

# EU Digital Content Directive And Evolution Of Lithuanian Contract Law

by Laurynas Didžiulis\*

**Abstract:** Lithuania's national legislature is once more facing the task of implementing another consumer protection directive into national law. This time it is not as easy as it may seem because by adopting the Digital Content Directive, the European Parliament and the Council intentionally left issues of legal classification of digital content contracts and their systemic ties with other bodies of law, such as intellectual property law, for regulation by national law. Hence, the proper time is now to reconsider basic trends of consumer legislation in Lithuania and to identify systemic challenges of implementation of the Directive. Within the internal structure of Lithuanian civil law, consumer relations belong to the subject matter of the law of obligations. Most often consumer legal relations arise from the contract, less often – in cases of defective production – from the tort. The author proposes to extract almost all consumer private law rules (leaving untouched only marginal exceptions such as private international law rules) from Lithuanian Civil Code and other statutes to a newly created Book 7 "Consumer law". From one side, it could facilitate concentration and systematization of whole consumer private law in one place, without impairing coherence of other sections in Lithuanian Civil Code. From another side, this option would still maintain consumer law within the scope of Lithuanian Civil Code and influence of civil law doctrine, thus avoiding legal dualism and preventing insufficient academic attention.

According to its legal nature, movable and controllable digital content under Lithuanian law may be treated and protected as a novel form of property. However, normative content of existing Lithuanian Civil Code regarding contractual rules is not specifically tailored for digital goods. In general, Digital Content Directive rules are far more developed and detailed than current Lithuanian Civil Code rules on consumer sales, which transpose various EU directives and are applicable mostly for the sale of tangible goods. Therefore, contracts for supply of digital content deserve to be named *sui generis* by their nature and should be classified and regulated separately from other nominate contracts. Such a solution would overcome the full set of problems related to complex characterization and cross application of various rules regulating other types of contracts. Despite that, the Lithuanian Pre-draft mostly reflects a cautious and conservative approach for implementation of the Digital Content Directive within Lithuanian private law. However, Digital Content Directive should significantly enhance protection of consumer rights in Lithuania. Legal innovations and rules specifically tailored for a digital environment will lead to optimization and development of the existing contractual regime. In turn, all this should provide legal certainty on rights and duties of the trader and consumer with the obvious benefit for development of digital markets.

**Keywords:** Digital content; Lithuanian private law; consumer contracts; intangible property

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## A. Introduction

- 1 The focus on comprehensive consumer protection in Lithuania has been brought from the very beginning of Lithuanian independence in the early 1990's. Undisputable evidence of such an ambitious attitude is contained within the clause on consumer protection included directly in the Art. 46 of the Lithuanian Constitution of 1992 which declares that the State shall defend the interests of the consumer. For some time, this was mostly a constitutional declaration, because a substantive and institutional system for consumer protection in Lithuania was only in the stage of early development during the transition period from command economy to market economy.
- 2 Gradually, consumer protection in Lithuania became a significantly more important policy of the State. Several years before the formal accession in 2004 to the European Union, some important European directives were already implemented into Lithuanian law, such as The Unfair Terms in Consumer Contracts Directive 93/13/EEC<sup>1</sup>. After accession, EU law started to shape Lithuanian law even more intensively, especially in the field of consumer law.
- 3 Today, Lithuanian legislators are again facing the task to implement another consumer protection directive into national law. However, this time it is not such an easy task as it may seem because by adopting the Digital Content Directive 2019/770<sup>2</sup> (hereinafter – DCD) the European Parliament and the Council intentionally left issues of legal classification of digital content contracts and their systemic ties with other bodies of law, such as intellectual property law, for national law (Recital 12 sentence 2). Unfortunately, there is no practical way to avoid such issues because even if the legislator simply copy-paste the directive into particular Lithuanian statutes, the workload will automatically be transferred. Courts which as gatekeepers of legal system would be obliged to deliver required answers and solutions.

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- 1 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.
- 2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

- 4 Hence, it seems that now is proper time to reconsider basic trends of consumer legislation in Lithuania and to identify systemic challenges of implementation of the DCD. It should burden not only academia, but also the national legislature and courts to make consumer contract law more clear, coherent and efficient. From the other side, it is equally interesting to (at least briefly) evaluate the impact of the DCD on consumer rights in Member States and whether they will actually become more protected in Lithuania.

## B. Place of consumer law in Lithuanian legal system

- 5 Although consumer law in the Lithuanian legal doctrine is characterized as encompassing both private law and public law aspects,<sup>3</sup> the prevailing one is that of private law. This is because the relations between traders and consumers are private legal relations in substance, whereas public law regulates only ancillary – procedural and institutional – aspects of consumer protection.
- 6 More precisely – consumer relations in Lithuania are called civil legal relations (lit. *civiliniai teisiniai santykiai*) to connote their belonging to the subject matter of *ius civile*. This clarification is used because civil law in Lithuania is a basic branch of private law, although not the only one, as there are also other branches such as labor law and private international law. Thus, to attribute legal relations simply to the realm of private law may be too abstract.
- 7 Within the internal structure of Lithuanian civil law, consumer relations belong to the subject matter of the law of obligations because most often consumer legal relations arise from the contract, but also may arise from the tort in the case of defective production.
- 8 The civil law nature of consumer contracts was so self-evident for Lithuanian society and the legal community that drafters of the Lithuanian Civil Code (hereinafter “LCC”)<sup>4</sup> implemented consumer contract law directly into the draft LCC without any noticeable public opposition or fierce discussions. The LCC directly included the definition of consumer contract, rules on conflict of consumer contract laws, prohibition of unfair consumer contract terms, tort liability for defective production, peculiarities of

3 Danguolė Bublienė. Vartotojų teisių direktyvos perkėlimas į Lietuvos teisę – tolesnis vartotojų apsaugos teisės dekodifikavimas ar kodifikavimas? *Teisė: mokslo darbai*, t. 83, 2012, p. 50.

