue Juristische Wochenschrift* 2009, 3780; cf. also S. Ernst, ‘Gewährleistungsrecht – Ersatzansprüche des Verkäufers gegen den Hersteller auf Grund von Mangelfolgeschäden’, *Monatsschrift für Deutsches Recht* 2003, p. 4-10 (p. 5).
- 54 I. Samoy, ‘Het toepassingsgebied van de verschillende koopregelingen in kaart gebracht (gemeenschappelijke koop, consumentenkoop en internationale koop), met bijzondere aandacht voor gemengd gebruik en gemengde overeenkomsten’, *Revue générale de droit civil belge/Tijdschrift voor Belgisch Burgerlijk Recht* 2009, p. 71-85 (p. 75-76). See also Court of Appeal Antwerp 30 June 2009, *Nieuw juridisch Weekblad* 2010, 504, with case-note by R. Steennot; Court of Appeal Ghent 19 October 2012, *Nieuw juridisch Weekblad* 2014, 32, with case-note by R. Steennot.
- 55 M.Y. Schaub, ‘Wie is consument?’, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2017/1, p. 30-40 (p. 37).
- 56 See, with regard to unfair terms, M.B.M. Loos, *Algemene voorwaarden*, 3rd ed. 2018, no. 21 (p. 36-37) regarding natural persons acting for mixed purposes, and nos. 400-413 (p. 332-339) regarding SMEs; see also, with regard to consumer sales and digital content under existing Dutch law, M.B.M. Loos,

extend the scope of the provisions transposing the Digital Content Directive to such ‘non-consumers’ is of course uncertain.

IV. Update obligation

- 19 Art. 8(2) DCD introduces an obligation for the trader to update the digital content supplied to the consumer insofar as this is necessary in order to keep the digital content in conformity. A similar obligation to update the digital content is introduced for the seller of goods with digital elements under Art. 7(3) Sale of Goods Directive. These provisions are transposed by Art. 7:50ae(4) BW (draft) and by Art. 7:18(4) BW (draft), respectively. The update obligation under the former provision has not been the subject of any comments to the consultation draft, but the corresponding update obligation under Art. 7:18(4) BW (draft) for what is usually referred to as embedded software was criticized fiercely. The response from the business side to the corresponding provision in the consultation draft was unanimously negative. Business organizations (as well as one individual) all emphasized that imposing such an obligation on the *seller* (or, as the case may be, on the provider of the digital content) – instead of on the developer of the digital content – is the wrong idea: the seller does not play a role in practice in the development and provision of updates; is not capable of successfully demanding updates from the developer of the digital content; is not informed by them of updates; and – in particular with regard to contracts concluded on business premises – often does not have the correct contact details of the consumer. One business organization expressly argued that insofar as the seller is accountable for the provision of updates, an obligation should be imposed on developers of digital content to inform sellers when an update is available.⁵⁷

- 20 I have to concur with the objections from the business side here. More importantly, as the seller or the supplier of the digital content typically cannot provide the updates themselves, they have to rely on the developer of the digital content to provide the update (whether the seller or the supplier of the digital content is aware of the updates being provided or not). As the seller or supplier of the digital content is under an obligation of result to provide the updates to the consumers, they will be liable for a lack of conformity if the developer of the digital content fails to provide the updates. The consumer may or may not have a claim for replacement, termination,

Consumentenkoop, Monografie BW B65b, Deventer: Wolters Kluwer, 4th ed., 2019, no. 13 (p. 13).

- 57 See the response by Techniek Nederland.

price reduction or damages, but repair – which is the most sustainable remedy in case of the sale of goods – cannot be offered as the seller of the goods with digital elements or the supplier of the digital content is incapable of repairing the lack of conformity by providing the updates after all. This suggests that imposing the obligation to provide updates on the seller or on the supplier of the digital content instead of on the developer of the digital content may prove to be a paper tiger.

