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Editorial

by **Karin Sein and Martin Ebers**

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1 This special issue continues the academic debate on the topical issues of the new Directives on Digital Content and Services and Consumer Sales and, more broadly, on new technologies related to consumer contracts. The contributions of this volume are based on the presentations held at the virtual conference "Digital Consumer Contract Law and New Technologies" on the 26th-27th of November 2020. The conference – originally meant to take place in Tallinn but postponed and moved online due to COVID-19 restrictions – was part of the research project PRG124 "Protection of consumer rights in the Digital Single Market – contractual aspects", funded by the Estonian Research Council. The aim of the conference was to look into the core questions of the new consumer contract law directives, their interrelationship with other legal areas such as copyright or telecommunications law, their implications for consumers and industry as well as their ongoing transposition in Member States. Additionally, it provided a vivid discussion of certain new technologies and business models (AI, blockchain, internet of bodies, Legal Tech) and whether the new rules for consumer contracts are fit to deal with them.

2 Our special issue starts with *Hugh Beale*'s comprehensive overview of the Digital Content Directive and, more specifically, assessment of its rules on long-term contracts. He also reminds us of the utmost importance of public enforcement as consumers will usually have little incentive to exercise their rights under the directive due to their low value. *Gerald Spindler* then explores the interrelationship of the Digital Content Directive with copyright law and scrutinizes the triangle between copyright holders, traders and consumers by concentrating especially on the copyright restrictions in EULAs and whether they can be considered as a lack of conformity of digital content under the objective conformity test of the directive. He concludes, however, that the directive does not solve the problems in the triangle as consumers are not able to enforce their rights against the rightsholders and refers to the French model of *action directe* as a possible solution.

3 The issue then turns to the new digitalized Sale of Goods Directive, starting with the analysis of the seller's updating obligation in case of smart consumer goods by *Piia Kalamees*. She emphasizes that this obligation can be burdensome for traders as they usually are not in a position to provide the updates themselves; yet they are liable vis-à-vis consumers if the updates are missing or are leading to a lack of conformity of the good. To balance the seller's position, she suggests designing the national rules on the seller's right of redress in a mandatory manner, e.g. by limiting the possibility to exclude the right of redress in standard terms. *Alberto De Franceschi* also deals with the sale of consumer goods with digital elements and explores the consumer's remedies for lack of conformity, pointing out that consumers should not be allowed to by-pass the directive's system of remedies by using other remedies provided by national law. Moreover, he raises a fundamental question of whether the actual consumer law is fit to tackle planned (digital) obsolescence and ensure longer durability of consumer goods. *Peter Rott*, in turn, asks about the impact of the new consumer contract law directives on the smart car industry. He develops the argument that although the allocation of liability for inter-connected digital services with the seller of the car would seem to strengthen the consumer's position, different rules for hardware and digital content and services can easily complicate the enforcement of remedies. *Karin Sein* investigates the complicated interplay of the Digital Content Directive, the new European Telecommunications Code and Audio-Visual Media Directive, especially in case of bundle contracts, and points out certain inconsistencies.

4 At the time of the conference Member States were in the process of drafting their transposition rules of the new directives. As the Digital Content Directive leaves contract typology to the competence of Member States, it felt important to discuss how

jurisdictions with a civil code tradition deal with the implementation of its overarching contract law rules into national law. The country reports by *Brigitta Zöchling-Jud* (Austria), *Marco Loos* (Netherlands), *Monika Namysłowska*, *Agnieszka Jabłonowska* and *Filip Wiaderek* (Poland), *Laurynas Didžiulis* (Lithuania) and *Irene Kull* (Estonia) demonstrate that legislative choices vary considerably even within the civil law countries, including transposing the digital content provisions in the general part of contract law (Germany, Lithuania, Estonia), in the special part following the rules of sales contract (Netherlands) or even developing a separate act outside the civil code that integrates consumer contract law norms both on digital content as well as consumer sales (Austria, Poland).

5 The last section of this special issue deals with new technologies and the question of whether EU consumer law directives and especially the new Directives on Digital Contract Law are equipped to deal with the upcoming challenges posed by them. *Cristina Amato* focuses on the Internet of Bodies (IoB), which can be understood as an extension of the Internet of Things (IoT), since it connects the human body to a network through devices that are ingested, implanted, or connected to the body in some way. As Amato points out, the European Union has not yet set up a coherent regulatory framework in this field and proposes to set up a new framework which integrates the New Legislative Framework and the European Standardisation System with sales law. After that, *André Janssen* examines whether the new Directives on Digital Contract law are really "smart contract ready" based on blockchain technology. In this context, he focuses especially on two problems that can arise with smart contracts, i.e. (i) whether a smart contract with a virtual currency payment obligation is governed by the new Consumer Sales Directive, and (ii) whether a smart contract component is a "digital element" of a sold good under the New Consumer Sales Directive. The last contribution, written by *Martin Ebers*, discusses whether existing EU consumer law is equipped to deal with situations in which AI systems are either used for internal purposes by companies or offered to consumers as the main subject matter of the contract. The analysis reveals a number of gaps in current EU consumer law, in particular regarding dark patterns and online behavioral advertising, growing information asymmetries, risks of algorithmic decision making, liability for defective AI systems, and missing standards for assessing whether AI systems comply with the objective conformity criteria. In this light, Ebers discusses upcoming legislation in the field of AI and Consumer Law.

6 The new Directives on Digital Contracts are part of a wider strategy of the European Union in the field of consumer law and the digital economy in general. In the past two years, the EU also amended – as part of the "New Deal for Consumers" – the Consumer Rights Directive (CRD) 2011/83 and the Unfair Commercial Practices Directive (UCPD) 2005/29 – and adopted the new Directive on Representative Actions 2020/1828, in order to facilitate the enforcement of consumer rights in the digital age. Additionally, the European Commission presented in December 2020 two new proposals: first, the proposal for a Digital Services Act, which aims to introduce mechanisms for removing illegal content, possibilities for users to challenge platforms' content moderation decisions, and transparency measures for online platforms. And second, the proposal for a Digital Markets Act, which aims to ensure that large online platforms (so called "gatekeepers") behave in a fair way vis-à-vis business users who depend on them. In November, the European Commission also published a new consumer law agenda for the next 5 years. According to this agenda, the Commission is planning to publish guidance documents on the application of the UCPD and the CRD to problematic practices observed in e-commerce that prevent consumers from obtaining important information and abuse their behavioural biases. This refers, more specifically, to the use of 'dark patterns' (user-interface designs aimed at manipulating consumers), profiling, hidden advertising, fraud, misleading information and manipulated consumer reviews.

7 More legislative actions are yet to come: In the field of new technologies, the European Commission intends to present – as a follow up to its White Paper on AI – legislation aimed at tackling the 'technological, ethical, legal and socio-economic aspects of AI.' In parallel, there is also an ongoing discussion on how the current liability framework can be adapted to new technologies, discussed inter alia in the European Commission's Report on the safety and liability implications of AI, and the European Parliament's resolution with recommendations to the Commission on a civil liability regime for AI. Last but not least, as part of its European Data Strategy, the Commission presented also a proposal for a Data Governance Act and announced to come up with a proposal at the end of 2021 for a so-called Data Act aiming to "foster business-to-government data sharing for the public interest". How these legislative proposals will fit into existing consumer law, remains – for the time being – unclear.

8 In view of these dynamic developments, this special issue attempts to contribute to a better understanding of the new Directives on digital contract law. We hope that we have succeeded in doing so and wish all readers a stimulating and exciting read.

Karin Sein and Martin Ebers

Digital Content Directive And Rules For Contracts On Continuous Supply

by **Hugh Beale***

Abstract: This paper is in three parts. The first part gives a brief summary of the Digital Content Directive. The second part looks in more detail at longterm contracts for digital content or digital services, concentrating mainly on digital services but also considering contracts for digital content where there is to be "a series of individual acts of supply" and where the digital content is made available for a fixed period. It also considers "mixed" contracts under which digital services are to be supplied along with digital content and/or goods. The third and fourth parts look at gaps in the legislation from the points of view of consumers and then of traders, considering both issues that fall within the scope of the Directive yet nonetheless are left to Member States, and issues that are outside the scope of the Directive, and attempting to assess the extent to which these gaps may cause problems. The paper ends with a reminder that we need to consider also enforcement by public bodies and consumer organisations, which may have a particular importance in relation to the supply of digital content and services.

Keywords: Digital content; Digital services; Scope of Directive; Trader's obligations; Consumer Remedies; Gaps in Coverage; Enforcement by Public Bodies

Recommended citation: Hugh Beale, Digital Content Directive and rules for contracts on continuous supply, 12 (2021) JIPITEC 96 para 1.

A. Overview of the Directive[1]

Scope and nature of the Directive

1 In terms of scope, the Digital Content Directive[2] covers the supply of both digital content and digital services.[3] The Directive applies to digital content that is supplied to the consumer directly in digital form (for example by downloading or streaming) and to digital content that is supplied on a tangible medium, where the tangible medium is merely the carrier of the digital content.[4] It does not apply to goods with what are now termed "digital elements", that is, essential embedded or interconnected software: these will fall within the new Directive on Sale of Goods.[5] The Digital Content Directive applies when digital content or services are supplied for a price,[6] which may be in money or

* Emeritus Professor, University of Warwick; Senior Research Fellow, Harris Manchester College and Visiting Professor, University of Oxford. This work was part of the research project PRG124 "Protection of consumer rights in the Digital Single Market – contractual aspects", funded by the Estonian Research Council.

1 See generally JM Carvalho, Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771" [2019] J EU Consumer and Market Law 194; C Caufmann, "New EU rules on business-to-consumer and platform-to-business relationships" [2019] Maastricht Journal of European and Comparative Law 1; P Giliker, "Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?" in T-E Synodinou, P Jougleux, C Markou and T Prasitou (eds) *EU Internet Law in the Digital Age* (Munich: Springer 2020), 299; 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" (2019) 15 European Review of Contract Law 257 and "Conformity Criteria, Remedies and Modifications – Part 2", ibid, 365; R Schulze and D Staudenmayer, *EU Digital Law: Article-by-Article Commentary* (Oxford: Nomos/Hart 2020).

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, OJ L136 of 22 May 2019 ("DCD").

3 DCD Art 1.

4 DCD Art 3(3) and Rec 20.

5 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 166 0f 22 May 2019 ("SGD"), Art 2(5)(b).

6 DCD Art 3(1) al 1.

some digital equivalent of money (such as a token or, presumably, a cryptocurrency),[7] and where in exchange for the content or services the consumer provides personal data to the trader.[8] I will not discuss the issue of supplying personal data for reasons of space. The Directive applies when digital content or digital services are supplied by a trader to a consumer. Later I will consider whether this may catch a third party rights-holder with whom the consumer enters an end user license agreement.

2 The Directive is a "full harmonisation" Directive.[9] In other words, save as otherwise provided, Member States may not provide either less or more stringent measures of consumer protection. We will see that the Directive permits Member States to have different rules on one issue only.

3 For the sake of simplicity, in the remainder of this overview I will refer simply to contracts for the supply of digital content, but unless otherwise indicated the rules apply equally to the supply of digital services. Issues affecting the supply of digital services particularly will be considered in the next part.

Supply of digital content

4 The trader is under an obligation to supply the digital content, i.e. to make it accessible to the consumer,[10] "without undue delay", unless the parties have agreed otherwise.[11] Recital 61 states that in most cases the consumer can expect the supply to be immediate. However, if the digital content is supplied on a tangible medium, then the rules on delivery of goods contained in the Consumer Rights Directive[12] apply and not the rules on supply of the Digital Content Directive.[13]

5 If the trader fails to supply the digital content, the consumer may terminate the contract immediately if the trader has stated or made it clear that it will not supply the digital content, or if it was either agreed or is clear from the circumstances that supply by a specific time was essential to the consumer.[14] Otherwise the consumer must first "call on the Trader to perform" and may terminate the contract only if the trader then fails to supply without undue delay or within an agreed further period.[15] The consumer will presumably be entitled to damages for late performance but, as we will see later, the question of damages is left to be regulated by Member States.[16]

Conformity of digital content

6 The digital content must comply with two sets of requirements. First, there is a set of "subjective" requirements: the digital content must comply with the terms of the contract[17] and be fit for any particular purpose stated by the consumer, provided that there has been "acceptance" of the particular purpose by the trader.[18] Though the question is not a new one,[19] it is not quite clear what "acceptance" means here. As this is an additional requirement to knowledge of the consumer's purpose, it seems clear that merely mentioning the particular purpose to the trader will not suffice, but equally "acceptance" cannot mean that the fitness for purpose requirement has to be written into the contract, because this criterion is different from the requirement that the digital content comply with the contract.[20] Secondly,

7 DCD Art 2(7). On whether the DCD and the SGD apply when payment is to be made in cryptocurrency see Jansen's paper, below, pp 201-202.

8 DCD Art 3(1) al 2.

9 DCD Art 4 and Recs 3-9.

10 DCD Art 5(2).

11 DCD Art 5(1).

12 Directive 2011/83/EU of the European Parliament and of the Council 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 ("CRD"), Art 18. Equally the CRD rules on the consumer's right of withdrawal from a goods contract will apply (DCD Rec 20), and presumably also CRD Art 20 on the passing of risk.

13 DCD Art 3(3).

14 DCD Art 3(2).

15 DCD Art 13(1). Schulze and Staudenmayer (n1 above), 230 argue that there may not be an immediate right to terminate if a further time has been agreed but the trader then refuses to supply within that time, as it is not explicitly covered by Art 13(2).

16 DCD Art 3(10) and Rec 73.

17 DCD Art 7(a), (c) and (d).

18 DCD Art 7(b).

19 The Consumer Sales Directive, Art 2(2)(b) also refers to the seller having "accepted".

20 For this reason I do not find the division into "subjective" and "objective" criteria helpful; I fear that "subjective" may be misinterpreted as requiring expression in the contract. The distinction is also criticised by Carvalho (n 1 above), 12.

the digital content must comply with "objective" criteria. It must be for the purposes for which digital content of the relevant type is normally used; it must be of the quality and performance that the consumer may reasonably expect, taking into account public statements made by the trader or others in the chain of transactions; it must come with adequate accessories and instructions; and it must match any trial version or preview that the trader made available to the consumer[21] (and, presumably, that the consumer actually examined before the contract was concluded). The only exception allowed is where the consumer has been told that the digital content will not comply with the objective criteria and the consumer has accepted this expressly and separately.[22] The requirement of "separate acceptance" is to be welcomed. Having to give a separate mouse-click next to a list of possible shortcomings of itself might not bring home much to most consumers,[23] but we can hope that "expressly" will be interpreted as requiring that the actual facts be made clear to the consumer. In the context of the Directive on Unfair Terms in Consumer Contracts,[24] consumers seem to have gained useful additional protection from the requirement that traders use plain and intelligible language and, in particular, the Court of Justice's rulings, in the context of the exemption for "core terms", that this requires a very high degree of transparency.[25] "Expressly" in the DCD should equally be interpreted as requiring transparency.