4 LCC (*Official Gazette*, 2000, Nr. 74-2262) was adopted in 18th of July 2000 and came in force year after - 1st of July 2001.

nominate contracts in cases of consumer sales, lease, work (processing) and credit. As consumer relations are relations *in personam*, they were mostly included in Book 6 of LCC on law of obligations.

- 9 The legal doctrine in Lithuania was silent on this point until discussion about the place of consumer law arose nearly a decade after the adoption of the LCC. Not surprisingly, the first voice came from the chief drafter of the LCC – Valentinas Mikelėnas. During the observations on the first decade of application of the LCC, he alerted that in Lithuania there is an ongoing process of decodification of civil law, including in the field of consumer rights when private law is legislated outside the LCC. Decodification, in his opinion, is in part caused by EU law because every implementation of an EU legal act means either inclusion of an alien piece in the LCC or elimination of respective parts of the LCC.<sup>5</sup> This view was soon followed by consumer law scholars. Danguolė Bublienė, for instance, stressed that during implementation of EU law in Lithuania, there is a constant wandering between codification and decodification. She made the conclusion that although codification (or at least systematization) of legal norms is a very complicated and difficult way for the regulation of the consumer protection (as well as for the implementation of the EU law in Lithuanian law), this is the only way which ensures the legal certainty, transparency, and effectiveness of the implementation of legal norms in practice. Thus, consumer private law should be included in the LCC, whereas consumer public law should be codified in the existing separate Law on Protection of Consumer Rights.<sup>6</sup>
- 10 Probably following those academic discussions, the legislature opted in 2013 for a mild recodification of consumer law in the LCC by starting to pool the transposition of new consumer law directives, including Consumer Rights Directive 2011/83/EU<sup>7</sup>, into the separate chapter XVIII<sup>1</sup> in Book 6 of the LCC. The chapter was named “Consumer contracts”

and located in the general part of contract law. It means that the Lithuanian legislature, at least so far, decided to continue the initial plan of the LCC drafters and codified various European rules on consumer contracts in the LCC instead of further fragmenting national private law. Nevertheless, I call it only “mild recodification” because some important consumer directives were still left outside the LCC, namely Consumer Credit Directive 2008/48/EC<sup>8</sup> and Mortgage Credit Directive 2014/17/EU.<sup>9</sup> Both those directives have been implemented in separate statutes.

- 11 According to State officials and the pre-draft of the DCD (hereinafter “Pre-draft”),<sup>10</sup> the DCD should be implemented in the LCC’s chapter XVIII<sup>1</sup> in Book 6 of the LCC named “Consumer contracts”. Hence, at least with respect to the DCD, the process of codification will continue.
- 12 In general, I share the position of my academic colleagues on the need to codify consumer law in the LCC because consumer relations by their nature are civil patrimonial relations and thus, should normally fall under the scope of civil legislation. Transposition of directives into separate statutes is fragmenting both civil and consumer law, especially by copy-pasting rules from directives into national legal acts. However, some reservations still must be made.
- 13 Transposition of directives in Civil Code does not automatically ensure coherence and high-level systematization of consumer law. Rules may also be simply copy-pasted from directives into Civil Code without sufficient adjustment of respective definitions and tailoring of rules; this not only fails to achieve goals of systematization but in addition, impairs clarity and internal coherence of the Civil code. Dispersion of consumer rules across the sections of the whole code may also be problematic, as this may impact systemic understanding of all consumer law rules and provide real challenges for less qualified and experienced judges.
- 14 An alternative solution would be to codify the whole consumer law in a separate Consumer

5 Valentinas Mikelėnas. Apibendrinimai ir išvados: dešimt Civilinio kodekso metų – pasiekimai ir praradimai. *Lietuvos Respublikos civilinis kodeksas: pirmieji dešimt galiojimo metų*. Vilnius: Mykolas Romeris University, 2013, p. 1125.

6 Danguolė Bublienė. Vartotojų teisių direktyvos perkėlimas į Lietuvos teisę – tolesnis vartotojų apsaugos teisės dekodifikavimas ar kodifikavimas? *Teisė: mokslo darbai*, t. 83, 2012, p. 37-60.

7 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

8 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

9 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34.