- 21 The ATR has come to the same conclusion, but via a different approach. They pointed to the possibility, under Article 7:18(6) BW (draft) for sellers to exclude their obligation to provide an update altogether, provided that they inform the consumer thereof expressly and the consumer has accepted the exclusion expressly and separately. The ATR argued that if sellers would extensively make use of this option, for example because producers do not want to make any promises about updates, and consumers would agree to the exclusion, this would have major consequences for consumers. According to the ATR, it is impossible to estimate in advance whether the use of the exclusion will remain to be the exception or rather become the rule, but if the latter would be the case, the update obligation would become a ‘paper reality’.⁵⁸ The same may be said regarding the corresponding possibility to exclude the update obligation under Art. 7:50ae(6) BW (draft).
- 22 It would be good if the European Commission would not wait until the deadline for the evaluation of both Directives expires (12 June 2024) to see what has become of this obligation under the Directives.⁵⁹
- 23 Of course, since the matter is not regulated in either the Sale of Goods Directive or the Digital Content Directive, Member States are free to impose an obligation to provide updates also on the developer of the digital content of the digital content. In fact, recital (13) of the preamble to the Digital Content Directive invites Member States to regulate liability claims against the developer if that developer is not the supplier of the digital content to the consumer. The introduction of such an obligation would bring about a system, which would be more or less in line with the 1985 Product Liability Directive.⁶⁰ Given the fact that the Dutch legislator is encouraged by *Aanwijzing 9.4* not to introduce additional provisions when transposing a directive, it is not surprising that the legislator has not proposed such a system.

58 ATR, Advice of 22 January 2020, *Kamerstukken II, 2020/21, 35 734*, annex to no. 3, p. 3.

59 See Art. 25 Digital Content Directive and Art. 25 Sale of Goods Directive.

60 Council Directive 85/374/EEC, *OJ* 1985, L 210/29.

V. ‘Data as payment’

- 24 The Digital Content Directive does not only apply to digital content or digital services provided in exchange for the payment of a price in money, but also to situations where the consumer provides or undertakes to provide the trader with personal data that are not exclusively provided for the trader to be able to provide the digital content or service, or to comply with legal requirements to which the trader is subjected and where the trader does not process the personal data for other purposes.⁶¹ This provision regarding the scope of the Digital Content Directive will be transposed in Dutch law in Art. 7:50ab(1)(b) BW (draft). The Dutch Data Protection Authority (AP) was critical about the recognition of ‘data as payment’, but accepted that this recognition does offer chances for more protection by regulating existing (bad) practices. The regulator advised the government to express in the wording of Art. 7:50(ab)(1)(b) BW (draft) that payment with personal data takes the form of consent to process the personal data.⁶² The government responded that this is not required by the Directive and that it is not in accordance with government policy to introduce additional rules in the implementing Act,⁶³ thus implicitly giving effect to *Aanwijzing 9.4*.
- 25 The AP also pointed to the risk that people who have less to spend are put under undue influence to permit infringement of fundamental rights⁶⁴ and that unequal power position and too wide scope for consent could seriously erode the protection of personal data.⁶⁵ The AP therefore recommended that the bill should designate forms of consent that are to constitute counter-performance for the supply of digital content and digital services that are presumed to be unacceptable and therefore lead to the possibility for the consumer to invoke avoidance of the contract. Since the rules on validity of contracts have not been harmonized, the Member States have retained the possibility to maintain or introduce rules in this area, the AP argues.⁶⁶ The government, however, did not consider it expedient to only regulate the possible avoidance of contracts for the supply of digital content and digital services,

61 Art. 3(1), 2nd paragraph, Digital Content Directive.

62 AP, Advice of 16 April 2020, *Kamerstukken II, 2020/21, 35 734*, annex to no. 3, p. 9.

63 *Kamerstukken II, 2020/21, 35 734*, no. 3, p. 4.

64 AP, Advice of 16 April 2020, *Kamerstukken II, 2020/21, 35 734*, annex to no. 3, p. 15.

65 *Ibidem*, p. 7.