7 The trader must also provide the consumer with the right to use the digital content.[26] Again I will not discuss this further because it will be the subject of a separate presentation.[27]

Maintaining conformity

8 It is not enough that the digital content conforms at the time it is supplied. The trader must inform the consumer of any updates that are necessary to keep the digital content in conformity with the contract and ensure that those updates are made available to the consumer.[28] Where "the contract provides for a continuous supply over a period of time", this obligation applies throughout the period.[29] Where there is no fixed period of supply, for example where there is a single supply for use for an indefinite period, the trader must maintain conformity for the period that the consumer may reasonably expect.[30]

9 Member States may limit the trader's responsibility to nonconformity which appears during a limited period of time.[31] Nonetheless the consumer must have the remedies prescribed by the Directive for non-conformities that appear in at least two years from the date of supply.[32] Likewise, limitation periods, which are also left to Member States' law, must not prevent the consumer from exercising any remedies for a non-conformity that appears within a two-year period.[33]

I suspect that in practice "acceptance" will depend on the criterion applicable under the UN Convention on Contracts for the International Sale of Goods (Vienna, 1980), Art 35(2)(b), that the goods do not conform unless "the buyer did not rely, or... it was unreasonable for him to rely, on the seller's skill and judgement".

21 DCD Art 8(1).

22 DCD Art 8(5).

23 See also Spindler, below, p 114 (para 9).

24 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

25 E.g. *Van Hove v CNP Assurances SA* C-96/14 EU:C:2015:262, April 23, 2015. For a detailed discussion see H Beale (Gen Ed), *Chitty on Contracts*, 33rd edn (as supplemented in 2020), Vol.II, paras 38-261-38-262C (- S. Whittaker).

26 DCD Art 10.

27 See Spindler's paper, below, p 111.

28 DCD Art 8(2) and Rec 44. It has been pointed out that updates are likely to be in the hands of third-party rights-holders, and a rights-holder may refuse to supply an update: see Kalamees's paper, below, p 133, para 8, In that case it would seem to be disproportionate to require the trader to bring the digital content into conformity (see below, p 99, para 12) and the consumer will be able to reduce the price or terminate the contract. In principle this should result in the trader having a right of redress, directly or indirectly, against the rights-holder under Art 20, but see below (p 104-105, para 46) for the limitations of the right of redress.

29 DCD Art 8(2)(a).

30 DCD Art 8(2)(b) and Rec 47. Note the qualifications in Art 8(3) when the consumer has not installed the update.

31 This is often referred to as "the legal guarantee period". Note that MSs may not require the consumer to notify the trader of a defect within any particular period, Rec 11.

32 DCD Art 11(2) al 2 and Rec 56.

33 DCD Art 11(2) al 3 and Rec 58.

10 We have seen that where digital content is supplied for indefinite use, the trader must inform the consumer of updates that are needed to maintain conformity of the content and ensure that they are made available to the consumer for a reasonable time.[34] Recital 47 says that this might require updating for a longer period than the "liability period" that may be set by a Member State, "particularly with regard to security updates". It is not clear how this can be the case, however.[35] If an update is required to keep the digital content in conformity, that must because a nonconformity has appeared. If a Member State has excluded the trader's liability for nonconformities that appear only after the liability period, the trader cannot have an obligation to supply an update unless the non-conformity had appeared before the end of the liability period; nor would the consumer have a reasonable expectation that updates would be supplied beyond that period. Updates must be provided throughout that period[36] but not, it is submitted, beyond it.

Burden of proof

11 The burden of proving that the digital content was supplied (i.e. made available to the consumer) within the appropriate time is on the trader.[37] As to other forms of nonconformity, if the nonconformity appears within one year of supply, it is up to the trader to show that the digital content was in conformity at the time was supplied,[38] unless the requirements of the digital content were incompatible with the consumer's digital environment and the trader had informed the consumer of these requirements in a clear manner;[39] or unless the consumer did not cooperate with the trader's attempt to determine whether the consumer's digital environment was compatible with the requirements, providing that before the contract was concluded the trader had informed the consumer that the trader might require the consumer's co-operation and that the trader used the least intrusive means.[40]

Remedies for nonconformity

12 The trader is required to bring nonconforming digital content into conformity, unless that is impossible or doing so would impose a disproportionate burden on the trader, and to do so within a reasonable time and without significant inconvenience to the consumer.[41] If this would be impossible or disproportionate, or if the trader either fails or refuses to bring the digital content into conformity as required, or if the nonconformity is sufficiently serious to justify it immediately, then the consumer may either reduce the price or may terminate the contract,[42] except that the consumer may not terminate the contract if the nonconformity is minor.[43] If however the digital content was not supplied for a price, then the consumer may terminate for even a minor nonconformity. Again the consumer will presumably be entitled to damages for any loss suffered, but these are left to Member States' law.

Termination for nonconformity

13 The consumer may exercise the right of termination by simply giving notice to the trader.[44] The trader then has 14 days in which to refund all sums paid by the consumer.[45] As we will see later, it appears that the refund must be of the full amount with no deduction for any use that the consumer has made of the digital content. The trader must deal with the consumer's personal data as is required by the General Data Protection Regulation.[46] Other types of data must not be used unless it is useless outside the application, relates only to consumer's activity while using the digital content or cannot be disaggregated;[47] and the trader must enable the consumer to retrieve data generated or supplied by the consumer.[48]

34 DCD Art 8(2)(b).

35 See also Sein and Spindler (n1 above), 387.

36 DCD Art 8(2)(a).

37 DCD Art 12(1).

38 DCD Art 12(2).

39 DCD Art 12(4).

40 DCD Art 12(5).

41 DCD Art 14(1)-(3).

42 DCD Art 14(4).

43 DCD Art 14(6).

44 DCD Art 15.

45 DCD Arts 16(1) and 18(1).

46 DCD Art 16(2).

47 DCD Art 16(3).

48 DCD Art 16(4).

14 Conversely, the consumer must refrain from using the digital content and, if it was supplied on a tangible medium, return the tangible medium to trader if asked to do so.[49]

B. Digital services or supply of digital content over a period

Fact situations and issues

15 We need to consider a number of fact situations. First, the service may be supplied with no content being downloaded: for example, where data is stored in the Cloud or is streamed to the consumer's device. Secondly, the contract may provide for several individual downloads of digital content.[50] Thirdly, there may be a download of digital content that the consumer is allowed to use for only a limited period, as with recent versions of Microsoft Office. Lastly, there may be a combination of digital services and periodic downloads of content, or of digital content supplemented by a digital service.

16 We need to consider a range of issues: the time for supply, the meaning of conformity, the conformity period, remedies (including withholding of performance as well as termination) and modifications to the digital content or service by the trader.

Supply of digital services

17 The trader must start to supply the service without undue delay;[51] as we have seen, this means making it available to the consumer, normally "immediately".[52] If there are to be further downloads these will fall within the phrase "unless agreed otherwise". In either case, if the services of further downloads are not supplied on time, the consumer may terminate if the trader has been called on to perform but has failed to do so, again as agreed or without undue delay.[53]

18 An obvious concern with digital services is that the services should be available to the consumer continuously (unless agreed otherwise, e.g. if the trader has stipulated that there may be 'down times' for site maintenance). From the Articles of the Directive by themselves it is not wholly clear whether an unauthorised interruption in service should count as a failure to supply within article 13 (so that the consumer may have to call on the trader to supply the services before terminating the contract) or as a nonconformity within article 14, but Recital 51 states that it is to be treated as a nonconformity. Thus the consumer must comply with the hierarchy of remedies, i.e. may have first to demand that the service be brought into conformity, and may then move to price reduction or termination. Where the trader has temporarily failed to supply the services and is called on to "bring it into conformity", the reasonable time for doing so will be expire almost immediately. The consumer may terminate immediately, however, if the trader is unwilling or unable to do so or if the delay is serious for the consumer;[54] or in those cases the consumer may opt immediately for price reduction.

The meaning of conformity

19 Leading commentators have written:

> *It needs to be emphasised that the quality criterion relates to the digital content or the digital service. It does not relate to its content. For example, if the e-book or digital film purchased is of bad quality from the point of view of the writing, directing or from an artistic point of view, does not amount to lack of conformity leading to the consumer remedies of Art. 14.*[55]

I am sorry to say that I think this may be misleading, if not positively wrong. If a film that is advertised as suitable for children under 10 were to contain scenes of a sexual nature or of great violence it would not be fit for the purpose for which digital content of the same type would normally be used, let alone possess the qualities that the consumer may reasonably expect.[56] The same must be true of an online translation service that regularly produces gibberish. It is true that it is not reasonable to expect the trader to be responsible for providing "good" writing (whatever that means), but unsuitable content or recurrent inaccuracy are different.

49 DCD Art 17(1) and (2). Schulze and Staudenmayer (n1 above), 298 note that any sanction for non-compliance is left to national law.

50 Recital 56 gives the example of a consumer being provided with a link to download a new e-book every month.

51 DCD Art 5(1).

52 DCD Art 5(2) and Rec 61.

53 DCD Art 13(1).

54 See Art 14(4).

55 Schulze and Staudenmayer (n1 above), 140.

56 See DCD Art 8(1)(a) and (b).

The conformity period

20 Where there is to be a "continuous supply" of digital content or services for an agreed period, it must conform throughout the agreed period.[57]

21 Recital 57 indicates that this is also the position when the period for continuous supply is indefinite:

> *"Continuous supply can include cases whereby the trader makes a digital service available to consumers for a fixed or an indefinite period of time, such as a two-year cloud storage contract or an indefinite social media platform membership. The distinctive element of this category is the fact that the digital content or digital service is available or accessible to consumers only for the fixed duration of the contract or for as long as the indefinite contract is in force. Therefore, it is justified that the trader, in such cases, should only be liable for a lack of conformity which appears during that period of time."*

22 Conversely, the consumer is entitled to updates throughout the time for which the consumer is entitled to use the digital content.[58]

23 It is submitted that the same must apply when digital content is supplied by a single download but is available to the consumer for a limited period only. This is certainly the case if the trader has undertaken to supply updates at intervals during the period, which Recital 57 seems to treat as a form of "continuous supply".[59] The same result must apply even if there was no promise of updates: the consumer would reasonably expect updates for that period, though not beyond it. The consumer is not entitled to use the content after the expiry of the period and therefore be cannot entitled to have it updated later (unless of course the period is renewed).

Remedies for nonconformity

Withholding performance

24 If the digital service or digital content does not conform, the consumer is entitled to have it brought into conformity. What is the position before that has been done? With digital services, it is very likely that the consumer will be paying periodically, and possibly this will happen also with digital content that the consumer is permitted to use for only a limited period. Can the consumer suspend payment until digital content has been fixed? The Directive leaves the right to withhold performance to Member States' law.[60] This should not be a problem for most consumers, for two reasons.

25 First, Article 14(5) al 2 provides that consumer is entitled to a price reduction for the period of the nonconformity. This surely implies that the consumer who has not yet paid for this period need not do so.

26 Secondly, most legal systems seem to provide a right to withhold performance as a matter of general contract law. In many civil law systems, non-performance by party A will entitle party B to withhold its performance of a reciprocal obligation unless to do so would be disproportionate or contrary to good faith. Under common law, the right is a little more limited but B will be entitled to withhold its performance if the nonconformity is sufficiently serious that it would justify termination if ultimately it were not cured.[61] Of course the right to withhold performance may be only a "default rule" that can be excluded by the terms of the contract, but any exclusion is likely to fall foul of the Directive on Unfair Terms in Consumer Contracts.[62]

Refunds after termination

27 If the consumer justifiably terminates the contract, then the consumer is entitled to a refund of the price paid for the period of non-conformity and in respect of any period after the date of termination. Article 16 (1) al 2 provides:

> *"... in cases where the contract provides for the supply of the digital content or digital service in exchange for a payment of a price and over a period of time, and the digital content or digital service had been in conformity for a period of time prior to the termination of the contract, the trader shall reimburse the consumer only for the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated."*

57 DCD Art 8(4).

58 DCD Art 8(2)(a).

59 DCD Rec 57 last sentence.

60 DCD Rec 15. Contrast SGD Art 13(6), which requires the consumer to have the right to withhold performance, though MSs "may determine the conditions and modalities for the consumer to exercise the right to." Why the Directives differ on this point is unclear.

61 See the Notes to the *Principles of European Contract Law* (PECL) Art 9:201 and *Draft Common Frame of Reference* (DCFR) Art III.-3:401.

62 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, see especially Annex para 1(b).

Conformity assessed objectively

28 What if the consumer uses, and indeed enjoys using, the digital content or services for a significant period before it discovers the non-conformity? It is submitted that under the Directive there can be a nonconformity even if the consumer is wholly unaware of it. Although Recital 66 states that the consumer should not have to pay for digital content or services when the consumer is "unable to enjoy" them, in the Directive itself this is implemented by the paragraph of Article 16(1) just quoted, which is dealing with contracts for supply over a period. For other contracts, i.e. where digital content is supplied for indefinite use, Article 16(1) al 1 requires the trader to refund all sums paid by the consumer and Article 17(3) further provides:

> *"The consumer shall not be liable to pay for any use made of the digital content or digital service in the period, prior to the termination of the contract, during which the digital content or the digital service was not in conformity."*

29 This provision appears to apply not only to a supply of services or content for a period but also to a supply for indefinite use. So where the supply was for indefinite use, if the nonconformity was present when the digital content was supplied, the trader must make a full refund, whether or not the non-conformity was known to the consumer at the time. The same must apply to cases of the continuous supply of services and where digital content supplied for use for a limited period.

Modifications (other than to cure non-conformity)

30 We have seen already that the trader has an obligation to update digital content or services to maintain conformity. In addition, the trader has the right to make other modifications provided that certain conditions are satisfied: the contract must reserve the trader's right to do so and provide a valid reason for it; modification must be at no additional cost to the consumer; and the consumer must be informed "clearly and comprehensibly" of the nature of the modification and of the consumer's rights.[63] These rights are that if the modification has more than a minor negative impact, the consumer may terminate the contract within 30 days of receipt of the information being supplied or the modification being made, whichever is later; and if the consumer elects to terminate, the trader must reimburse the consumer for any payments made for the period after the date of termination.[64]

31 That may seem eminently fair to the consumer, who can allow the modification and terminate the contract if it turns out to be unsatisfactory. However, what the Directive gives with one hand it seems to take away with the other. Article 19(4) provides:

32 "Paragraphs 2 and 3 of this Article shall not apply if the trader has enabled the consumer to maintain without additional cost the digital content or digital service without the modification, and the digital content or digital service remains in conformity."

33 So the consumer will have no right to terminate if trader gave the consumer the option of maintaining the digital content or service in its existing form without modification at no cost the consumer. To my mind this effectively undermines the consumer's position. Most consumers will not be able to tell in advance whether modification will cause them a problem. If they decide to permit the trader to make a modification but then find it unsatisfactory, they will have to live with it. The consumer has no right to revert to the original version of the digital content or service.

34 It is possible that the Trader might bundle the modifications with an update that is necessary to keeping the digital content in conformity. It seems to me that to do this, without allowing the consumer to choose separately whether or not to accept the "unnecessary" modification, might well amount to an unfair commercial practice.[65]

Evaluation in respect of "long-term" contracts

35 How useful is the Digital Content Directive for consumers? As far as digital content is concerned, the Directive seems to perform a very useful role. Few Member States have any legislation specifically designed for digital content, though some like the Netherlands and Germany have provided that their legislation on sale of goods should extend to digital content.[66] In the absence of such provisions, courts may find it hard to know how to treat contracts for digital content. The contracts will not normally fall within legislation on sale of goods for two reasons: first, digital content is intangible and, secondly, it is very seldom that ownership is transferred under the contract - normally the consumer only obtains

63 DCD Art 19(1).

64 CDC Art 19(2) and (3), applying Arts 15-18, the effects of which were outlined in Part I.

65 See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

66 See Loos's paper (below, p 230).

the right to use the digital content.[67] But equally legislative provisions on services may not seem wholly appropriate to digital content, particularly where there is a one-off download for use for an unlimited period.[68] Moreover, in many systems to treat the supply of digital content as a service would lead to the result that the trader is under an obligation to use reasonable care (*de moyen*) rather than a stricter obligation (e.g. of result); and it would also affect the remedies available, at least in common law jurisdictions where specific performance is traditionally not available for contracts for services.[69] The approach of the Directive, which leaves categorisation to national law,[70] and applies the rules however the contract is categorised, seems to me to be very sensible.