10 Project of Law on Amendments of Lithuanian Civil Code. Pre-draft version as of 16 October 2020.

Code. This way, for instance, has been chosen in 1990 by Brazilian, in 1993 by French and in 2005 by Italian legislators, all of whom have adopted consumer codes in their states. Italian and Brazilian scholars seem to be content about this legislative move, naming the consumer code “a remarkable systematization”<sup>11</sup> and “an authentic legal micro-system”.<sup>12</sup> In contrast, French scholars stress that the existence of a separate code for consumer law contributed to consumer and civil law remaining separate. Consumer law is still considered in France by most civil lawyers as not belonging to civil law. As a result, systematic study of consumer law is not very widespread. More surprisingly, no systematic theory of consumer contracts has yet emerged in France.<sup>13</sup> Hence, a separate Consumer Code is not a perfect solution as it may also create unnecessary dualism within the structure of private law and isolate consumer law from the intellectual basis of highly developed and sophisticated doctrines of civil law.

- 15 The “Golden Mean” in this situation would be the extraction of almost all consumer private law rules (leaving untouched only marginal exceptions such as private international law rules) from the LCC and other statutes in new Book 7 “Consumer law”. From one perspective, it could facilitate concentration and systematization of all consumer private law in one place without impairing coherence of other LCC sections. Obvious for the benefit of using a separate book for codification of consumer law is the fact that every book of the LCC has its own numeration starting from the first article (e.g. LCC Art. 1.125, 4.100, 6.1, etc.). Hence, changes in one book do not impair numeration of the whole LCC. From another view, this option would still maintain consumer law within the scope and influence of the LCC, thus avoiding legal dualism and preventing lack of sufficient academic attention.

11 Giacomo Pailli, Cristina Poncibò. In Search of an Effective Enforcement of Consumer Rights: The Italian Case. *Enforcement and Effectiveness of Consumer Law*. Springer International Publishing, 2018, p. 349.

12 Claudia Lima Marques, Patricia Galindo da Fonseca. Consumer Protection in Brazil: The 2016 Report for the International Academy of Consumer Law. *Enforcement and Effectiveness of Consumer Law*. Springer International Publishing, 2018, p. 119.

13 Jean-Sébastien Borghetti. *French Law. The Scope and Structure of Civil Codes*. Springer Netherlands, 2013, p. 192.

## C. Legal characterization of contracts for supply of digital content under Lithuanian civil law

- 16 For the purpose of the Consumer Rights Directive, contracts for digital content which are not supplied on a tangible medium should not be classified as sales contracts nor as service contracts (Recital 19). In contrast, the DCD is neutral on the issue of legal characterisation, since according to Recital 12, the Directive should not determine the legal nature of contracts for the supply of digital content or a digital service, and the question whether such contracts constitute, for instance, a sales, service, rental or *sui generis* contract should be left to national law. In addition, DCD Art. 3 (9) states that Directive should be without prejudice to Union and national law on copyright and related rights.<sup>14</sup> Thus, the DCD is not only technologically (Recital 10), but also conceptually neutral since the issue of legal characterisation of digital content contracts is reserved for national law.
- 17 In Lithuania, proper national law which should be addressed for characterisation of contracts for digital content is special part of contract law as prescribed in LCC Book 6 on Law of Obligations. In contrast to the general part, the special part of a contract law deals only with specific types of nominate contracts (*contractus nominatus*), such as sale, lease, services, etc. Thus, it is insufficient to apply just consumer law rules to characterise contracts for digital content as there is a necessity to address the whole system of contract law.<sup>15</sup>

14 As explained in recitals 3, 4 and 7 of the Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, consumers increasingly enter into contractual arrangements with service providers for the provision of online content services. Certain online services include content such as music, games, films or entertainment programmes which are protected by copyright or related rights under Union law. The rights in works protected by copyright and in subject-matter protected by related rights are harmonised, *inter alia*, in Directives 96/9/EC (2), 2001/29/EC (3), 2006/115/EC (4) and 2009/24/EC (5) of the European Parliament and of the Council. The provisions of international agreements in the area of copyright and related rights concluded by the Union in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights annexed as Annex 1C to the Agreement establishing the World Trade Organization of 15 April 1994, the WIPO Copyright Treaty of 20 December 1996, and the WIPO Performances and Phonograms Treaty of 20 December 1996, as amended, form an integral part of the Union legal order.