66 *Ibidem*, p. 6.

where similar cases where personal data are supplied ‘in exchange’ for the supply of ‘free’ toy cars, tennis balls and pregnancy boxes. According to the government, this matter should be solved more generically, and not within the course of this bill, as that would go beyond what is necessary for the proper implementation of the Directive.⁶⁷ That the frequency of ‘free’ digital content and digital service being offered in exchange for personal data is considerably higher than that of the supply of ‘free’ toy cars, tennis balls and pregnancy boxes, and that the risks of abuse of personal data are considerably higher in the former case, is as such ignored by the government. It rather appears that this argument has been dragged in in order not to have to explicitly rely on *Aanwijzing 9.4*.

- 26 Recital (25) of the preamble to the Directive offers Member States the possibility to extend the scope of the provisions transposing the Directive to contracts for the supply of digital content or digital services where the trader collects personal data exclusively to perform the contract, or for the sole purpose of meeting legal requirements. The Dutch legislator, of course bearing in mind *Aanwijzing 9.4*, did not make use of this possibility. Similarly, the legislator did not extend the scope of these provisions to situations where the trader only collects metadata, or to situations where the consumer is exposed to advertisements in order to gain access to digital content or a digital service without having concluded a contract with the trader.
- 27 The Directive does not regulate whether the provision of personal data is to be seen as a real counter-performance for the supply of the digital content or the digital service and whether the consumer could be held liable or whether the trader may terminate the contract in case the consumer does not provide the personal data or provides incorrect personal data, e.g. by giving a false address. Similarly, the Directive does not regulate whether withdrawing consent to processing of personal data is to be seen as a unilateral termination of the digital content contract by the consumer or entitles the trader to terminate for non-performance: this is left to the Member States.⁶⁸ In practice, of course the consumer offers the trader something which is of value to that trader, in order to receive the digital content or digital service. In economic terms, this implies that the personal data is indeed to be seen as the counter-performance for the digital content or

digital service that is provided to the consumer. This is also how the Dutch legislator sees the consumer’s obligation to provide the trader with personal data.⁶⁹

- 28 In order to be allowed to process the personal data, the trader requires a legal basis. The personal data may be necessary for the performance of the contract, e.g. where an e-mail address or a password is needed in order to access an account. In such case, the legal justification to process personal data follows from Article 6(1)(b) GDPR. Where the personal data is not needed for the proper performance of the digital content contract but instead is collected and processed for commercial purposes, the trader will need the consumer’s freely given consent to the processing of her personal data in accordance with Article 6(1)(a) GDPR.⁷⁰ The mere fact that the consumer cannot conclude the contract unless she has consented to the processing of her personal data, e.g. by ticking a box, need not stand in the way of the consent having been given freely as she can decide not to conclude the contract.⁷¹ The consumer is, however, entitled to withdraw her consent for the processing of her personal data under Art. 7(3) GDPR. Where the withdrawal would lead to a loss of functionality of the digital content, the withdrawal of consent would have negative consequences. This then implies that consent was never given freely within the meaning of the GDPR and therefore cannot serve as a justification for the processing of the consumer’s personal data.⁷²
- 29 The GDPR requires traders to inform a consumer of her right to withdraw consent prior to the giving of consent.⁷³ Moreover, under Art. 17(1)(b) GDPR the consumer is entitled to require the erasure of the personal data when she has withdrawn her consent or objects to the processing of her personal data.⁷⁴

67 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 14.

68 Cf. K. Sein and G. Spindler, ‘The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader’s Obligation to Supply – Part 1’, *European Review of Contract Law* 2019; 15(3), p. 257-279 (p. 265).

69 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 10.

70 Cf. C. Langhanke & M. Schmidt-Kessel, ‘Consumer Data as Consideration’, [2015] *EuCML* 218-223 (p. 220).

71 Cf. H. Graux, ‘Privacybescherming op sociale netwerken: heeft u nog een privéleven’, in: P. Valcke, P.J. Valgaeren & E. Lievens (eds.), *Sociale media. Actuele juridische aspecten*, Antwerpen/Cambridge: Intersentia, 2013, p. 10-11.