36 How useful are the provisions on digital services for consumers? It seems to me that they are valuable in three ways. First, the trader is under an obligation of result to supply services and content) that conform to the subjective and objective criteria, not merely one to use reasonable care. Secondly, the consumer's remedies are clear, particularly the right to have the services brought into conformity. Thirdly, the trader's right to make modifications must be set out in the contract, with reasons for the modification – though I am not clear what "reasons" really means and whether it will provide any effective safeguard for the consumer. Something like "to meet operational requirements" is a kind of reason but will tell the consumer almost nothing.

C. Gaps in consumer protection

Damages

37 Recital 73 provides:

> *"The compensation should put the consumer as much as possible into the position in which the consumer would have been had the digital content or digital service been duly supplied and been in conformity. As such a right to damages already exists in all Member States, this Directive should be without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules."*

38 Accordingly, Article 3(10) leaves the question of damages entirely to Member States. This may be problematic.[71] My understanding is that the laws of damages in all Member States are generally functionally equivalent (i.e. though they employ different concepts and terminology, they give broadly similar outcomes), but there are at least two areas that may be problematic.

Damages for loss of enjoyment

39 The first is the recovery of damages for loss of enjoyment. In some systems damages for loss of enjoyment are awarded regularly, at least where the main purpose of the contract was to provide enjoyment,[72] as will often be the case with contracts for digital services. In some other systems there seems to be a problem. For example in German law §283 BGB provides that damages for non-pecuniary loss may be recovered only where stipulated by law[73] or if the loss was the result of an injury to the claimant's body, health, freedom or sexual self-determination. I am not aware that there is a relevant stipulation in the law and I would find it hard to bring loss of enjoyment of films, music or video games within the second paragraph.[74]

67 These problems seem not to arise in every MS. For example, Lithuanian sales law applies not just to goods but to the sale of rights, which includes the transfer of limited rights such as a licence to use digital content. See Didziulis's paper, below, p 261.

68 For a discussion in the UK context see R. Bradgate, Consumer Rights in Digital Products, A research report prepared for the UK Department for Business, Innovation and Skills (2010), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf .

69 Under the UK Consumer Rights Act 2015 the consumer can now require the trader to repair or replace digital content (s 43) or to repeat performance of a service to make it conform to the contract (s 55), and if necessary the court can grant an order of specific performance to compel the trader to perform (s 58); but ironically, the Act does not provide for specific performance to compel delivery or performance in the first place. Under the common law rule specific performance will seldom be available because damages would be treated as an adequate remedy and, with services, also because of difficulties over supervision. See H Beale (Gen Ed), *Chitty on Contracts* (33rd edn, 2018), Vol I, paras 27-015 – 27-045.

70 DCD Rec 12.

71 It is criticised also by Schulze and Staudenmayer (n1 above), 43.

72 See PECL Art 9:501, Note 4, and DCFR Art III.-3:701, Notes Section IV.

73 Which is the case for holiday contracts (§ 651f BGB).

74 For examples in other national laws see DCFR Art III.-3:701, Note 13.

Strict versus fault-based liability

40 The second is that while in the common law systems liability for damages is normally strict, in some continental systems liability in damages is based on fault[75] and in others force majeure is a defence.[76] This is again left to Member States' law.[77] Lack of fault or force majeure is most likely to be relevant where the trader has failed to supply the digital content or service in due time or there has been an interruption in its provision.

41 How far this is really a problem is not clear. Even if the applicable Member State's law does not recognise force majeure as a defence or does not require fault for damages, it is quite likely that the express terms of the contract will purport to exclude the trader's liability if the non-performance was not the trader's fault. Then the question would be whether the exclusion is fair under the Directive on Unfair Terms. It is quite possible that the court would accept the term as a fair departure from normal law, even in those countries in which force majeure is not a defence and fault is not required for liability.

Harm to the consumer's digital environment

42 I am also unsure about the traders' liability if the digital content causes harm to the consumer's "digital environment" - e.g it corrupted other digital content on the consumer's appliance. In many countries this situation would simply be seen as a form of breach of contract by the trader, but it has been suggested that in others (e.g. in German law[78]) this would fall within a duty of protection, and that duties of protection are outside the scope of the Directive.[79]

43 Where the harm was caused by the digital content itself, it seems to me that the harm will normally be the result of a nonconformity, and the trader will be "liable" under Article 11(1). Nonetheless, the Directive does not actually deal with the situation. In any event, the consumer's right to have the digital content brought into conformity will not entitle the consumer to have the corrupted data restored. The consumer will merely be entitled to damages, which are left to national law.

44 Where the damage was caused by the method of installation adopted by the trader, it is far from clear that the Directive applies at all, as it might not be seen as a non-conformity but as a breach of a duty of protection.

45 So in either case the trader may be able to escape liability by showing that it was not at fault or that it could not have anticipated or avoided the problem.

Digital content and service developers

46 In many cases the trader with whom the consumer first contracts will not be the producer of the digital content or services; the consumer will be given a right to use digital content or services that are actually provided by a third party rights-holder under an end user license agreement (or "EULA"). If that is the case, and the digital content or services are defective, what is the position? First, it is clear that the trader with whom the consumer first dealt will be liable to the consumer; the content or services supplied are non-conforming and, as we have seen, lack of fault is no defence to a claim to enforce the right to have what was supplied brought into conformity with the contract. If the trader reasonably incurs costs in bringing the content or services into conformity or (where appropriate) in providing the consumer with a refund, the trader should in principle be able to pass the cost back up the chain of supply. Article 20 of the Digital Content Directive replicates the provision found in the Consumer Sales Directive under which the trader "shall be entitled to pursue remedies against the person or persons liable in the chain of commercial transactions".[80] However, in practice the trader may find difficulty in obtaining an effective remedy. As in the Consumer Sales Directive, even though the principle of effectiveness may require that the

75 E.g. § 280(1) BGB.

76 E.g. French law, see H Beale, B Fauvarque-Cosson, J Rutgers and S Vogenauer) *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law* (Hart, 3rd edn 2019), ch 28.3.

77 DCD Rec 14.

78 On duties of protection in German law, see B Markesinis, H Unberath and A Johnston, *The German Law of Contract*, 2nd ed (Hart, 2006) 126

79 See Schulze and Staudenmayer (n1 above, 40).

80 CSD Art 4; now replaced by SGD Art 18. It is not entirely clear to me whether these provisions apply to the case where the trader is made liable in damages to the consumer, as the matter of damages is left to MSs' law, see above. While to an English lawyer the word "liable" immediately suggests liability in damages, in the DCD the word is used to refer to the trader being responsible to provide a remedy of the kind required by the Directive (see e.g. Art 8(3) and Art 11). The relevant recital (Rec 78) does not help on this point. However, the question may be moot, as I imagine that in most MSs' laws the trader would be able to pass back liability in damages provided that the next person up the chain was responsible, on which see above (whether requirement of fault or defence of force majeure).

trader has a remedy of some sort,[81] questions of against whom the trader may pursue remedies, the relevant actions and conditions of their exercise are left to national law. In practice recovery by the initial trader will depend very much on what terms are contained in the relevant contracts and whether, if the relevant contract attempts to limit the liability of the party higher in the chain, national law will uphold the limitation of liability.

47 Will the consumer have rights only against the trader with whom the consumer first contracted, or will the consumer also have rights against a third party rights-holder who developed the digital content? One possibility is that the rights-holder is liable as a "producer" under the Product Liability Directive;[82] but there is doubt about the applicability of the Directive to digital content,[83] let alone digital services, and in any event the consumer's loss will seldom meet the €500 minimum level for liability for damage to property.[84]

48 What about liability under the Digital Content Directive itself? Recital 13 might be read as indicating that the Directive does not apply to developers. It says:

> *"Member states also remain free, for example, to regulate liability claims of a consumer against a third party that supplies or undertakes to supply the digital content or digital service, such as a developer which is not at the same time the trader under this Directive."*

49 However, the last phrase of the recital begs the question: might the developer be a trader and supplier under the Directive? Although it can be argued that the EULA is sometimes no more than a grant of a permission to use the digital content, if the content or services (or updates) are downloaded from the licensor's website, then it is being "supplied" by the licensor, and Article 3(1) second alinea does not say the supply must be under a contract.[85] If the developer then collects personal data from the consumer, the developer will be responsible for supplying data that meets the objective criteria for conformity[86] and, of course, any subjective criteria[87] that are contained in the EULA. So I think developers and other rights-holders may sometimes find themselves liable under the Directive; but consumers will not have a remedy against such parties in every case.

Other gaps for consumers

50 There seem to be at least four further gaps in protection for consumers.

Mixed-purpose contracts

51 It has been noted by others that Recital 17 leaves the question of mixed-purpose contracts to Member States' law, which seems unfortunate.[88]

Right to terminate long-term contracts

52 Unlike the initial proposal,[89] the Directive as adopted does not deal with the consumer's right to terminate a long-term contract for the supply of digital content or services. I understand that this is because Member States were not able to agree on an article.[90] Most Member States have the rule that contracts for an indefinite duration can be terminated by either party on reasonable notice;[91] and any clause of the contract which purported to tie the consumer down to a really lengthy notice period would almost certainly be treated as unfair. I suspect the problem comes with contracts that are for a long, fixed period. The length of the period would probably not be subject to review for fairness under the Directive on Unfair Terms in Consumer Contracts because it would be part of the "main subject matter" of the contract. What I do not know is whether there are serious problems over long-term contracts for digital content and services. When things in the digital market change so quickly, I would not expect traders to use long fixed period contracts.

81 Schulze and Staudenmayer (n1 above), 320-321.

82 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Art 1.

83 S Whittaker, "European Product Liability and Intellectual Products" (1989) 105 Law Quarterly Review 125.

84 Art 9(b).

85 Compare Art 3(1) al 1, which applies the Directive to "any contract" to supply in exchange for a price under

86 Under DCD Art 8.

87 DCD Art 7. Art 7(b) will seldom apply since there will normally be no exchange of information between the consumer and the rights-holder before the EULA is concluded.

88 See e.g. C Caufmann (n 1 above), 11.

89 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2105) 634 final of 9 December 2015, art 16.

90 See Schulze and Staudenmayer (n1 above), 81 and 91.

91 See DFCR Art III.-1:109, Notes Section III.

53 However, we have to recognise that the effects of the Coronavirus are likely to be that many families suffer a very sudden and wholly unexpected fall in income. For them even a contract for digital services lasting only a year may suddenly become insupportable, and we may be very sorry that the Directive does not at least allow termination of fixed period contracts for an important reason such as illness or unemployment. We may see more laws adopting a doctrine of social force majeure.[92]

54 Another serious point is the one made by Sein and Spindler,[93] that the Directive does not give the consumer who terminates a contract by notice the right to retrieve data that the consumer has supplied or created. That seems a very unfortunate omission.

Mixed and bundled contracts

55 The second problem arises with mixed or bundled contracts, where the supply of digital certain content or digital services is combined with the supply of goods or other services. The effect of the termination of one element of the contract on the rest of the bundle is left to Member States. This must leave consumers who have entered mixed or bundled contracts in some doubt as to their position. The omission again seems unfortunate, particularly as Recital 34 points out that bundling may be an unfair commercial practice. The issue of linked contracts is also left to Member States' law, with potentially similar results.

Digital input from third party required

56 Lastly, I am concerned about the situation where the consumer is supplied with digital content which requires input in the form of digital services from a third party - for example, where the consumer buys a navigation programme that for its proper operation must have regular traffic reports that may be provided by a third party.

57 If the digital service is to be provided under the trader's responsibility then the issues seem to be similar to those that arise when goods with a digital element require digital services to operate, a situation discussed by Sein and Spindler.[94] The question will be either what was actually agreed between the parties, or what it was reasonable for the consumer to expect. Needless to say, the outcome does not depend simply on the agreement made between the trader and the third-party; it is a question of what the consumer was led reasonably to expect. Article 13(3) provides that in case of doubt the supply of incorporated or interconnected content or service is presumed to be covered by the sales contract.

58 If nothing is said to the consumer about the extent of the third party's responsibility or the trader's responsibility for provision by the third party, and the digital content is made available for a fixed period (for example on an annual subscription), I think it would be reasonable to expect that the necessary digital service would remain available for the same period of time. If there is no fixed period, then it seems to me that the digital services should remain available for a reasonable period, just like necessary updates. In other words, the question might be whether the service provided meets, first, the "subjective" requirements of the contract and, secondly, the objective requirements. It is not easy, however, to fit the question of the continued supply of digital services by a third party into either set of conformity criteria. The nearest explicit criterion in the Directive is "accessibility" which, I have it seen argued,[95] covers supply of digital content on a limited number of occasions; perhaps "accessibility" can be stretched to cover our situation also.

59 Where the trader does not either expressly or implicitly accept responsibility for provision of the digital service, there may be more of a problem. If the digital content (or for that matter, goods with digital elements) will only operate satisfactorily with a service for which the trader takes no responsibility, then surely the Consumer Rights Directive requires the trader to inform the consumer; this would seem to be a main characteristic of what is being supplied,[96] albeit a negative one. However, if the trader fails to inform the consumer, it is not clear that at present the consumer has any remedy. The Consumer Rights Directive states that information given by a trader before a distance or off-premises contract will form an integral part of the contract[97] but says nothing about failures to give information. However when

92 Cf T Wilhelmsson, "Social Force Majeure – A New Conception in Nordic Contract Law" (1990) 13 J of Consumer Policy 1. On the way that different laws of contract are being changed, or measures are being taken to alleviate hardship, in response to the effects of the Coronavirus, see E Hondius et al (eds) *Coronavirus and the Law in Europe*, Part 4, available at https://www.intersentiaonline.com/bundle/coronavirus-and-the

93 Sein and Spindler (n1 above), 379.

94 Sein and Spindler (n1 above), 272-275

95 Schulze and Staudenmayer (n1 above), 142.

96 CRD Art 5(1)(a) and 6(1)(a). Alternatively, this could be treated as an aspect of "functionality" under Arts 5(1)(g) and 6(1)(r). The CRD does not define "functionality" but DCD Art 2(11) says it means "the ability of the digital content or digital service to perform its functions having regard to its purpose". In practice this definition will probably be read across to the CRD.

97 CRD Art 6(1).

the new better enforcement and modernisation Directive[98] comes into force, the consumer who has been the victim of an unfair commercial practice will have remedies of damages and price reduction or termination.

60 It is possible that where the digital content will not work satisfactorily without the supply of digital services which are to be supplied buy third party under a separate contract, the two contracts will be seen as linked. This may often mean that the ending of one contract will give the consumer right to terminate the other contract. However, as we saw earlier, the question of linked contracts is left to national law. I suspect national rules are far from consistent.