15 LCC contains about two thousand articles, half of whom prescribe rules of contract law.

- 18 The main classification of nominate contracts in Lithuania is based under the criterion of subject matter (prestation) of a contract. Examples include: sales contracts that transfer property against price, barter contracts that exchange property against another property, lease contracts which give use of a tangible property against payment of money, licence contracts to give use of intellectual property irrespective of consideration, works contracts that create or repair property against payment of money, remunerative services contracts to provide intangible services against payment of money, etc.
- 19 Consequently, consumer contracts for supply of a digital content should also take into account their subject matter: supply of digital content or digital services against consideration of price. It is, apparently, an uneasy task because to characterise such a contract one should firstly decode the meaning of “digital content” and “digital services”, and only then compare it with the existing concepts of the LCC. It is a very complicated task as the legal status of data is one of the most difficult and evolving issues in the contemporary private law, which concerns the blurred intersection between general property law and intellectual property law.<sup>16</sup> Thus, the search for answers posed by consumer law leads to contract law and even to the structural questions of the whole private law.
- 20 DCD Art. 2 prescribes that “digital content” means data which are produced and supplied in digital form. Whereas “digital service” means either a service that allows the consumer to create, process, store or access data in digital form, or a service that allows the sharing of or any other interaction with data in digital form that is uploaded or created by the consumer or other users of that service.
- 21 It follows from the definition below that the notion of digital content is characterised by two cumulative criteria: (i) data or information by itself and (ii) digital forms in which data is produced and supplied. Here, data is clearly understood *largo sensu* as encompassing both – information which is and is not protected by intellectual property law.
- Digital form is the expression of an information in digital language – a code which is understandable to machines. Let us briefly examine how data and its digital form may be treated in Lithuanian civil law.
- 22 Under Lithuanian civil law, information is directly listed in LCC Art. 1.97 among possible objects of civil rights, apparently because the LCC expressly protects commercial secrets, professional secrets (LCC Art. 1.116) and privacy (LCC Art. 2.23). Information also may be protected by intellectual property law (Law on Copyright and Related Rights,<sup>17</sup> Law on Patents,<sup>18</sup> etc.), tort law (LCC Art. 6.263) and transferred by the contract (LCC Art. 6.156).
- 23 Things are more complicated under general property law. It should be noted that although Lithuanian law provides for a very wide concept of property (LCC Art. 4.38), which includes even *res incorporales*, such information is not an independent object under general property law. Indeed, it would be too extreme and even impossible to exclusively attribute all information for the person who discovers it against all the remaining world (*erga omnes*). From the other side, the embodiment of valuable information in some controllable and movable form (*corpus mechanicum*) such as in the particular data file stored in the computer’s hard disk or cloud, may pretend to be separate object of property law since it replicates at least a weak form of attributable assets.
- 24 In summary, data may be partially protected by various rules of Lithuanian civil law, for instance by copyright law, but it is not an independent legal object itself in general property law.<sup>19</sup> The universal protection by general property law may only benefit digital embodiments of data in movable, controllable, and valuable form, such as data files. In the latter case, digital content may simultaneously be the object of both ordinary and intellectual property rights, which should protect different elements of it.
- 25 Text of the DCD may also be used to support the reasoning of a dual structure of property rights on digital content. First, we can see that Recital 19 lists computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications as examples of digital content. In addition, Recitals 53 and 54 make it clear that digital content or digital services may be subject

16 See, for instance, Sjef van Erp, Ownership of Data: The Numerus Clausus of Legal Objects. *Brigham-Kanner Property Rights Conference Journal*, 2017, p. 235-257; Andreas Boerding, Nicolai Culik, Christian Doepke, Thomas Hoeren, Tim Juelicher, Charlotte Roettgen & Max V. Schoenfeld. Data Ownership – A Property Rights Approach from a European Perspective. *Journal of Civil Law Studies*, Vol. 11, 2018, p. 323-369; K. K. E. C. T. Swinnen. Ownership of Data: Four Recommendations for Future Research. *Journal of Law, Property, and Society*, Vol. 5, 2020, p. p. 139-175; Sjef van Erp, Willem Loof. Digital content as a legal object (“Rechtsobjekt”) from a Dutch and comparative perspective. *Geschäftsmodelle in der digitalen Welt*, 2017, p. 63-76, etc.

17 *Official Gazette*, 2003, No. 28-1125.

18 *Official Gazette*, 1994, Nr. 8-120.

19 Lithuanian copyright law protects not every type of data, but only creative works. Law on Copyright and Related Rights Art. 5 provides list of unprotectable works, including ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries or mere data.

to intellectual property rights and restrictions stemming from them.<sup>20</sup> Secondly, Recital 19 lists as examples on how digital content or digital services may be supplied the transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media. From the methods listed above, we can see that some of them, such as transmission on a tangible medium and downloading by consumers on their devices, results in a transfer of separate data files to the consumer's control, resembling property transfer. In those cases, the consumer gets data files, which may be subject to intellectual property rights of third persons, but still owned by the consumer under the applicable national property law.<sup>21</sup> In addition, the consumer gets relevant intellectual property rights to lawfully use such content. Remaining intellectual property rights held by third parties in essence function as *ius in re aliena* or limited

property rights which burden right of ownership on digital assets or data files.

20 This is also seen in the EC Digital Market Strategy, which expressly equals digital content with copyrighted works.

21 Recall the ECJ case law in copyright cases to either support or deny this view. For instance, in *UsedSoft*, concerning resale of computer programs, the ECJ stated that, according to a commonly accepted definition, a "sale" is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him. It follows that the commercial transaction giving rise, in accordance with Article 4(2) of Software Directive 2009/24, to exhaustion of the right of distribution of a copy of a computer program must involve a transfer of the *right of ownership in that copy*. In this respect, it must be observed that the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of a computer program is pointless if *the copy* cannot be used by its *possessor*. See Judgment of the European Court of Justice (Grand Chamber), 3 July 2012, in case C-128/11 (*UsedSoft*). In the *Tom Kabinet* case, concerning resale of e-books, the ECJ did not follow such reasoning and stated that unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium (namely an item of goods), every online service is an act which should be subject to authorisation where the copyright or related right so provides. The supply of a book on a material medium and the supply of an e-book cannot, however, be considered equivalent from an economic and functional point of view. See Judgment of the European Court of Justice (Grand Chamber), 19 December 2019, in case C-263/18 (*Tom Kabinet*). However, even the conservative ECJ approach in *Tom Kabinet* case does not deny possibility to provide an independent proprietary status for a digital copy of intellectual work under national property law. It only says that such a copy may be used without prejudice to applicable intellectual property rights (namely communication to the public), which are not exhausted under Information Society Directive 2001/29/EC.