72 Cf. recital (42) of the preamble to the GDPR and Article 29 Working Party, *Guidelines on consent under Regulation 2016/679*, WP259 rev.01, p. 10-11. The Working Party’s Guidelines are available online at https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51030 (last accessed on 31 March 2021).

73 Art. 7(3) and 13(2)(c) GDPR.

74 Art. 17(1)(b) *in fine* and (3) GDPR provide for some restrictions to the right of erasure.

The basic idea, therefore, is that the consumer who has freely given her consent to the processing of personal data, is also entitled to withdraw that consent and have the personal data erased. The GDPR does not specify *how* the consumer is to withdraw her consent to the processing of the personal data nor *how* she should request their erasure: Art. 7(3) GDPR merely indicates that withdrawing consent must be as easy as giving it, and the wording of both Art. 7(3) and 17(1)(b) GDPR suggest that the consumer is required to take action towards the trader. The question of how to withdraw consent is left to national law. Dutch data protection law does not contain an explicit provision to this extent, but general patrimonial law does: Art. 3:37(1) BW provides that statements may be made in any form. In other words: no formal requirements exist as regards the manner in which the consumer may withdraw her consent for the processing of information.⁷⁵ The explanatory memorandum confirms that no formal requirement applies to the withdrawal of consent.⁷⁶

30 Art. 7:50ab(5) BW (draft) indicates that for a digital content contract where the consumer does not (also) undertake to pay a price in money, the consumer's withdrawal of consent is to be understood as implying that the consumer is no longer bound to the contract. The withdrawal of consent thus implies unilateral termination of the digital content contract.⁷⁷ The consumer is not required to return any performances already received from the trader. The government justifies this by explaining that the GDPR's provisions on the giving and withdrawing of consent aim for the protection of the person whose personal data are processed, and an obligation to return any performances already received from the trader would undermine the protection offered to the consumer by the GDPR.⁷⁸

31 The question then is whether the opposite is true as well: should the consumer's statement to the trader

75 According to Art. 3:59 BW, Art. 3:37(1) BW applies also outside the field of patrimonial law as such application is incompatible with neither the nature of the juridical act of withdrawing consent nor the nature of the relation between the trader and the consumer.

76 *Kamerstukken II*, 2020/21, 35 734, no. 3., p. 11-12. The website of the Dutch regulator for data protection, the AP, contains model letters showing consumers how to actually withdraw consent, <https://autoriteitpersoonsgegevens.nl/nl/zelfdoen/voorbeeldbrieven-privacyrechten> (last accessed on 31 March 2021).

77 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 11. See in this sense also AP, Advice of 16 April 2020, *Kamerstukken II*, 2020/21, 35 734, annex to no. 3, p. 4.

78 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 12.

expressing her decision to terminate the contract⁷⁹ be interpreted as *also* include a statement expressing her decision to withdraw consent to the processing of the personal data she provided? According to the explanatory memorandum, this is indeed the case. The explanatory memorandum adds that the consumer therefore need not separately withdraw her consent to the processing of her personal data when terminating the contract.⁸⁰

32 Moreover, since the consumer is entitled to withdraw consent at any time, she cannot be held liable for breach of contract if she withdraws consent.⁸¹ In such a case, however, the trader cannot be expected to continue to perform its obligations under the contract and is entitled to block the consumer's access to the digital content or the digital service.⁸²

33 If the consumer neither withdraws consent to the processing of her personal data nor terminates the digital content contract, she is of course required to honor her obligations under the contract. The question arises whether the trader is entitled to a remedy if she does not – either by not providing the

79 There are free situations where the consumer may terminate the digital content contract:

(1) as a remedy for non-performance for the trader's failure to supply the digital content even after having received a notice allowing the trader a final period to perform her obligation within a reasonable time after having received the notice (art. 7:50ah(1) BW (draft));

(2) as a remedy for lack of conformity, if the consumer is not entitled to demand that the trader brings the digital content or the digital service into conformity, the trader is not able or willing to cure the lack of conformity within a reasonable period and without causing significant inconvenience to the consumer, or the lack of conformity is such as to justify immediate termination (art. 7:50ai(4) BW (draft)); or

(3) in case of a digital content contract that is to be performed over a period of time, when the trader changes the digital content or the digital service to a larger extent than is necessary to keep the digital content or service in conformity with the contract, and the change bears negative and non-negligible consequences for the consumer's access to or use of the digital content or the digital service (art. 7:50al(2) BW (draft)).