D. Surprises for traders

Background[99]

61 Like other consumer Directives, the digital content Directive has as its legal base promotion of the internal market; consumer protection per se is not a legal basis on which the EU may legislate. Before approximately 2003, most Directives were aimed at promoting the internal market by encouraging consumers "actively" to shop abroad (either in person or by distance contract) by giving them the confidence that, wherever they shopped, they would have certain set of minimum rights, for example as to the conformity of goods, remedies for non-conformity and to challenge unfair contract terms. Thus most of the consumer Directives were minimum harmonisation Directives. Many Member States used the opportunity to give or maintain higher standards of consumer protection than was required by the Directives. So for example, some Member States allow terms to be challenged as unfair even if they have been negotiated[100] or in some cases even if the term was one of the core terms that under the Directive is exempt from review.[101] The UK, for example, provided that a consumer who has been supplied with nonconforming goods could reject them and obtain a full refund of the price without first asking for repair or replacement.[102] In about 2003, however, the European Commission's approach changed. Though consumer protection remains an important goal,[103] the emphasis shifted to trying to promote the internal market by making it easier for traders to sell their goods across borders.[104] In particular the Commission was concerned with what came to be known as "the Rome I problem". Under the Rome I Regulation[105] parties to a consumer contract remain free to choose which law should govern the contract, and so the trader may continue to use the law with which it is familiar and its normal terms and conditions, subject only to the rule the mandatory rules of that law - but there is one important exception. This is contained in Article 6(2) if the Regulation: if a trader contracts with the consumer in the state in which the consumer is habitually resident, or if the trader directs its activities at consumers in that state, consumers contracting with the trader are entitled to protection of the mandatory rules of the state in which they are habitually resident. This might mean, for example, that a business seeking to sell its products across Europe via a website might have to deal with the different rules of consumer protection in every member state.

62 The Commission's first answer to this was to move from minimum harmonisation to full harmonisation, so that in effect the rules of consumer protection would be the same everywhere and traders would not have to worry about the differences. Member States have not always welcomed the change in approach, as it might mean reducing their level of consumer protection to the European minimum standard. The first attempt by the Commission was its 2008 proposal for a Consumer Rights Directive,[106] which would have replaced not only the Doorstep

98 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, Art 3(5), inserting a new Art 11a into the CRD.

99 This section draws on H Beale, "The Story of EU Contract law - from 2001 to 2014" in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2016) 431.

100 See H Schulte-Nölke, C Twigg-Flesner and M Ebers, *EC Consumer Law Compendium* (Sellier, 2008) 199-200, 226. The UK now also allows the review of terms that were negotiated: Consumer Rights Act 2015, s 62.

101 E.g. the Nordic Contracts Act s 36.

102 Sale of Goods Act 1979, ss 1 and 13-15; see now Consumer Rights Act 2015, s 19.

103 See DCD Rec 5.

104 See DCD Rec 4

105 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

106 Proposal for a Directive of the European Parliament and of the Council of 8 October 2008 on consumer rights COM(2008) 614 final.

Sales[107] and Distance Sales[108] Directives but also the Unfair Terms and the Consumer Sales Directives. There would have been some increase in consumer protection but the main change would have been to full harmonisation. Politically this was something of a failure; the Commission was only able to get the Consumer Rights Directive through by limiting it, by and large, to distance and what are now called off-premises sales.

63 The Commission then turned to a different approach, proposing a Common European Sales Law[109] which would not have replaced the various national laws but would have provided traders and consumers with an optional, alternative regime. That too was a political failure and was withdrawn.[110] The Commission has now reverted to full harmonisation.

64 As far as the Digital Content Directive is concerned, I think it can be said that the full harmonisation approach has been pretty successful. Most of the issues that are covered by the Directive will be fully harmonised, the main exception being that Member States may limit the consumer's remedies to non-conformities that appear within a certain period, provided that the period is at least two years from the date of supply.[111] The same cannot be said for the new Directive on Sale of Goods. This is not the place for analysis of that Directive but so many issues are left to Member States that it can only be described as Swiss cheese harmonisation – full of holes.

65 So, in the context of contracts to supply digital content and digital services, what are the gaps in full harmonisation that might cause problems for traders who want to sell across borders but do not have the resources to investigate the laws of the states but they are targeting, so that they might be in for a nasty surprise?

66 Some of the same issues that I have suggested may be problematic for consumers because they are left to national law may also be problematic for traders. For example, a trader who normally operates in a regime in which damages are based on fault, but who has contracted to supply a consumer in a common law jurisdiction, may be surprised to find itself strictly liable to the consumer.

67 There are other issues which might cause problems for traders, some of them not even mentioned by the Directive. I think the list must include illegality, though I accept that to ask for harmonisation on such a culturally specific and sensitive issue would be to cry for the moon. More realistically, a trader used to a "legal guarantee" period limited to two years may be surprised to find that in the consumer's law there is no such limit. Traders may be surprised at the effects of termination (some Member States do not require each party to make full restitution after termination, though admittedly that will not be problem for the trader who was able to demand full payment from the consumer in advance); limitation periods; liability for hidden defects; and the liability of producers who are not traders within the meaning of the Directive (at least to the extent that digital content or services is seen as being outside the scope the Product Liability Directive.) The last kind of liability is of course non-contractual but it might well be regarded as mandatory by the applicable law, and so fall within Article 5 of the Rome II Regulation.[112]

68 Whether there are other issues of general contract law that have not yet been addressed by Directives and that might cause traders to be unpleasantly surprised is a topic for another day. My suspicion is that there are not very many.[113] Some issues are simply not likely to arise in the context of the supply of digital content or digital services to consumers. For example, there are major differences between the various general laws on questions such as mistake, fraud by silence and duties of disclosure,[114]

107 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/ 31.

108 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19

109 COM(2011)635 Final of 11 October 2011.

110 European Commission, Commission Work Programme 2015 Com(2014) 910 final, Annex 2 p.12.

111 DCD Art 11(2).

112 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

113 There might be some scope for liability for breaking off negotiations contrary to good faith (on which see, for example, J Cartwright and M Hesselink, *Precontractual liability in European Private Law* (Cambridge University Press 2011). The Law Commission for England and Wales has been looking at the practice of many online sellers to defer the formation of the contract until the goods have been dispatched. (See Law Commission, *Consumer Sales Contracts: Transfer of Ownership* (CP No 246, (2020), ch 4.) Might consumers who are unaware of this practice and who have acted on the assumption that their orders have been accepted, only to find that seller is not willing to supply the goods after all, have a remedy?

114 See e.g. R.Sefton-Green (ed), *Mistake, Fraud and Duties to inform in European Contract Law* (Cambridge University Press, 2005); H Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law* (Oxford: OUP, 2012).

but given the extensive information duties imposed on traders by the CRD and the private law remedies that will shortly be available if information is not disclosed, I suspect issues of this type will seldom arise in this context. Nor do I not see much scope for doctrines such as threat, undue influence (at least in its common law meaning, which requires abuse of a relationship between the parties)[115] or abuse of the consumer's circumstances. Equally until very recently I doubted whether adjustment for change of circumstances, at least along "classical" lines, will apply, as most contracts will be fairly short term; but, as mentioned earlier, the coronavirus may change this in ways we cannot yet fully foresee.

E. Conclusion and a final point

Conclusions

69 Overall, as far as concerns the supply of digital services, contracts for digital content where there is to be "a series of individual acts of supply" and contracts where the digital content is made available for a fixed period, the new Directive is a useful piece of legislation for both consumers and traders. There are certainly some problems with its provisions, for example that consumers who have agreed to a modification that later they regret may be left without recourse;[116] but by and large the Directive seems fit for purpose as far as it goes.

70 The main problems with the Directive are over the issues that it does not harmonise, that instead are left to national law - either explicitly, or because they are outside the scope of the Directive. Perhaps the most serious examples are liability in damages, the right of Member States to limit liability to non-conformities that appear within two years, limitation periods and possibly rights to terminate long-term contracts.

71 Consumers and traders will have to hope that work to protect them or, as the case may be, to save them from unpleasant surprises, can be taken further in future years. But the Directive is a good start.

Enforcement by public bodies and consumer organisations

72 I would like to end by briefly referring to another issue that the rises under the Directive (and also under the Directive on Sale of Goods). It is an issue that I have given fuller treatment elsewhere,[117] but I mention it again because I believe it is important.

73 Article 21 of the Digital Content Directive requires Member States to enable public bodies and consumer organisations to ensure that the provisions of the Directive "are applied". This appears to mean that public bodies and consumer organisations must be empowered to act against defaulting traders. I think in practice this is likely to be far more important them any private remedy given to an individual consumer. Particularly in relation to digital content, claims by consumers are likely to be of relatively low value. If so, consumers will have little incentive to take up their rights and remedies. However, the aggregate harm caused by a defaulting trader to the body of consumers as a whole might be very significant. Public enforcement may play a very important role in policing the market, just as it has in relation to unfair terms. With digital content and services in particular, it seems that public bodies and consumer bodies will find it relatively easy to identify traders who are causing a problem by monitoring comparison websites and platforms, and possibly by watching social media. It has been pointed out that this monitoring is most likely to be effective if it is combined with ADR or an Ombudsman service. And hopefully the public bodies and consumer organisations will encourage traders to take responsibility things gone wrong and act so as to prevent things going wrong in the future, rather than using times as the sole means of deterring traders. Chris Hodges has described "The ideal sequence of reactions to adverse events" as being:

1. To identify an issue as quickly as possible.
2. To identify the root cause of the problem.
3. To share information on the problem and to discuss and agree the appropriate response.
4. To implement the right response, and share that information.
5. To apologize for harm caused, and repair it or provide redress.
6. To monitor the situation and see if changes need to be made in the initial response.[118]

115 Cf the different meaning under the Unfair Commercial Practices Directive Art 8.

116 See above, p 102, paras 30-33.

117 See H Beale, "Conclusion and Performance of Contracts: an Overview" in R Schulze, D Staudenmayer and S Lohsse (eds), *Contracts for the Supply of Digital Content: regulatory Challenges and Gaps* (Baden-Baden: Nomos, 2017), 33, Part III.

118 (C Hodges, Ethical Business Regulation: Growing Empirical Evidence, 2016), http://www.fljs.org/sites/www.fljs.org/files/publications/Ethical%20Business%20Regulation.pdf

74 If this approach is taken, it is likely to lead to significant improvements in both the initial quality of digital contents and services and, if things do go wrong, in the way that consumer complaints are handled.

Digital Content Directive And Copyright-related Aspects

by **Gerald Spindler***

Abstract: This article deals with the difficult relationship between the Digital Content Directive and copyright principles. Applying the objective consumer expectation test as laid down in Art 8 DCD, typical copyright restrictions such as those related to the exhaustion principle or limiting the use to a narrow circle of users are examined. Moreover, the triangle between rightholders, traders, and consumers as reflected by licenses are scrutinized.

Keywords: Copyright Law; Digital Content Directive; Copyright restrictions; Exhaustion principle; objective consumer expectations; license contracts

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A. Introduction

1 The Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services[1] has led to an intense discussion about reforms in contract law and consumer protection regarding all kinds of digital content contracts and services.[2] Whilst issues of consequential losses or standards and benchmarks for defects – in particular the subjective and objective standards and tests in Art 6 of the proposed DCD – have largely been discussed with regards to the first proposal of the DCD,[3] the relationship between copyright law and

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1 European Parliament and Council Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) [2019] OJ L 136/1 (hereafter cited as DCD).

2 Cf. Karin Sein and Gerald 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' (2019) 15 ERCL 292; Axel Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' [2019] JZ 577; for the first proposals cf. Gerald Spindler, 'Contracts for the Supply of Digital Content – Scope of application and basic approach' (2016) 12 ERCL 183; Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?*, (Manz Vienna 2016); Lydia Beil, 'Conference Report: ERA Conference „New EU Rules for Digital Contracts"' [2016] EuCML 110; Jan M. Smits, 'New European Proposal for Distance Sales and Digital Contents Contracts: Fit for Purpose?' [2016] ZEuP 319; Stojan Arnerstål, 'Licensing Digital Content in a Sale of Goods Context' [2015] GRUR Int. 882.

3 Johannes Druschel and Michael Lehmann, 'Ein digitaler Binnenmarkt für digitale Güter' [2016] CR 244, 247ff; Wolfgang Faber, 'Bereitstellungspflicht, Mangelbegriff und Beweislast im Richtlinienvorschlag zur Bereitstellung digitaler Inhalte' in Wendehorst/Zöchling-Jud (eds) (n 2) 90, 98 ff; Gerald Spindler, 'Contracts for the Supply of Digital Content' (n 2) 183, 196ff; Dirk Staudenmayer, 'Verträge

the proposed amendments to contract law had been widely ignored.[4] This might have been due to the fact that Art 3 No 9, Recital 20 and 36 of the DCD explicitly exclude copyright law from its scope of application. Moreover, the fact that the first DCD proposal stuck to a subjective conformity test, rather than to the now adopted mixed subjective-objective approach of conformity in Arts 7, 8 DCD which provides much more room for an objective control of End User License Agreements (EULA-) clauses, which contravene objective consumer expectations.[5]

2 However, copyright law is deeply intertwined with any kind of services and performances concerning digital content.[6] Frequently digital content is protected by copyright, be it music, movies, books, software or databases, even if just tiny pieces of content are at stake.[7] All of the mentioned digital content is explicitly covered by the DCD as stated in recital 19 DCD.[8] Thus, contracts on digital content are often closely related to transfer of copyrights – however, nearly all these transfers of rights are operated under a so-called license contract, which is deemed to be concluded directly between the user of the digital content and the rightholder, encompassing all kinds of different contractual obligations in addition to the main sale (or service) contract between the supplier and the user/ customer. Whether these so-called "end user licenses agreements" (EULAs) can be brought in line with traditional contract law and how the DCD will affect those contracts, and vice-versa, will be one of the main focal points of this article. In this context, we will concentrate on issues of conformity of digital content in the light of (complicated) copyright transfers and licenses (B). We will show both, how the conformity test of Art 8 DCD influences contract law between the supplier and the buyer, as well as its indirect impact on copyright principles laid down in the EULAs between rightholders and users (C).

B. Licenses

I. Licenses as two sides of the same coin

3 The transfer of rights is operated by license agreements; they are the only tool to entitle the user (consumer) to use copyrighted material as long as no limitation or exception applies. Even though the focus of licenses relies upon the transfer of rights, such reproduction etc. licenses are usually a two-sided contract containing all kinds of (contractual) obligations. Thus, it should be expected that licenses are regulated either by copyright law or by contract law. However, neither copyright nor contract law encompasses provisions on licenses, or they regulate licenses on a very low level. National contract law like German contract law ignores the concept of license contracts as they are not mentioned in the German civil law code (Bürgerliches Gesetzbuch). Whereas national copyright law at least provides some provisions, such as mandatory remunerations on an adequate level, Section 32 German Copyright Law (UrhG), the bulk of contractual provisions (e.g. restrictions of use etc.) are only slightly regulated by copyright law. Even in insolvency law the legislator has not been able to codify license contracts and the effect of insolvency on copyrighted goods – in particular software – despite the huge impact of software on industry.[9]

4 Given the absence of specific provisions, licenses and their general terms and conditions are to a large extent still left to court practice in each member state of the EU. As mentioned, we have

über digitale Inhalte' [2016] NJW 2719, 2721; Christiane Wendehorst, 'Hybride Produkte und hybrider Vertrieb - Sind die Richtlinienentwürfe vom 9. Dezember 2015 fit für den digitalen Binnenmarkt?' in Wendehorst/Zöchling-Jud (eds) (n 2) 45, 65ff.