26 Returning to the legal characterisation of contracts for supply of digital content, where consumer gets data files against payment of money, such a transaction from functional perspective should point to a sales contract. From the other side, according to LCC Art. 6.307, 6.383, 6.402, 6.428, eligible objects of sales contracts may only be things (including various sorts of energy and even business enterprise), financial assets (foreign currency and securities) and patrimonial rights including intellectual property rights. Since digital assets are not (at least expressly) listed in possible objects of sales contract, the sale of digital content could not be characterised as sale. Of course, this narrow scope of sales contracts seems to be obsolete. However, there are still two ways to apply sales rules for supply of digital content as sales rules may be applicable either by analogy (LCC Art. 1.8) or where supply of digital content equals sale of copyright, as is in case of unlimited licence against payment covering the market price of computer programs which was characterised as a sale in the aforementioned *UsedSoft* case.<sup>22</sup> In instances where digital content is transferred against personal data as consideration, the contract should be characterised as a barter. However, barter rules may be applicable only by the analogy as LCC Art. 6.432 restricts barter to corporeal things. Where digital content is developed in accordance with the consumer's specifications (situation mentioned in DCD Art. 3 (2)), the contract should be characterised as a work contract (LCC Art. 6.644).

27 Streaming, storage of data, file hosting, data sharing, access to the online games or use of social media and all other forms of digital content supply and services, which do not involve permanent transfer of digital records to consumer, should fall in the scope of service contracts *largo sensu*. Most contracts in this respect will be contracts of remunerative services (service contract *stricto sensu*, LCC Art. 6.716) as well as work contracts where the trader has assumed the duty to create or repair digital content (LCC Art. 6.644). Rules on some other specific types of services, such as lease, loan for use, and deposit may be applicable only by analogy because they are limited to tangible things (LCC Art. 6.477, 6.629, 6.830). In cases where digital content is facilitated for use against personal data as consideration, the contract cannot be characterised as a service contract because remunerative service contracts must be paid with money, not data. Once again, this does not preclude the application of rules regulating service contracts by analogy for express contracts for unregulated types of services.

22 Judgment of the European Court of Justice (Grand Chamber), 3 July 2012, in case C-128/11 (*UsedSoft*).

- 28 The legal analysis above shows how complicated the issue of characterisation of digital content contracts is within Lithuanian civil law. Although the LCC is relatively a new code (adopted during the past millennium), its classical rules on nominate contracts currently are not adapted to accommodate new types of goods, for example, digital content. Oddly, the usually more conservative and inflexible branch of law, property, acknowledges a wider spectrum of legal objects than the special part of Lithuanian contract law dealing with nominate contracts. Application of existing rules on nominate contracts by analogy may be a formal, however, inefficient solution, since supply of digital content is a multifaceted phenomenon which may attract various rules and create uncertain and volatile case law.
- 29 The difficulties described above are inevitable, as rules on digital content contracts are located in the general part of a contract law. Such legislative techniques say nothing about the characterisation of digital content contracts and presuppose the search for additional rules in a special part of Lithuanian contract law dealing with nominate contracts. This situation could probably be justified where just few rules on digital content contracts exist (as currently is with LCC Art. 6.228<sup>12</sup> and several other rules transposed from the Consumer Rights Directive), but not anymore due to more comprehensive regulation presented by the DCD.
- 30 This leads to the conclusion that contracts for supply of digital content deserve to be named *sui generis* by their nature and should be classified separately from other nominate contracts. Such a solution would enable the legal system to overcome a full set of problems related to complex characterisation and cross-application of various rules regulating other types of contracts. Furthermore, this conclusion corresponds with the logic of the Consumer Rights Directive where contracts for digital content that are not supplied on a tangible medium should be classified as neither sales contracts nor service contracts (Recital 19). From the other side, it is hard to deny its conceptual similarity to the sales contracts as in both cases, valuable objects are exchanged for a price.<sup>23</sup> Therefore, in my opinion, the DCD should be transposed in Lithuanian law by introducing digital content contracts as new specific type of nominate contract in the LCC chapter close to sales contracts.

23 This is also evidenced by sources of soft law – such as Draft Common Frame of Reference and CESL, where supply of digital content is regulated within or closely with the sales contract. See *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Full ed., Sellier, 2009; Proposal for a Regulation on a Common European Sales Law. COM/2011/0635 final - 2011/0284 (COD).