80 Cf. *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 14. See in this sense also AP, Advice of 16 April 2020, *Kamerstukken II*, 2020/21, 35 734, annex to no. 3, p. 4.

81 *Kamerstukken II*, 2020/21, 35 734, no. 3., p. 12 and 46.

82 *Kamerstukken II*, 2020/21, 35 734, no. 3, p. 12.

promised personal data or by providing false data. In my view, the fact that the consumer can withdraw consent and thus terminate the digital content contract at any time without being liable for damages suggests that a non-performance by the consumer to provide the (correct) personal data does not lead to liability either.⁸³ This does not mean that the trader in such a case is required to perform its obligations under the contract nonetheless. It may be that data protection law stands in the way of liability of the consumer, but the specific nature of the consumer's non-performance does not justify that the trader would also be deprived from its right to invoke termination of the contract for non-performance.

E. Concluding remarks

- 34 Even though the bill transposing the Digital Content Directive in Dutch law has not yet been discussed in parliament, the bill submitted to parliament clearly shows the direction the government is taking. In line with Dutch legislative tradition, the Digital Content Directive will be implemented in the Dutch Civil Code, in a new title of Book 7 BW on specific contracts, directly following the regulation of sales law. Moreover, whenever possible the new title will follow the corresponding provisions of (consumer) sales law. Following the *Aanwijzingen voor de regelgeving*, little use has been made of the options offered to the Member States, or the suggestions in the preamble of the Directive to extend the scope of the provisions transposing the Directive. For instance, the legislator failed to explicitly include mixed purpose contracts within the scope of the bill, or even to mention the matter in the explanatory memorandum. Similarly, both texts remain silent as to the protection of SMEs, NGOs and start-ups, or the possible extension of the scope of the transposing instruments to other digital content contracts whereby personal data is collected and processed or advertisements are shown to consumers before they may gain access to the digital content. For the same reason, the bill and the explanatory memorandum remain silent as to the possibility of creating a legal regime imposing an update obligation not only on the seller of goods with digital elements under the Sale of Goods Directive and on the supplier of digital content or digital services under the Digital Content Directive, but also on the *developer* of the digital content.
- 35 Only with regard to the liability of the supplier of the digital content or the digital service for a lack of conformity has the legislator made use of one of the options offered to the Member States: in line
- with (both consumer and commercial) sales law in The Netherlands, the consumer may invoke a remedy for any lack of conformity that existed at the moment of delivery, even if delivery has taken place years ago and only later the defect manifested. Once discovered, however, the consumer needs to take action as the remedies for lack of conformity prescribe two years after the defect was discovered.
- 36 With regard to digital content contracts for which the consumer 'pays' with her personal data, the legislator clarified the relation with the GDPR. As a consumer is free to withdraw consent for the processing of personal data, she is not liable for damages when exercising her right. Moreover, if she does, the digital content is automatically terminated. She may withdraw by any declaration in any form. Conversely, where the consumer terminates the contract, e.g. for lack of conformity, she is deemed to have withdrawn consent for processing her personal data, implying that the trader must refrain from doing so.
- 37 All in all, the Dutch act transposing the Digital Content Directive will not offer many surprises, as legislative tradition stands in the way of further-reaching provisions than is required for a correct transposition of the Directive. Only with regard to contracts whereby the consumer 'pays' with her personal data, the legislator had to make a decision as regards the relation with the GDPR. Fortunately, he also explained what consequences his choice has. Let's hope that these clarifications will lead to a smooth application of the new legislation in The Netherlands.

83 Cf. C. Langhanke & M. Schmidt-Kessel, 'Consumer Data as Consideration', [2015] EuCML 218-223 (p. 221-222).