4 Exceptions are Liliia Oprysk and Karin Sein, 'Limitations in End-user Licensing Agreements: Is there a Lack of conformity under the new Digital Content Directive?' [2020] IIC 594; Metzger (n 2) 578; Michael Grünberger, 'Verträge über digitale Güter' [2018] 218 AcP 213; Michael Grünberger, 'Die Entwicklung des Urheberrechts im Jahr 2019' [2020] ZUM 175.

5 Cf. now for more extended discussion Oprysk/Sein (n 4) 595ff.

6 In detail on possible subject matter and relevant acts of use for digital contents according to (German) copyright law cf. Grünberger (n 4) 228ff.

7 Case C-5/08 *Infopag International A/S v Danske Dagblades Forening* [2009] ECR I-06569, para 51.

8 As recently decided by the CJEU Case C-476/17 *Pelham v Huetter* [2019] EU:C:2019:576, para 39; cf. also Linda Kuschel and Darius Rostam, 'Urheberrechtliche Aspekte der Richtlinie 2019/770' [2020] CR 393; Sein/Spindler (n 2) 292.

9 Christian Berger, 'Lizenzen in der Insolvenz des Lizenzgebers' [2013] GRUR 321; Winfried Bullinger and Kai Hermes, 'Insolvenzfestigkeit von Lizenzen im zweiten Anlauf einer Insolvenzrechtsreform?' [2012] NZI 492; Mary-Rose McGuire, 'Lizenzen in der Insolvenz: Ein neuer Anlauf zu einer überfälligen Reform' [2012] GRUR 657; Roman Trips-Hebert, 'Lizenzen in der Insolvenz – die deutsche Insolvenzordnung als Bremsklotz' [2007] ZRP 225; Ralf Dahl and Jan Schmitz, 'Der Lizenzvertrag in der Insolvenz des Lizenzgebers und die geplante Einführung des § 108a InsO' [2007] NZI 626.

to distinguish two core elements of licenses, the transfer of rights and the (contractual) obligations between the rightsholder and user.[10] Both are in a complex manner intertwined, as compliance with contractual obligations is often combined with the transfer of rights. For instance, the widely used General Public License for open source code may serve as a blue print for this relationship: Users of an open source code may modify and alter the code, however, under the condition that they offer third parties the modified code for free[11] and place the code under the same license (GPL).[12] When users do not comply with these obligations (and others as well) they will forego their rights under the GPL and will eventually not be entitled to modify the code anymore. The mechanism of the GPL thus ties contractual obligations to the transfer of rights.[13]

II. Distribution chain and End User License Agreements (EULA)[14]

5 In contrast to the analogue world where buyers (users) did not have to acquire specific (copy)rights in order to make use of their work, the era of digital content reverses that situation: Every use of a digital content entangles different kinds of copyright relevant acts such as reproduction, transmitting/broadcasting or making the content available to the public. Without a reproduction in a (temporary) cache or memory they can scarcely be displayed or made audible etc.

6 However, copyright law tries to take these technically necessary actions into account by establishing specific limitations to copyrights. Mandatory limitation of ephemeral reproduction, Art 5 (1)(d) InfoSoc-Directive[15], which allows users to reproduce and copy the digital content in their cache memories if the reproduction is only due to technical requirements and is limited in time while not being able to be exploited economically, may serve as an example in this context. In a similar way, Article 5 (1) of the Software-Directive provides a mandatory right for the user to use his software in the usual way according to his rational expectations.[16]

7 Even though copyright law thus provides for some mandatory limitations to copyright in order to enable users to use the acquired digital content without asking for consent of the rightholders, a lot of contractual obligations and direct restrictions in copyright are still enforceable by means of EULAs. A famous example is the restriction in licenses by Apple to reproduce digital content on 5-6 computers or to limit reproductions to the proprietary digital environment (operating systems).[17] Such licenses limit the extent to which a piece of work might be used. Another example refers to restrictions particularly used in software licenses, providing

10 Ansgar Ohly, 'Commentary on Vor § 31 UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) para 5; Andreas Wiebe, 'Commentary on Vor §§ 31 ff. UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H.Beck 4th edn Munich 2019) paras 1ff; Martin Soppe, 'Das Urhebervertragsrecht und seine Bedeutung für die Vertragsgestaltung' [2018] NJW 729, 730; Gordian N. Hasselblatt, '§ 43 Urheberrecht und verwandte Schutzrechte' in MAH Gewerblicher Rechtsschutz (C.H.Beck 5th edn Munich 2017) paras 11ff.

11 Other expenses etc. may be, however, claimed.

12 LG Köln [2014] CR 704, 705; Gerald Spindler, 'Commentary on Vor §§ 69a UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) para 25ff; Gerald Spindler, 'Open Source Software Lizenztypen und Abgrenzungen' in Gerald Spindler (eds), *Rechtsfragen bei Open Source* (Otto Schmidt Cologne 2004) paras 101, 102; Thomas Dreier, 'Commentary on § 69a UrhG' in Thomas Dreier and Gernot Schulze (eds), *Urheberrechtsgesetz Kommentar* (C.H.Beck 6th edn München 2018) para 11; Thomas Hoeren, 'IT-Verträge' in Graf von Westphalen (eds), *Vertragsrecht und AGB-Klauselwerke* (C.H. Beck 38. EL 2016) para 210; Jochen Marly (ed), *Praxishandbuch Softwarerecht* (C.H. Beck 7th edn Munich 2018) para 955.

13 LG Frankfurt a.M. [2006] CR 729,731; LG München I [2004] MMR 693, 695; Spindler (n 12) para 31.

14 An overview about the discussion whether a transfer of software has to be classified as "Sale" or "License-Agreement" is given by Marly (n 12) paras 695ff.

15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

16 OLG Düsseldorf [1997] CR 337, 339; Gerald Spindler, 'Commentary on § 69d UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) paras 7, 8; Marly (n 12) para 247ff; Thomas Dreier, 'Commentary on § 69c UrhG' in Thomas Dreier and Gernot Schulze (eds), *Urheberrechtsgesetz Kommentar* (C.H.Beck 6th edn Munich 2018) paras 7ff.

17 "The End of Apples Copy Protection" is described by Marco Dettweiler, 'Kein Kopierschutz mehr! Na und?' *Frankfurter Allgemeine Zeitung*(Frankfurt, 7 January 2009) < http://www.faz.net/aktuell/technik-motor/computer-internet/itunes-kein-kopierschutz-mehr-na-und-1751781.html> accessed 11 November 2020; by now Apple reinforced these restrictions cf. 'Sec. B, G Apple Media Service Terms and Conditions' (last updated: 16 September 2020) <https://www.apple.com/legal/internet-services/itunes/us/terms.html> accessed 23 November 2020.

that the software can only be implemented on certain types of Central Processing Units (so called CPU-clauses) and thereby prohibiting to use it on more powerful machines. The German Federal court acknowledged such limitations on the contractual level by invoking copyright arguments.[18] Even more, if a rightholder uses Digital Rights Management Systems, they overrule some limitations such as the right to reproduce the work for private purposes, Article 5(2)(b) InfoSoc-Directive.

8 Thus, in spite of some mandatory limitations in copyright law in favor of the user, license agreements still play a decisive role in transferring the necessary rights and also restricting their use. In contrast to the traditional distribution chain in the analogue world where the supplier/seller transfers the property to the buyer without the buyer having to contact the producer of the good (chain model) the digital world is characterized by a direct sale of the digital content (seller and buyer/user). Here, the sale is comprised of a license agreement that is directly concluded between the buyer/user and the rightholder at the moment when the buyer/user wants to implement the (bought) digital content[19], be it a software, a computer game, or any other (copyrighted) item of digital content – the famous End User License Agreement (EULA).[20]

9 It is, however, somehow surprising that there are scarcely any court cases which attack this model of EULAs as they clearly contradict the traditional logic of contract law and transfer of property rights.[21] Click-wrap and shrink wrap contracts have been discussed widely[22] as the idea of concluding a contract with the rightholder just by clicking an install button is certainly not in line with the distribution of obligations and rights in a contractual relationship between the buyer and seller. Moreover, buyers are usually not aware of the additional contractual duties which are placed upon them when they install software or digital content and when they have to agree to the EULA – a refusal to approve the EULA terms usually ends in the abortion of the implementation procedure so that the digital content cannot be used. In many cases, users are predominantly interested in using the software and not in concluding a further binding contract, therefore it seems at least legally questionable to interpret the installation procedure as an affirmative declaration of intent.[23]

10 EULAs are usually not part of the contract concluded with the retailer (seller) nor in some sort of performance definitions. Only in certain cases, such as computer games, the packaging sometimes contains a (small-printed) hint that playing the game

18 BGH [2003] GRUR 416 – CPU-Klausel; Spindler (n 16) para 15; Andreas Wiebe, 'Commentary on § 69d UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H.Beck 4th edn Munich 2019) paras 34ff.

19 *Authorized dealer model*, where the characteristic is to establish a double contractual relationship with the end customer, with the distributor and with the rights holder; in detail about the different models: Hans Peter Wiesemann, '§ 24 Vertrieb von Software' in Astrid Auer-Reinsdorff and Isabell Conrad (eds), *Handbuch IT- und Datenschutzrecht* (C.H. Beck 3nd edn Munich 2019) para 116; in some cases the distributors try to act merely as an agent in order to avoid possible warranty obligations, to the legal (in)validity of this construction: Sascha Kremer 'Vertragsgestaltung bei Entwicklung und Vertrieb von Apps für mobile Endgeräte' [2011] CR 769, 771.

20 Matthias Lejeune, 'Softwarevertrieb über Distributoren' [2014] ITRB 234, 237; Manfred Rehbinder and Alexander Peukert, *Urheberrecht - Ein Studienbuch* (C.H. Beck 18th edn Munich 2018) paras 771ff.

21 Although this trend was not unexpected, in times of advancing digitization and the associated mass or automated use of protected digital works it is hardly possible to negotiate all acts of use individually, cf. Thomas Dreier and Leistner 'Urheberrecht im Internet: die Forschungsherausforderungen' [2013] GRUR 881, 892; whereby it is of course noticeable that the conditions do not necessarily correspond to legitimate consumer expectations, on consumer expectations see part B. 2. and in detail Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we buy now' [2017] University of Pennsylvania Law Review 315.

22 Marly (n 12) paras 987ff; Hans Peter Wiesemann (n 19) paras 119ff; Hoeren (n 12) paras 207ff; Alex Freiher v. d. Bussche and Tobias Schelinski, 'IT-Vertagsgestaltung' in Andreas Leupold and Silke Glossner (eds), *Münchener Anwaltshandbuch IT-Recht* (C.H. Beck 3rd edn Munich 2013) paras 149ff.

23 Declining with regard to the conclusion of the contract in shrink wrap situations: Hoeren (n 12) para 209; also critical in this respect, Wiesemann (n 19) paras 119, at least if there was no clearly emphasized explicit mention of the necessity to conclude a second contract; hinting in this direction is also an older decision of the Regional Court (LG) Hamburg on gaming software, which states that a consumer generally observes the instructions on the product packaging of a software, since he examines the packaging, for example, in terms of the minimum requirements for the use of the software. Based on this, a note on the packaging could be sufficient Regional Court (LG) Hamburg (2007) 324 O 871/06, para 17.

requires an activation of an account or some other actions by the user[24], establishing a direct contact between the "buyer" and the rightholder.

11 Thus, if buyers do not agree to the EULAs, in theory they may turn to the retailer requesting remedies, such as delivering a digital content without the contractual obligations and restrictions of the EULA or to withdraw from the contract. However, in most cases the set of remedies will be reduced just to the withdrawal as retailers in general are not in the position to request from their supplier a waiver of the EULA (more precisely: of the enshrined contractual obligations therein). Given the fact that obviously every digital content which is sold is accompanied by such an EULA, consumer protection and traditional contractual remedies are reduced to a "take it or leave it" situation – which is apparently not what contract law intended to establish.

12 Apart from remedies against retailers – which are absolutely rare in (court) practice – it may be argued that users/customers are not bound by the EULA obligations even if they agreed to them whilst installing the digital content. If their rational expectations do not match the content of an EULA (for instance, not to be subject to inspections (audits) by a rightholder) these terms and conditions could be treated as not being part of the finally concluded EULA. However, as EULA terms and conditions are displayed on the screen or made available before an implementation starts, the customer may take notice of their content. Moreover, as copyright law explicitly allows for restriction *in rem* on the specific use of copyrighted works, it is arguable how to construe objective expectations of a user contradicting these restrictions. In other words, the rational expectations of a customer/buyer regarding the original sales contract (between trader and consumer) may not be transformed to those expectations on the level of the EULA. The customer/buyer may well refer to these rational expectations with regard to his seller (retailer) – but not to the rightholder. Accordingly, unfair terms and conditions of an EULA have to be attacked in principal on the level of the contract with the rightholder and their unfairness has to be claimed with regard to the rightholder. Furthermore, it is and will remain difficult to determine what the user can legitimately expect from the contract with the distributor, as no reliable common practice has yet been developed in this regard.[25] Depending on the individual situation, requiring the user to sign or accept an EULA may constitute a legal deficiency in itself, but it would be deficient in any case if the contracts were not congruent, meaning that the distributor granted the customer more extensive rights of use than those granted by the rightholder in his EULA (missing *back-to-back protection*).[26]

13 The situation gets even more complicated if rightholders opt for similar legal constructions in their EULA such as the General Public License (GPL) for open source code, i.e. that any breach (or non-acceptance) of contractual obligations by a customer/user leads to the automatic termination of the license, thus, also of transferred rights. However, if EULA terms and conditions would be declared as void (as unfair), the license would not automatically be terminated and the rights would not fall back per se, as these terms would then be replaced by the correspondent provisions in contract law. The liability exemptions of the GPL, which even provides liability exemption in case of intentional behavior, may serve as an example: Whereas these clauses are clearly void under EU law (and national laws as well[27]) they are just replaced by the corresponding civil code provisions such as liability privileges of donation contracts (under continental law, under common law: promise of a gift).[28]

24 In detail on this model: Wiesemann (n 19) paras 124ff.; Chrocziel 'Branchenspezifische Besonderheiten im Vertriebsrecht' 11th chapter § 48 Computer und Software in Michael Martinek, Franz-Jörg Semler and Eckhard Flohr (eds.) *Handbuch des Vertriebsrechts* (C.H. Beck 4th edn Munich 2016) para 37.

25 Wiesemann (n 19) paras 121ff.

26 Wiesemann (n 19) para 118.

27 Whilst it seems that in general it has not yet been completely clarified whether EULAs are per se considered as general terms and conditions within the meaning of Art. 3 (2) Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contract Terms Directive) so that a legal examination within the meaning of Art 3 (1) Unfair Contract Terms Directive would be possible, or whether they have to be measured on the basis of the evaluations of copyright law and general principles of contract law; for more detail on this question with regard to the German legal situation: Matthias Berberich, 'Der Content „gehört" nicht Facebook! - AGB-Kontrolle der Rechteeinräumung an nutzergenerierten Inhalten' [2010] MMR 736, 737ff.