## D. Main features of forthcoming implementation of the DCD into Lithuanian law

- 31 When reading the text of the current Pre-draft, it becomes evident that implementation of the DCD, at least in one direction, is going to impact all Lithuanian civil law, i. e. beyond the limits of consumer contracts.
- 32 Currently, the prescription term on claims for defective goods is 6 months and for defective works is one year (LCC Art. 6.667), whereas claims for defective services are limited by a general ten-year prescription term (LCC Art. 1.125). Only in consumer sales of tangible movables for most claims the limitation is two years (LCC Art. 6.363). The Pre-draft will unify limitation on all those claims as well as claims for defective digital content for a two-year prescription period. The new rule is to be included in LCC Art. 1.125 and applicable for consumer, commercial and general civil contracts of sale and services. Although such broad change is not obligatory under the DCD, it is apparently to bring more legal clarity and unity for contract law remedies. All in all, six months is obviously too short a prescription period for a sales claims, especially in cases of defective real estate.<sup>24</sup>
- 33 Other changes to the LCC under the Pre-draft are limited to consumer contracts, but one of them is somewhat surprising. Although the DCD and its “sister” Consumer Sales Directive 2019/771 are derived from the same legislative package, share common logic, and equal functional level, they will be transposed differently from a structural point of view. The DCD will be transposed in the separate (second) section in the chapter XVIII<sup>1</sup> titled “Consumer contracts for supply of digital content and digital services”, i.e. in the general part of contract law. The Consumer Sales Directive, in contrast, will be transposed in the section on consumer sales, i. e. in the special part of contract law dealing with nominate contracts. In my opinion, this is not only incongruent but also a conceptually wrong choice, because as analyzed above, contracts

24 Take for example, the group of consumers who may want to unify their efforts and submit a class action for the same sort of defects of newly constructed block of residential buildings created under the identical construction projects by the same developer. Currently, this would be very difficult because there is a need to gather at least basic evidence on relevant defects, such as obtaining construction technical expertise, organizing all claimants and submitting to a compulsory pre-trial claim to the defendant with at least 30 days for consideration, which is prerequisite for a class action (Code of Civil Procedure [Official Gazette, 2002, Nr. 36-1340] Art. 441<sup>2</sup>). All those tasks require time.

of supply of digital content by their nature are a new type of *contractus nominatus*. Therefore, rules on digital content from the Consumer Rights Directive and the DCD should be aligned and codified in the special part of contract law next to rules on consumer sales of movables based on the Consumer Sales Directive.<sup>25</sup> This would bring more clarity and logic within the whole structure of the LCC and better reflect the equivalence between two types of consumer contracts: supply of digital content and sales of tangible movables.

- 34 When analyzing the remaining content of the Pre-draft, it is evident that most rules concerning digital content are simply copied from the DCD. This restrictive approach is not surprising having in mind that the DCD provides for maximum harmonization. However, even in both cases where DCD Art. 11 (2) enables deviation from its rules, the Lithuanian legislature tends to follow default European rules. Thus, according to the Pre-draft, LCC Art. 1.125 and LCC Art. 6.228<sup>22</sup>, on the period of a legal guarantee of conformity and period of prescription respectively, should be limited for two years as is minimally required by the DCD.
- 35 With respect to legislative options which were left to Member States, only a few of them were directly addressed in the Lithuanian Pre-draft. For instance, the Lithuanian Pre-draft transposes the DCD in the general part of contract law, however, such a place within the LCC says nothing about the exact legal nature of digital content contracts. The notion was left to national law (Recital 12 sentence 2 of the Directive). The legal classification of digital content contracts apparently was left to case law, though it could have been solved directly in the LCC by providing separate section on new types of *contractus nominatum* with respective rules on characterization and precluding legal uncertainty.
- 36 Another legislative option left for Member States was a possibility to provide for specific remedies on hidden defects (Recital 12 sentence 3 of the Directive). Such remedies, mainly the right to terminate a contract in cases where hidden defects destroy goods, exist in general sales law (LCC Art. 6.334 (2-3)); however until the legal nature of digital content contracts is settled, the possibility to rely on those norms is uncertain. From the other side, application of the latter rules should not create real

problems because if a digital content is destroyed, for instance by the programming error, general rules on conformity will apply (DCD Art. 14).

- 37 The flowing legislative option was to choose from (1) the legal guarantee (time limit to discover defects after delivery), or (2) prescription period (time limit to sue trader in court), or (3) combine both concepts at once for purposes of remedying non-conformity (Article 11 (2) subparagraph 3, Article 11 (3) subparagraph 2, recital 58 of the Directive). As it was mentioned above, Lithuanian drafters opted to maintain both those time periods in tandem. This coexistence, in my opinion, is positive as it facilitates for better consumer protection and reflects the pre-existing situation in Lithuanian contract law (LCC Art. 1.125, 6.338, 6.363).
- 38 Another open possibility was to extend regulation of the DCD to a broader spectrum of considerations. However, like the DCD, its Pre-draft regulates only those relations where digital content and digital services are supplied in exchange for a price or personal data. Other considerations, such as where the trader only collects metadata or where the consumer is exposed to advertisements exclusively to gain access to digital content or digital services, are not eligible for formation of contract for supply of digital content. On the other hand, there is still a possibility for parties to expressly create an innominate consumer contract which would provide other forms of consideration. If this is not the case and there is no express contract, non-contractual obligations like tort liability still may arise, for example, if digital content is malicious.
- 39 Default rules of national private law were left for application to other issues also. For instance, the DCD establishes the traders' right of redress against the person or persons liable in the chain of commercial transactions, while leaving details of this redress to be determined by national law. The Pre-draft is silent on this point because current Lithuanian rules on civil liability already catch all those aspects.
- 40 The Pre-draft is also silent on commercial guarantees for digital content or services, leaving this point to already existing general rules on commercial guarantees in LCC Art. 6.228<sup>14</sup>, based on Consumer Sales Directive 1999/44/EC<sup>26</sup>. However, those rules, according to LCC Art. 6.228<sup>1</sup>, are applicable only with tangible goods and services (including digital services as there are no exceptions for them). Commercial guarantees for intangibles, such as digital content, are left for operation under general contract law principles of freedom of contract (LCC

25 Unless Lithuanian legislator will reform Lithuanian consumer law and concentrate legal rules in the new separate book of LCC on Consumer private law. In such case, of course, digital content contracts should be included not in Book 6 on Law of Obligations, but in a separate LCC book on Consumer private law.