28 Gerald Spindler, 'Vertragsrecht' in Gerald Spindler (eds), *Rechtsfragen bei Open Source* (Otto Schmidt Cologne 2004) paras 6ff; Malte Grützmacher, 'Commentary on § 69c UrhG' in Artur-Axel Wandtke and Winfried Bullinger (eds) *Praxiskommentar Urheberrecht* (C.H.Beck 5th edn Munich 2019) para 113; Marly (n 12) para 983; Axel Metzger and Till Jaeger, 'Open Source Software und deutsches Urheberrecht' [1999] GRUR Int. 839, 847; Helmut Redeker, *IT-Recht* (C.H. Beck 7th edn Munich 2020) paras 617ff.

14 Still, even though customers/users may attack the EULA contract terms, they cannot request the rightholder to transfer rights as their claims concerning the transfer of rights relate only to their contracting partner, the retailer, as the one who has to fulfill the contractual obligations; the rightholder is not directly bound by the sales contract.[29] In practice, relevant cases would refer to interoperability and DRM-systems (or product activations) as the customer/user here needs the release (clearance) of DRMs in order to transfer his digital content to other items or other users. A mere disregard of (unfair) EULA contract terms would not be sufficient as they do not lead to additional rights and product activations (as may have been expected by the customer on the level of the contract with the retailer), the customer still has to claim his rights against the rightholder before court. However, the rightholder may uphold that contract terms (with the retailer) may be void but that he is not obliged to transfer more rights than provided for by the EULA – in contrast to the expectations the customer/buyer has had when he bought the digital content at the store of the retailer. In other terms, the customer/buyer cannot refer to these expectations stemming from the contract with the retailer (regarding transfer of rights, for instance) in order to claim this transfer against the rightholder. Only if jurisdictions would follow the French example of an "action directe" against anyone involved in the distribution chain concerning contractual claims, the problem would be avoided and solved.[30]

15 However, the traditional chain model may be modified in such a way that retailers do not act on their own account anymore rather than presenting themselves to the buyer as agents for rightholders (like in the "app stores" and platforms).[31] Nevertheless, regarding these "agent models" EULAs have to be part of the contract then concluded by the agent. Moreover, it depends on the individual case whether the position of the retailer as a mere agent of the rightholder has become clear to the customer.[32] Thus, app stores and similar platforms may also be treated as traders in the sense of the DCD[33] – especially if it is not made clear to the consumer that only an intermediary role is taken on, with whom the contract is actually concluded and with what content.[34] A bare mention in the general terms and conditions that the contract is not concluded with the distributor will not be sufficient to eliminate the legitimate consumer expectations.[35]

16 Finally, even though the contractual relationship between rightholder and user/consumer is usually connected "only" to copyright law, there might also be a case to establish a contractual relationship under the DCD regarding rightholders and users/consumers, in particular if the user/consumer has to deliver data when they install the digital content (or service). As Art. 3 (1) DCD provides for an equal treatment of "paying with data" (notwithstanding the opponent position of the European Data Protection Officer/Board[36]) still the DCD covers explicitly these kinds of contractual "exchanges". However, we have to distinguish between different kinds of data provided by the user/consumer to the rightholder: if data is being provided that allows diagnosis of the installed digital content/service, this kind of data exchange does not belong to the contractual exchange of goods and services – it just rather serves as a means to keep the digital content/service up to date. Moreover, it is very unlikely that the rightholder promised services in the EULA to the consumer/user.

17 However, if the rightholder requires data going beyond the mere guarantee of the functionality

29 Cf. Karin Sein and Gerald Spindler The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2, 15 *European Review of Contract Law* (2019), 365, 372; Oprysk/Sein (n 4) 599; also Kuschel/Rostam (n 8) para 8.

30 Markus Beaumart, *Haftung in Absatzketten im französischen Recht und im europäischen Zuständigkeitsrecht* (Duncker& Humblodt Berlin 1999) 93ff; Sabrina Salewski, *Der Verkäuferregress im deutsch-französischen Rechtsvergleich* (Mohr Siebeck Tubingen 2011) 171ff.

31 Cf. also Sein/Spindler (n 2) 261 concerning the contractual relationships under the DCD.

32 A detailed analysis of the contractual relationships between consumer, seller and rightholder can be found in Jochen Schneider, *Handbuch des EDV-Rechts* (Otto Schmidt 5th edn Cologne 2017) Chapter J paras 7ff.

33 Sein/Spindler (n 2) 261.

34 So already prior to the adoption of the Digital Content Directive Kremer (n 19) 771.

35 Therefore, such a clause would be considered as non-transparent in the sense that the Unfair Contract Terms Directive or in any case would constitute an unfair disadvantage for the consumer, in detail: Kremer (n 19) 771ff.

36 EDPS Opinion 8/2018 on the legislative package "A New Deal for Consumers" [2018] <https://edps.europa.eu/sites/edp/files/publication/18-10-05_opinion_consumer_law_en.pdf> accessed 27 November 2020; EDPS Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content [2017] <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf> accessed 27 November 2020.

of the digital content it may be argued that there is some sort of contractual exchange. Again, the distinction can be drawn along the parallel lines of the GDPR which allows in Art 6 (1 b) data processing for contractual purposes, whereas every other kind of data requires the consent of the data subject.

III. Digital Right Management-Systems

18 These restrictions of copyright law are even aggravated if we consider Digital Rights Management Systems (DRM). These technical means to protect digital content against piracy and unjustified use are themselves strongly protected by Art 6, in particular Art 6 (4) InfoSoc-Directive, and also by Art 7 (1) (c) the Software Directive.[37] Even though users/customers may benefit from a mandatory limitation on copyrights such as a private copy limitation as enshrined in Sec. 53 (1) German Copyright Act, some of these limitations are overridden by DRM-Systems as Art 6 (4) InfoSoc-Directive clearly states.

19 Thus, DRM-Systems may even prevent the user/customer from making copies for private purposes (for instance, using music or eBooks on multiple devices etc.). It is evident that once again interoperability and reasonable expectations on the level of the contract between customer and retailer may deviate – unless the retailer clearly stated that DRM-systems may prevent the customer/consumer from exercising his otherwise given rights. Once again, the customer/consumer can only take recourse to the retailer claiming withdrawal from the contract if the rightholder does not agree to activate the digital content or to release the DRM-blocking feature – so that the rightholder still keeps control of the digital content, whereas the customer/consumer probably expected to use the digital content in the same way as other goods.

C. Copyright and Conformity

20 Even though licenses are essential for digital content, the DCD explicitly leaves licenses untouched (Recital 19, Art 3 Nr. 9 DCD).[38] Only Art 10 DCD mentions licenses indirectly when Member States have to ensure that "the consumer is entitled to the remedies for lack of conformity provided for in Article 14" when "a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the digital content or digital service in accordance with Articles 7 and 8". The previous iteration of Art 8 of the DCD proposal, which suggested that the supplier was required to deliver the good "free of third party rights" has been dropped as it was misleading[39] because the customer especially needs these third party rights (belonging to the rightholder). This clearly means that Art 10 DCD refers to conflicting third-party rights which may prevent the customer from using the digital content.

21 Hence, the DCD explicitly confirms the traditional stance that (consumer) contract law does not have an impact on the license agreements and the copyright situation;[40] thus, the consumer has to turn to his trader in order to claim remedies for any infringement due to non-conform EULAs, and the rightholder remains unaffected.[41]

22 Given the fact that the DCD deliberately does not regulate any copyright issues we would not expect any impact on licenses – and vice versa concerning the contract with the supplier/retailer. While the first proposals of the Commission and of the Council indeed left the question of the impact of EULAs on the conformity of a contract untouched,[42] the European Parliament was the first to raise the

37 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111/16, for example such an action as a removal of a Dongle, Spindler (n 16) para 11.

38 Dirk Staudenmeyer in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020) Richtlinie (EU) 2019/770 Art. 3 paras 140ff; critical to this exclusion Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' [2019] ZEuP 695, 702.

39 Cf. also Simon Geigerat and Reinhard Steenot, 'Proposal for a directive on digital content – Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds.), *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia Cambridge 2017) 143: "nonsense".

40 Cf. Frank Rosenkranz in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020) Art 10 paras 57, 74.

41 Sein/Spindler (n 2) 262; Oprysk/Sein (n 4) 599; cf. already for the DCD-proposal Spindler (2017) 226ff.

42 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM (2015) 634 final. European Commission; Council's General Approach. [Fn. 4: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading)– General approach. 2015/0287 (COD); summarized by Oprysk/Sein (n 4) 595ff.

problem.[43] However, in particular in relation to the conformity test laid down in Art 8 DCD, Recital 53 clearly states:

> *"Such restrictions can arise from the end-user license agreement under which the digital content or digital service is supplied to the consumer. This can be the case when, for instance, an end-user license agreement prohibits the consumer from making use of certain features related to the functionality of the digital content or digital service. Such a restriction could render the digital content or digital service in breach of the objective requirements for conformity laid down in this Directive, if it concerned features which are usually found in digital content or digital services of the same type and which the consumer can reasonably expect. In such cases, the consumer should be able to claim the remedies provided for in this Directive for the lack of conformity against the trader who supplied the digital content or digital service."*

23 Consequently, the fundamental issue remains unresolved: should contract law (and the DCD) follow copyright restrictions or should (lawful) copyright restrictions be counterbalanced by contractual rights (as provided by the objective conformity test of the DCD)? And if the latter would apply, how and according to which criteria should the objective conformity test be assessed (or construed)?

I. Objective conformity test

24 Even though Art 7 DCD also provides for subjective criteria concerning the conformity, the objective conformity test has to be equally respected.[44] In summary, according to Art 8 (1) – (4) DCD the digital content must meet the following objective criteria: the general suitability for the purpose of the contract, an average performance quality, the content's ability to meet the expectations set e.g. by advertising, the provision of the necessary support, and the basic identity of the content with any test versions or equivalent that may be shown prior to the conclusion of the contract.[45]

25 Hence, the test of objective conformity has now become crucial in order to assess if the trader has fulfilled his obligations. However, Recital 53 just states that some restrictions contained in EULAs can contravene objective requirements for conformity given. The test at hand is then modified, asking if the features in question can be "usually found in digital content or digital service of the same type" and even more important "which the consumer can reasonably expect". Thus, the test is three-fold:

- The concerned features should "usually be found";
- In the "same type of digital content";
- And which the consumer can "reasonably" expect.

26 However, this test raises some fundamental problems which are not easily answered:

- First, there is scarcely any settled normative experience and expectation of consumers as the digital content and services are relatively new and are subject to constant change – the determination of whether a product is customary will therefore most likely become a task of the courts,[46] which initially leads to legal uncertainty for both parties.
- Second, in order to assess the objective conformity, we have to consider the specific descriptions of digital content and services which then turns the objective conformity test into something subjective again.[47] Hence, it has been stressed that the industry may manipulate the expectations of consumers so that eventually we have to turn to a more normative standard.[48]

27 Nevertheless, it seems at least feasible to distinguish some scenarios which may allow to formulate objective conformity criteria:

43 Commission, 'Report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM (2015) 634 – C8-0394/2015 – 2015/0287 (COD). Available at: http://www.europarl.europa.eu/doceo/document/A-8-2017-0375_EN.html.

44 This results from the use of the term "in addition" in Art. 8 (1) DCD.

45 See also for the objective criteria: Kristina Ehle and Stephan Kreß, 'Neues IT-Vertragsrecht für digitale Inhalte und Dienste gegenüber Verbrauchern' [2019] CR 723, 725.

46 Cf. Vanessa Mak, 'The new proposal for harmonized rules on certain aspects concerning contracts for the supply of digital content' Report for the JURI Committe of the European Parliament 2016, p. 16ff; Ehle/Kreß (n 45) 726.

47 Cf. Grünberger AcP 218 (2018) 213, 250, 259; Oprysk/Sein (n 4) 611; see also Kuschel/Rostam (n 8) para 11.

48 Oprysk/Sein (n 4) 611 referring to Marco B.M. Loos et al., 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts' (University of Amsterdam 2011), p. 105 <https://dare.uva.nl/search?identifier=7d3d806d-8315-4aa6-8fb6-1fc565d2b557> accessed 21 November 2020 and Peter Rott, 'Download of copyright-protected content and the role of (consumer) contract law' (2008) 31 Journal of Consumer Policy 441, 449.

- where the consumer expects a constant availability of the digital content like in the analogue world in the case of a sale, combined with the expectation to do whatever he likes with the digital content (free use);

- in contrast, where the consumer expects only a temporary availability of a service or content.

28 Nevertheless, it must be noted that the goal of the mixed objective-subjective concept of conformity has not been fully achieved and the weaknesses of a purely subjective concept[49] of conformity have not been completely eliminated. Critical regarding the subjective concept of conformity in the original Commission proposal was the fact that this gave preference to the supposed private autonomy in a context in which it cannot prevail at all, at least not at present.[50] Even in the analogous context, the supposed correctness of the legal consensus of two market parties can be doubted; in the digital area, the assumption of such an informed and autonomous consensus would be a *fiction*.[51] Due to the ever-increasing asymmetry of information and the superiority of some market participants, there can be no parity of action. Distributors of digital goods have a de facto unilateral right to formulate the contract, which they regularly use in extensive general terms and conditions.[52] The consumer has hardly any actual possibilities to assert his interests. Even in the case of individual software the consumer has neither the necessary knowledge about the functionality of the software nor the muse to study the usually very detailed general terms and conditions. Therefore, a purely subjective concept of conformity based on the contractual agreements would mean that the retailers would have it in their hands to determine whether there is a deficiency and thus whether any warranty rights apply. This should and can be counteracted by introducing objective criteria, although these are still inadequate in their current form: firstly because, as already mentioned, subjective circumstances have to be taken into account to determine some objective criteria, and secondly because the relationship between objective and subjective deficiencies has not yet been fully clarified.[53] The Directive initially indicates that they are of equal rank and that, unlike in consumer goods law,[54] there is no general priority of the subjective concept of defect,[55] but Art 8 (5) DCD allows a deviation from objective criteria as long as the consumer has been notified and has agreed to the deviation, thereby enabling a subjective concept to prevail again. Hence, although the final DCD turned to the objective conformity test, Art 8 (5) DCD allows derogations according to Recital 53 only:

> *"if the trader specifically informs the consumer before the conclusion of the contract that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity and the consumer has expressly and separately accepted that deviation."*

29 This in turn gives the contributors the right to determine the content of the contract quasi unilaterally and thus the possible intervention of warranty rights.[56] Thus, *Oprysk/Sein* rightfully stated that:

49 Cf. Mak (n 46) 15ff.; Grünberger (n 4) 255ff.

50 Grünberger (n 47) 255; critical of the Commission proposal at the time: European Law Institute, Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers, COM (2015) 634 final, 7. 9. 2016, p. 18 available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf>; Axel Metzger, Zohar Efroni, Lena Mischau and Jakob Metzger, 'Data-Related Aspects of the Digital Content Directive' [2018] JIPITEC 90, paras 57ff.

51 So correctly Heike Hummelmeier in Executive Comittee of the Association of German Jurists (eds) *Verhandlungen des 71. Deutschen Juristentages 2016* (C.H.Beck Munich 2017) pt. II/1 ch. K, 39; also Grünberger (n 47) 257.

52 Heike Hummelmeier, in Executive Comittee of the Association of German Jurists (eds) *Verhandlungen des 71. Deutschen Juristentages 2016* (C.H.Beck Munich 2017) pt. II/1 ch. K, 39; Grünberger (n 47) 257.