26 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171.



Art. 6.156) and *pacta sunt servanda* (LCC Art. 6.189). This leads to legal fragmentation because with respect to contractual guarantees, digital services and digital content fall under different rules.

- 41 Alternatively, there are at least two situations where the Pre-draft directly addresses issues that were left untouched in the DCD.
- 42 Firstly, the DCD does not regulate the consequences for the contracts in the event that the consumer withdraws consent for processing of the consumer's personal data. Such consequences should remain a matter for national law (Recital 40 of the Directive). On this point Pre-draft on LCC Art. 6.228<sup>18</sup> prescribes that if the consumer withdraws consent, the trader is not entitled to payment for digital content (services) supplied until the moment of withdrawal. This national rule is sound and coherent; if consumer still uses digital content (or services) but no longer wants to remunerate the trader with special consideration, such as personal data, he assumes duty to pay money. Of course, traders should warn about such consequences in advance to avoid any misunderstandings that digital content was supplied free of charge.
- 43 Secondly, according to Recital 15, Member States should remain free to regulate the right of parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. Indeed, such rule on suspension of performance currently exists in general Lithuanian contract law. LCC Art. 6.207 (1-2), based on UNIDROIT Principles of International Commercial Contracts, provides that where the parties are bound to perform a contract simultaneously, either party shall have the right to suspend performance until the other party begins to perform and where the parties are bound to perform a contract consecutively, the party who is to perform later shall be able to suspend its performance until the first party has performed his obligations. Despite this, the Lithuanian Pre-draft tends to introduce an additional rule in LCC Art. 6.228<sup>24</sup> that gives the right for the consumer to withhold payment until non-conformity of digital content or service will be cured. This is a poor choice since it creates unnecessary repetition of an already existing regulation.
- 44 Overall, the Lithuanian Pre-draft mostly reflects a cautious and conservative approach for implementation of the DCD within private law. There are several exceptions but on most occasions, questions directly untouched by EU law are reserved to ordinary rules of national private law. Often this is justified since the LCC, being a comprehensive and contemporary code, already provides for most answers. However, a cautious approach also creates legal uncertainty as

to the legal nature and classification of digital content contracts creating fundamental issues on which the Pre-draft is silent.

## E. Supposed effect Of the DCD on consumer rights in Lithuania

- 45 Art. 46 of the Lithuanian Constitution of 1992 obliges the State to defend the interests of the consumer. Lithuanian Constitutional Court has interpreted this constitutional norm as requiring from the State to react to particularity, diversity and dynamics of particular economic activities and adapt legal regulation accordingly.<sup>27</sup> European legislation which is specifically designed for digital content is a reactionary instance to changes in economic relations, which in case of digitisation are radical. It is expected, though, that such a reaction should enhance (not compromise) existing consumer protection.
- 46 It has been analysed in the preceding section that, for the purposes of characterisation, digital content contracts hardly fit into a specific type of contract regulated by the LCC. The same is with normative content of existing LCC contractual rules, which were not specifically tailored for digital goods. Since the DCD was developed based on European sales law, let us take for comparison consumer sales.
- 47 In general, DCD rules are far more developed and detailed than current LCC rules on consumer sales, which transpose various EU directives and are applicable mostly for the sale of tangible goods (LCC Art. 6.228<sup>1</sup>). For example, whereas current law (LCC Art. 6.363, Consumer Sales Directive 1999/44/EC Art. 2) regulates only problems of installation, DCD also touches upon issues of functionality, compatibility, interoperability and integration (DCD Art. 7-9). The same are with most other DCD rules, namely supply (Art. 5), conformity (Art. 6-8) and remedies (Art. 13-20). Express calibration and division of conformity rules into two separate blocks (subjective conformity and objective conformity – DCD Art. 6-8) is a legal innovation for both EU law and national contract law. Another interesting example is the reversal of burden of proof against a consumer who does not cooperate with the trader (Art. 12). From the perspective of fairness, which is the cornerstone of a contract law, this rule looks very sound and welcome.

27 Judgment of the Constitutional Court of Republic of Lithuania of 2 March 2009 in the case No. 28/08.

- 48 The DCD also sets a longer-term on burden of proof than the LCC. Under DCD Art. 12 (2), the burden of proof, regarding whether the supplied digital content or digital service was in conformity at the time of supply, shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied. This period in the LCC currently is 6 months (LCC Art. 6.363).
- 49 Another change is specific for Lithuanian law. Under LCC Art. 6.218 (1) the aggrieved party is bound to give the other party notice of termination in advance within the time-limit established by the contract; if the contract does not indicate such a time-limit, the notice must be given within thirty days. In contrast DCD Art. 15 does not provide any default time limits on notice of termination.
- 50 Where the LCC has already addressed issues submitted for harmonisation, things should not change. For instance, the general rule in sales law already makes the seller liable for legal defects, i.e. when third parties enforce their rights against buyer (LCC Art. 6.321). Therefore, similar DCD Art. 10 regulation on third-party rights will make no impact, at least to those transactions where sales law is currently applicable by analogy.
- 51 In one critical aspect, however, new legislation will restrict consumer rights. Currently, in Lithuanian sales law, a consumer has relative freedom to elect remedies,<sup>28</sup> whereas under Consumer Sales Directive 1999/44/EC, freedom to elect remedies is restricted. For instance, according to LCC Art. 6.363, a consumer as a primary remedy may elect price reduction; whereas under the Directive's Art. 3, it is only subsidiary remedy, applicable where repair or replacement is not possible. This will change after implementation of the new Consumer Sales Directive and the DCD, which both are maximum harmonisation directives and provide for the similar subordination of remedies as Consumer Sales Directive 1999/44/EC.
- 52 In summary, the DCD should enhance protection of consumer rights in Lithuania. Legal innovations and rules specifically tailored for the digital environment will lead to optimisation and development of the existing contractual regime. In turn, all this should provide legal certainty on rights and duties of both the trader and consumer. That the DCD will introduce

a more structured and restrictive approach on election of remedies into Lithuanian law, should not be seen as dramatic. All in all, European remedial structure, which now will become mandatory for Lithuania as well, is focused on proportionality and is time tested.

## F. Conclusions

- 53 Efficient consumer protection in Lithuania is a constitutional obligation of the State that implies a duty to adapt legislation for changes in economic relations. During the ongoing digital revolution, harmonised and tailored European consumer law on digital content should strongly contribute for fulfilment of this duty. Paradoxically, the European legislature by adopting the DCD helped the national legislature to perform its duties under the Constitution.
- 54 Consumer relations in Lithuania are universally seen as civil legal relationships that are basically, but not exclusively, regulated in LCC Book Sixth "Law of obligations", whereas other consumer law rules are dispersed in various other statutes. According to the Lithuanian Pre-draft, the DCD should be implemented in the LCC chapter generally regulating whole contract law. Therefore, the Pre-draft leaves an issue of legal characterisation of digital content contracts to case law.
- 55 In my opinion, consumer private law, including DCD rules on digital content, should be concentrated in a new book of the LCC, specifically designated for consumer law. This would be an optimal solution to avoid distortion of normally coherent LCC rules.
- 56 Regarding the legal characterisation of digital content, the objective scope of Lithuanian property law is very flexible and is potentially ready to accept data files as a new type of *res incorporales*. Thus, movable and controllable digital content under Lithuanian law may be treated and protected as a novel form of property. However, the same cannot be said about the scope of nominate contracts in Lithuanian law, most of which are designed having in mind traditional forms of property. This mismatch alone creates difficulties of characterisation. These difficulties are exacerbated due to the multifaceted nature of digital content contracts which tend to attract various types of contracts and as a result, create legal uncertainty. Contracts for supply of digital content deserve to be named *sui generis* by their nature and should be classified separately from other nominate contracts. Such a solution would overcome a full set of problems related to complex characterisation and cross application of various rules regulating other types of contracts.

28 In a recent landmark case Lithuanian Supreme Court has confirmed that Lithuanian law prescribes more protective rules for consumers than those Consumer Sales Directive 1999/44/EC, namely that Lithuanian law has no hierarchy of consumers' remedies. See. Judgment of the Lithuanian Supreme Court of 10 June 2020 in the civil case No. 3K-3-186-1075/2020.

- 57 The lack of case law and complex legal characterisation of digital content contracts creates great uncertainty in practice and also hinders consumer protection in digital markets. Normative content of existing LCC contractual rules is not specifically tailored for digital goods. In general, DCD rules are far more developed and detailed than current LCC rules on consumer sales, which transpose various EU directives and are applicable mostly for the sale of tangible goods.
- 58 The Lithuanian Pre-draft mostly reflects a cautious and conservative approach for implementation of the DCD within private law. There are several exceptions, but on most occasions, questions directly untouched by EU law are reserved to ordinary rules of national private law. Often this is justified since the LCC is a comprehensive and contemporary code already providing for most answers. However, a cautious approach also creates legal uncertainty as to the legal nature and classification of digital content contracts creating fundamental issues on which the Pre-draft is silent.
- 59 Overall, the DCD should enhance protection of consumer rights in Lithuania. Legal innovations and rules specifically tailored for the digital environment will lead to optimisation and development of the existing contractual regime. In turn, all this should provide legal certainty on rights and duties of both the trader and consumer. That the DCD will introduce a more structured and restrictive approach on election of remedies into Lithuanian law, should not be seen as dramatic. All in all, the European remedial structure, which now will become mandatory for Lithuania as well, is focused on proportionality and is time tested. Since the DCD reflects the next evolutionary step in European contract law, Lithuanian contract law should inevitably benefit from the possibility to move hand in hand with time and civilisation.