53 Cf. Andreas Sattler, 'Neues EU-Vertragsrecht für digitale Güter' [2020] CR 145, 149; in this direction also Metzger (n2) 581; Mak (n 46) 16ff.

54 See Art 2 of the 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 amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, it should be noted, however, that the Directive on the sale of goods, which will soon come into force, follows the mixed objective-subjective model, the clear prioritization of the subjective definition of a deviation is not maintained, see Art 6 and 7 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods.

55 Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' [2019] ZEuP 695, 709.

56 Critical of the question of whether and to what extent Art 8 (5) DCD actually gives distributors scope for their services Ehle/Kreß (n 45) 726.

"Nevertheless, with the wide variety of digital content, determining what is reasonable to expect from a particular type of digital content becomes rather blurred."[57]

1. Transfer and Resale of digital content and accounts

30 The first situation – a contract which seemingly is similar to a sale – already comes into conflict with some EULAs, which are widely used in the market as these usually restrict the free use of the acquired digital content, in particular the resale of a digital content or the transfer. Usually, the content is associated with an account which is registered with the provider.[58] Thus, a transfer of the digital content going beyond the user's account is not being allowed.

a) The exhaustion principle in copyright law

31 In the old analogue offline world, the exchange of goods with copyrighted content did not pose huge problems: the distribution right as laid down in Art 4 InfoSoc-Directive[59] may be invoked by the rightholder up to the first consented sale or other transfer of ownership. Once the good has entered the market cycle, the rightholder cannot claim his distribution rights anymore, the right is thus exhausted. However, this exhaustion principle is closely linked to content enshrined in physical goods, Art 4(2) and Recital 29 of the InfoSoc-Directive, from a national perspective Sec. 17 of the German Copyright Act.[60] Hence, at the first glance a mere download of a digital content would not exhaust the distribution rights of the rightholder as it has not been brought physically into the market cycle so that the customer may not resell it or hand it to somebody else. Legal qualification and treatment thus differed widely between tangible goods and immaterial goods, as the latter one could not be traded without the consent of the rightholder.

32 This situation changed when the CJEU decided the famous case "Used Soft" regarding the resale of software which previously had been downloaded by the (reselling) customer – instead of buying a CD/DVD etc. The prevailing doctrine in Germany (where the case originated) had upheld previously that due to the non-tangible distribution of the software, the rightholder could prohibit any resale of a bought software – on the level of copyright law.[61] The German High Federal Court (BGH) referred the case to the CJEU asking if this distinction fits under the Software-Directive.[62] Surprisingly to many commentators, the CJEU focused on the wording of the Software-Directive[63] which speaks of a "sale" of software regarding the exhaustion principle. Thus, the CJEU, in a nutshell, concluded that the buyer of a software which has been downloaded (and not transferred on a physical medium) and which usage terms are not limited in time, has to be in the same position as the buyer of a tangible good. Therefore, the buyer may exercise all rights of an owner without the rightholder having any chance to prohibit the first owner the resale of the "used" software.[64] Even patches etc. which had been added to the original software are part of the code which can be transferred without the consent of the rightholder. The CJEU, however, stated also that it

57 Oprysk/Sein (n 4) 598.

58 For example, part 4 of Google Play Services terms; part 1 of Amazon Kindle Store Terms; in depth analysis at Oprysk/Sein (n 4) 609ff.

59 European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

60 Copyright Act (Urheberrechtsgesetz – UrhG) of 9 September 1965 (Federal Law Gazette I, p 1273, as last amended by Art 1 of the Act of 28 November 2018 (Federal Law Gazette I, p 2014).

61 Cf. for the German discussion Gerald Spindler, 'Der Handel mit Gebrauchtsoftware – Erschöpfungsgrundsatz quo vadis?' [2008] CR 69; Gerald Spindler, 'Commentary on § 69c UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H. Beck 6th edn Munch 2020) para 32ff; Grützmacher (n 28) para 32ff; Truiken Heydn and Michael Schmidl, 'Der Handel mit gebrauchter Software und der Erschöpfungsgrundsatz' [2006] K&R 74, 75; Frank A. Koch, 'Lizenzrechtliche Grenzen des Handels mit Gebrauchtsoftware' [2007] ITRB 140, 141ff; Gernot Schulze, 'Commentary on § 17 UrhG' in Thomas Dreier and Gernot Schulze (eds), *Kommentar zum Urheberrechtsgesetz* (C.H. Beck 6th edn Munich 2018) paras 24ff; Olaf Sosnitza, 'Die urheberrechtliche Zulässigkeit des Handels mit "gebrauchter" Software [2006] K&R 206, 207; Andreas Wiebe, 'Commentary on § 69c UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H. Beck 4th edn Munich 2019) paras 21ff.

62 BGH [2011] GRUR, 418 – UsedSoft I.

63 European Parliament and Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.

64 Case C- 128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407, paras 59ff, 63.

should be guaranteed that the first owner shall delete the transferred software so that no copy is left; just a certificate by a notary would not be sufficient.[65]

33 This decision was qualified by commentators as "revolutionary" as it put an end to the distinction between offline and online distribution.[66] Even though a lot of details are still being discussed, such as the specification of "use without time restraints" or the necessary actions in order to guarantee a deletion of the software, it is now widely accepted that software will be exhausted when it is traded, without regard to the nature of distribution (offline or online). Concerning the relationship between contract law – in particular the DCD – and copyright law, the focus of the CJEU on the notion of "sale" is relevant: The court used the contractual obligations to transfer property rights finally to the buyer in order to construe the exhaustion principle, thus he used contract as a leitmotif for copyright law.

34 It is not surprising that in the aftermath of the CJEU decision, the exhaustion of other digital content (distributed solely online or per download) like eBooks, movies, or music was questioned as some commentators argued for an analogous application of the court's ruling on these goods. Indeed, it seemed highly arguable to distinguish offline and online distribution for the same sort of content. Nevertheless, the InfoSoc-Directive remains opaque on that point as the directive does not explicitly mention – unlike the Software-Directive – a "sale" to the customer. In contrast, Recital 29 of the InfoSoc-Directive seems to exclude any exhaustion principle to online services including downloaded digital content.[67] Only by a restrictive interpretation of of the term "online services" as not encompassing downloads, the exhaustion principle could be extended to online distribution of digital content.

35 German courts of appeal who had to deal with actions of consumer associations against terms and conditions of eBook-sellers held that contractual obligations and prohibitions to resell the eBook are not unfair: They argued that copyright does not provide for exhaustion in case of mere downloading a digital content so that corresponding contract clauses could not be deemed as unfair.[68] The same method – analyzing contractual limitations in an EULA according to the copyright situation – had been applied before by the German Federal Court in the Central Processing Unit CPU-clause case, upholding a restriction to use software on more powerful machines.[69] Hence, the German courts just adopted the contrary position to the CJEU in the "Used Soft" decision, focusing on copyright law as determining the range of contractual terms.

36 However, the CJEU put an end to this heated discussion by ruling in the "Tom Kabinet" decision that the offer of "second-hand" eBooks on an electronic platform would not fall under the distribution right rather than the right to communicate to the public.[70] The CJEU based its decision strictly on copyright law by invoking the preparatory texts for the InfoSoc-Directive (such as the explanatory memorandum of the EU Commission) as well as international law like the WCT,[71] pointing out that from the perspective of the CJEU the EU legislator did want to draw a clear distinction line between tangible and intangible goods.[72] Thus, the CJEU emphasized:

65 Case C- 128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407, para 70.

66 Cf. for all implications of the CJEU Used Soft decision Jochen Schneider and Gerald Spindler, 'Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?' [2012] CR 489; Jochen Schneider and Gerald Spindler, 'Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest' [2014] CR 213; Thomas Hartmann, 'Weiterverkauf und Verleih online vertriebener Inhalte' [2012] GRUR Int. 980; Reto M. Hilty, 'Die Rechtsnatur des Softwarevertrages' [2012] CR 625; Jochen Marly, 'Der Handel mit sogenannter "Gebrauchtsoftware"' [2012] EuZW 654; Nikita Malevanny, 'Die UsedSoft-Kontroverse - Auslegung und Auswirkungen des EuGH-Urteils' [2013] CR 422; Michael Rath and Christoph Maiworm, 'Weg frei für Second-Hand-Software?' [2012] WRP 1051; Malte Stieper, 'Anmerkung zu EuGH, Urteil vom 3. Juni 2012 – C-128/11 – UsedSoft' [2012] ZUM 668; Detlef Ulmer and Peter Hoppen, 'Die UsedSoft-Entscheidung des EuGH: Europa gibt die Richtung vor' [2012] ITRB 232; Hans-Werner Moritz, 'Eingeschränkte Zulässigkeit der Weiterveräußerung gebrauchter Software' [2012] K&R 456.

67 OLG Hamburg [2015] MMR 740, 741ff; OLG Stuttgart [2012] ZUM 811, 813; Hartmann (n 66) 980, 982; Hilty (n 66) 630; Matthias Kloth, 'Der digitale Zweitmarkt: Aktuelle Entwicklungen zum Weiterverkauf gebrauchter E-Books, Hörbücher und Musikdateien' [2013] GRUR-Prax. 239, 240; Stieper (n 66) 670, who questions the exhaustion of the distribution rights in case of an online transfer of digital content such as music, movies and eBooks.

68 OLG Hamburg [2015] GRUR-RR 361, paras 15ff; OLG Stuttgart [2012] ZUM 811ff; with regard to audio files also OLG Hamm [2014] ZUM 715, 720ff.

69 BGH [2003] GRUR 416 – CPU-Klausel.

70 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111.

71 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111, paras 40ff.

72 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene*

> *"51 Furthermore, recitals 28 and 29 of Directive 2001/29, relating to the distribution right, state, respectively, that that right includes the exclusive right to control 'distribution of the work incorporated in a tangible article' and that the question of exhaustion of the right does not arise in the case of services and online services in particular, it being made clear 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 in fact an act which should be subject to authorisation where the copyright or related right so provides."*

37 Moreover, the court contrasted its decision to the case of "Used Soft" in stressing that the Software-Directive has to be considered as *lex specialis* to the InfoSoc-Directive.[73]

> *"56 Such assimilation of tangible and intangible copies of works protected for the purposes of the relevant provisions of Directive 2001/29 was not, however, desired by the EU legislature when it adopted that directive. As has been recalled in paragraph 42 of the present judgment, it is apparent from the travaux préparatoires for that directive that a clear distinction was sought between the electronic and tangible distribution of protected material."*

38 The CJEU also took the stance that from an economic point of view software cannot be compared to eBooks:

> *"58 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. As the Advocate General noted in point 89 of his Opinion, dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel second-hand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment."*[74]

39 However, it is doubtful whether the decision really bars the application of the exhaustion principle to online-files that can be downloaded, since the CJEU also stressed the fact that, in the case of Tom Kabinet's platform, no technical measures were taken to limit the use of an online available copy of the eBook to a single person.

> *"69 In the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user (see, by analogy, judgment of 10 November 2016, Vereniging Openbare Bibliotheken, C-174/15, EU:C:2016:856), it must be concluded that the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public, within the meaning of Article 3(1) of Directive 2001/29."*

40 The CJEU hereby referenced the decision concerning a case stemming from the Netherlands and concerning the online lending of eBooks.[75] In particular the Rechtbank Den Haag (District Court, The Hague) decided to stay in proceedings and refer the question whether Art 1(1), 2(1)(b) and 6(1) of Directive 2006/15[76] would allow for a lending of eBooks by placing a digital copy while others - and even the lending institution - are excluded from using another or their digital copy of the lent eBook. The court widely followed the opinion of AG Szpunar in stating that online should be treated in the same way as offline. Furthermore, the court stated that the questioned Articles would cover the lending of digital copies of an eBook if the involved reproduction had been limited to a single user at once and the use of the reproduction to a certain time period.[77] However, the CJEU limited its decision to lending and did not extend it to the renting of online versions, as renting would refer exclusively to copies fixed in a physical medium.[78]

Uitgevers vTom Kabinet Internet BV et al. EU:C:2019:1111, paras 44ff.

73 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111, para 55.

74 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111.

75 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856.

76 Directive 2006/15/EC of 7 February 2006 establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC, [2006] OJ L 38/36.

77 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856, para 54.

78 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856, para 35.

41 Last but not least, one of the major business models concerning digital content highlights the problems of contract and copyright law: computer games. As this "digital content" consists of a variety of works such as software, movies, music, text scripts etc. it is hard to assess them according to the traditional categories of work such as enshrined in the InfoSoc-Directive. As the CJEU puts it in the famous Nintendo-case, every directive and every category has to be applied to computer games.[79] However, such a versatile approach ends up in a very complicated assessment regarding which provision of which directive is to be applied and how it relates to other norms. Unfortunately, the Software-directive as well as the InfoSoc-Directive do provide for different treatments of works, in particular concerning exceptions and limitations. Moreover, it is far from clear whether and how the exhaustion principle would apply to downloaded computer games. In addition to that, most contracts on computer games provide specific prohibitions for customers as well as requirements to activate their games on particular platforms – so that the use of the game depends on a constant connection with the (original) supplier of the game, even though the seller is not identical with the supplier of the game. Given these differences it is very likely that contract lawyers will tend to implement more "access"-like contracts than real "sale"-types.[80]

b) Exhaustion principle and the DCD

42 What is then the position of the DCD on the issue of exhaustion? In principle, none! As the DCD explicitly gives priority to copyright law, we cannot take recourse to contract law shaped by the DCD concerning the relationship between rightholder and user. However, with regard to the relationship between the consumer (user) and the trader, the objective conformity test may intervene by obliging the trader by contract to enable the consumer to resell the digital content. This is in particular the case when the consumer could have objectively expected the free use of the digital content, which is very likely in the case of a "sales"-like contract,[81] as already pointed out by the CJEU in the "Used soft" case. *Oprysk/Sein* carved out that "buy now" transactions are usually being perceived by consumers as given them unrestricted abilities to use the acquired content,[82] referring to some empirical studies.[83] The same study has also shown that half of the consumers did not know which rights they were acquiring ("I do not know") when being presented with the "license now"-option.[84] With these objective expectations of user/consumers in mind, restrictions on the resale of digital content by EULAs – such as in the case of eBooks in the CJEU decision "Tom Kabinet" – may only be adequate, if they are expressly accepted by the consumer (Art 8 (5) DCD).[85] Otherwise they would not match the objective conformity test of Art 8 (1) DCD.[86]

43 Even though it has been argued that the decision of the CJEU "Tom Kabinet" does not have any impact on the contractual objective expectations of the

79 Case C-355/12 *Nintendo v PC Box* EU:C:2014:25, para 23.

80 Cf. Andreas Sattler, `Urheber- und datenschutzrechtliche Konflikte im neuen Vertragsrecht für digitale Produkte' [2020] NJW 3623 para 25 – 27.

81 Michael Grünberger, 'Verträge über digitale Güter' [2018] 218 AcP 213, 249; Michael Grünberger, 'Die Entwicklung des Urheberrechts im Jahr 2019' [2020] ZUM 175, 190; Gerald Spindler and Karin Sein, 'Die Richtlinie über Verträge über digitale Inhalte' [2019] MMR 488, 490; differing Franz Hofmann, 'Recht der digitalen Güter: eine digitale Erschöpfung bei der Weitergabe von E-Books – Anmerkung zu EuGH, Urteil vom 19.12.2019 – C-263/18 – NUV u. a./Tom Kabinet Internet u. a.' [2020] ZUM 136, 138 who contradicts the assumption of stated consumer expectations by emphasizing the need to take the specifics of digital goods (like lack of wear and tear) into account in contract law.

82 Oprysk/Sein (n 4) 619ff; see already Sein/Spindler (n 29) 373ff.

83 Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we buy now' [2017] University of Pennsylvania Law Review 315, 340ff regarding the option "buy now" for eBooks, MP3s and digital movies on the US market; cf also the study of Sabrina Helm, Victoria Ligon, Tony Stovall and others, 'Consumer interpretations of digital ownership in the book market' (2018) Electronic Markets Research Paper 28:177, 181ff. <https://link.springer.com/content/pdf/10.1007/s12525-018-0293-6.pdf> accessed 23 November 2020, coming to the result that most consumers see a decrease in value when being confronted with the fact that they cannot resell, share or gift the content.

84 Perzanowski and Hoofnagle (n 82) 343ff Concerning the option „License now".

85 Cf. Kuschel/Rostam (n 8) para 20.

86 To avoid false consumer expectations from the very beginning, Perzanowski/Hoofnagle (n 82) 345ff, 375 suggest "short, prominent, easily readable, bullet-point list[s] of the behaviors consumers could engage in and those that they could not", which is not hidden in the depths of terms and conditions, as this short information leads to a strong reduction of misconceptions of the consumers according to their study results. Critical to the question to what extent this type of information can break down existing expectations and behavior patterns based on them Grünberger (n 4) 272ff .

consumer,[87] there are some doubts: If the copyright legal assessment would be part of the objective expectations of a "normative" consumer, the objective conformity test in favor of an exhaustion rule would fail. This had been the approach of several German courts of appeal concerning the control of standard terms and conditions of EULAs according to Sec. 307 German Civil Code which provides for a strong judicial control of any deviations from general legal principles ("gesetzliches Leitbild"). Instead of having recourse to the contractual model of sale, the majority of courts of appeal called in the copyright principles as the "gesetzliche Leitbild". No exhaustion was applicable here, so that these courts maintained the restriction contained in the standard terms and conditions.[88]

44 On the other side, the CJEU in the "Tom Kabinet" decision put special emphasis on the distinction to the previous decision regarding the lending of eBooks. Obviously, Tom Kabinet's platform had not established any measures to restrict the redistribution of copies of eBooks – which the CJEU had pointed out in the decision regarding the lending of eBooks as well as in the "Used Soft" decision. Hence, if a trader can still retain some control on the distribution of digital content by tying the content to an account, there is a strong argument that the consumer may pass on / transfer his account to a third party as the interests of rightholders are still being guaranteed.[89] However, without these guarantees there should be no normative objective expectation of consumers to do whatever they like with the digital content as there are significant differences between analogue and digital content, such as the non-rivalrous quality of digital goods and the 1:1 quality preserving quality in case of copies so that it may well be argued that a "digital content sale" has to be treated somehow differently to the traditional sale.[90] Hence, the interest of the rightholder to keep control of the distribution of his digital content is also obvious – and granted by copyright law such as the InfoSoc Directive.[91]

87 Kuschel/Rostam (n 8) para 21; Oprysk/Sein (n 4), 619.

88 OLG Hamburg [2015] MMR 740, 741; OLG Hamm [2014] MMR 689, 690; OLG Stuttgart [2012] MMR 834, 836.

89 Similar Oprysk/Sein (n 4), 619ff; cf also Sattler (n 53), 151.

90 In this direction Hofmann (n 80), 138; contrary (for a completely adequate treatment of sales) Kuschel, 'Der Erwerb digitaler Werkexemplare' (Mohr Siebeck Tübingen 2019) 111ff, 281.

91 Summarized recently in Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* EU:C:2019:1111, para 58.

2. Further Restrictions of use

a) Preliminary remark: ad rem restrictions by copyright law

45 The story of contract and copyright gets even more complex if we consider so-called in rem restrictions, for instance the unknown uses of a copyrighted work. These are qualified to restrict the transfer of rights in such a way that a rightholder may grant the customer the right just to use a work in a specified way, such as a hardcover edition instead of a paperback, even though the acts of reproduction and distribution may be the same. These restrictions apply to all stages of a distribution and are therefore qualified as restrictions ad rem – and not just contractual obligations.[92] However, the distinction between restrictions ad rem and just mere contractual obligations is sometimes not easy to assess: The German Federal Court (BGH) qualified the OEM-versions of software as well as those for just educational purposes not as ad rem restrictions, thus allowing traders to rip off the software of hardware that had been sold at a reduced price to educational institutions.[93] Accordingly, the exact qualification of use – if ad rem or not – is sometimes hard to determine, e.g. distinguishing between streaming and broadcasting.[94] However, whereas OEM software has been considered as a mere contractual obligation and not binding ad rem (in the distribution chain), it is not yet clear if courts would accept these restrictions as binding on the contractual level. In this regard the parallels to the judgements cited above concerning the exhaustion principle are nevertheless evident.

b) Restrictions on obtaining a (backup) copy,

46 As an empirical study on EULAs of major content providers such as Apple, Google Play, Amazon, or

92 BGH [1959] GRUR 200, 202 – Der Heiligenhof; BGH [1986] GRUR 736, 737 f – Schallplattenvermietung; BGH [1992] GRUR 310, 311 – Taschenbuch-Lizenz; BGH [2001] GRUR 153, 154 – OEM; Deutscher Bundestag, Drucksache 16/1828, 24 „abstrakte Beschränkung"; Gernot Schulze, 'Commentary on § 31a UrhG' in Thomas Dreier and Gernot Schulze (eds), *Kommentar zum Urheberrechtsgesetz* (C.H. Beck 6th Edition München 2018) para 68; Artur-Axel Wandtke and Wilhelm Grunert, 'Commentary on § 31a UrhG' in Artur-Axel Wandtke and Winfried Bullinger (n 28) para 12.

93 BGH [2001] GRUR 153, 154 f - OEM; BGH [2014] GRUR 264, para 31ff – UsedSoft II.

94 Cf. Thomas Dreier, 'Commentary on § 19a UrhG' in Thomas Dreier and Gernot Schulze (n. 61) para 10.

Microsoft has shown, most of these EULAs do not deal explicitly with a right of the user to make a backup copy[95] – even though at least for software it is explicitly provided by Art 5 (2) of the Software directive,[96] and can also be established by national copyright law by implementing Art 3 (2) (c) InfoSoc-Directive.

47 Hence, even under copyright law the user is often entitled to create a back-up copy which cannot be sold to third parties.[97] Moreover, if the trader's offer has raised the expectation of the user that the digital content will be constantly available and usable, there are good reasons for a consumer's objective expectation that the user can make at least one copy of the digital content in order to have a backup copy.[98] Even though the DCD did not take up former proposals in the literature to introduce such a mandatory contractual right in favor of consumers,[99] such an objective consumer expectation can still be based on the usual horizon of understanding of consumers that they acquire a content for free use.[100] On the other side, it can be argued that such an expectation is limited by options provided by the trader to re-download a digital content in case it has been destroyed etc.[101] However, since even copyright law does not provide for a prohibition, there are strong arguments that in these cases a backup copy should be part of the objective consumer expectation.

48 Finally, it should be noted that this principle can only be applied to the "classical" form of downloading content. In contrast to a download, a backup copy of streamed content, which is stored on the server of the trader and is only accessible, does not fall under copyright law limitations. This is due to the fact that streaming and access refer only to the right of making available to the public where the referred limitations are not applicable. Even if we consider that the contractual level respectively, the objective expectations of consumers may differ from the copyright situation, these cases are more likely to be related to temporary access to a service or content.

c) Restrictions of non-simultaneous use of digital content on few devices belonging to the consumer

49 Most of EULAs also contain certain restrictions on the simultaneous use of digital content, limiting their use to certain devices or tying them to a user account. This is in particular the case with DRM-protected content.[102] Moreover, some terms in EULAs limit the sharing of digital content to a family household.[103]

50 *Oprysk/Sein* have argued that consumers could objectively expect that they are entitled to use digital content on several devices, at least if the use is not simultaneous.[104] Concerning copyright law, users are entitled to make several copies for their own use, at least according to German copyright law, Sec. 53 of the German Copyright Act.[105] Tying these copies to

95 As is extensively being pointed out by Oprysk/Sein (n 4), 601ff.

96 Directive on the legal protection of computer programs, Art 5 (2) provides: The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

97 Ulrich Loewenheim and Malte Stieper, 'Commentary on § 53 UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H. Beck 6th edition München 2020) para 1 ff; Malte Stieper, 'Urheberrecht in der Cloud' [2019] ZUM 1, 4ff; Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 228.

98 Kuschel/Rostam (n 8) para 13; in principle also Oprysk/Sein (n 4), 612ff.

99 Concerning the proposals under the DCD cf. Hugh Beale, 'Scope of application and general approach of the new rules for contracts in the digital environment' (2016), 27 <http://www.epgencms.europarl.europa.eu/cmsdata/upload/4a1651c4-0db0-4142-9580-89b47010ae9f/pe_536.493_print.pdf> accessed 23 November 2020; European Law Institute, 'Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers' COM (2015) 634 final, 24; Rott (n 48), 454; Loos et al. (n 48), 224.

100 Cf. Oprysk/Sein (n 4), 612 with reference to an empirical study on consumer expectations on eBooks by Sabrina V. Helm et al., 'Consumer interpretations of digital ownership in the book market' (2018) Institute of Applied Informatics at University of Leipzig, 181 <https://link.springer.com/article/10.1007/s12525-018-0293-6> accessed 21 November 2020.

101 Oprysk/Sein (n 4), 613; Before Rott (n 48), 448.

102 See e.g., Part B of Apple Media Services Terms, more in depth the analysis of Oprysk/Sein (n 4), 604ff.

103 Example at Para. 1(2)(b) of Amazon Music Terms of Use, more at Oprysk/Sein (n 4), 606ff.

104 Oprysk/Sein (n 4), 615.

105 Ulrich Loewenheim and Malte Stieper, 'Comment on § 56 UrhG' in Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds) *Urheberrecht Kommentar* (6th edn C.H.Beck

just one device is in turn not provided by copyright law. However, as Art 6 (4) of the InfoSoc Directive stipulates, Digital Right Management systems may override this limitation to the advantage of the rightholder. Hence, even though copyright law may provide for mandatory limitations of private copies, a DRM-environment may restrict making such copies and then also – as a minor restriction – bind them to one device.

51 Thus, once again contract law and objective consumer expectation are decisive to solving the issue: Here, we have to distinguish between digital content that is only readable/usable on one device which is depending upon digital environment provided by the trader – usually (amongst other arguments) at least also for reasons of IT-security – then the consumer cannot objectively expect that his content can be used on other devices.[106] On the other hand, a digital content which can be easily used in different digital environments, such as an MP3-music file or a PDF, should also be allowed to be used on different devices, given a non-simultaneous use.[107] Several empirical studies also suggest that consumers are expecting such a use.[108]

d) Interoperability

52 Closely related to the use on different devices is the issue of interoperability. Here the connection between EULA (copyright) and the contract with the trader is even more evident when we look at Art 7 (1 a) DCD, which mentions the interoperability of the digital content as one of the core elements for subjective requirements of conformity. Art 2 No 12 DCD stipulates the definition of interoperability:

> *"'interoperability' means the ability of the digital content or digital service to function with hardware or software different from those with which digital content or digital services of the same type are normally used;"*

53 If the boundaries for interoperability of the digital content are not made clear by the retailer, Art 6(2) of the Proposal of the DCD refers to industrial standards, expectations of consumers etc. This requirement has been substituted in the final DCD by introducing the objective conformity test in Art 8. However, the explicit notion of interoperability in the subjective requirement test gives us a clear hint that interoperability is not part of the objective conformity. Moreover, Art 8 (1 b) DCD refers only to the functionality and compatibility "normal for digital content or digital services of the same type". Hence, interoperability on devices which use a different digital environment are not encompassed by the objective conformity test and expectations of users/consumers. Thus, the mere reference to an objective expectation that the user should be able to use the digital content in different digital environments[109] falls too short.

54 Furthermore, copyright law only provides in some cases for remedies for the customer to establish interoperability. For instance, Art 7(1) of the Software Directive provides for a right to decompile and reengineer the software in order to establish interoperability of the software with other software – in order not to block secondary markets.[110] However, in contrast to the Software Directive neither the InfoSoc-Directive nor any other copyright related directive such as the Database Directive contain a similar provision. Therefore, the customers/users are not entitled to change anything related to the digital content. This is why the content cannot be used on other devices. Even though the Software Directive would be applicable to the code contained in the digital content (steering its operability on devices etc.) with regard to the CJEU decision in the Nintendo case[111] the InfoSoc-Directive would bar any effort to make the content interoperable. Hence, in contrast to the provisions of the Proposal on Digital Content the customer (consumer) may just claim in most cases withdrawal from the contract with the supplier/retailer, rather than getting a real relief.

München 2020) para 13ff; Thomas Dreier 'Comment on § 53 UrhG' in Thomas Dreier und Gernot Schulze (eds) *Urheberrechtsgesetz* (6th edn C.H.Beck München 2018) para 7ff.

106 Coming to the same results Oprysk/Sein (n 4), 614 by referring to "centralized" systems.

107 Oprysk/Sein (n 4), 614ff.

108 Cf. Perzanowski/Hoofnagle (n 82), 357ff.; Nicole Dufft, Andreas Stiehler, Danny Vogeley and others, 'Digital Music Usage and DRM – Results from an European Consumer Survey' [2005] Research Paper, 50 <http://www.indicare.org/survey> accessed 23 November 2020.

109 Kuschel/Rostam (n 8) para 13.

110 Gerald Spindler, 'Commentary on § 69e UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds) *Urheberrecht Kommentar* (C.H.Beck. 6th edition München 2020) para 1; Malte Grützmacher, 'Commentary on § 69e UrhG' in Artur-Axel Wandtke and Winfried Bullinger (n 28) para 1.

111 Case C355/12 *Nintendo v PC Box* EU:C:2014:25, para 23.

e) Retraction of access to content supplied on a time-unlimited basis

55 Some EULAs restrict the continuous access of the user to digital content by allowing the provider to disrupt the service, even to remove content remotely.[112] However, as *Oprysk/Sein* have shown, most of these restrictions are aiming either at content which is provided as an online-service or is bound to a certain digital environment.[113] In the case of a time-unlimited access to digital content, *Oprysk/Sein* argue that from an objective conformity perspective the consumer could reasonably expect that they will be able to obtain access to the digital content continuously.[114]

56 However, there is a difference between obtaining permanent access to a digital content and the download of a digital content: In the latter case (the download of digital content) the trader has fulfilled his obligations by enabling the consumer to use the digital content. On the other hand, if the consumption or the use of digital content is bound to an account without being limited to a certain time period, so that to the customer the contract resembles more of a sale rather than a rental contract, it is fair to qualify the constant access as an objective consumer expectation. Any deviation would be treated under "usual" contract law as well as contradicting behavior. This is not to say that the consumer would have a right against the trader to remove the tie between the digital content and the account (or verification) as rightholders may have a legitimate interest to exercise control on the distribution of their digital content by using DRM-systems (to which account verification can belong to[115]).

57 However, if the digital content is tied to a certain digital environment and if this relationship has been part of the declaration of the trader, it is arguable that the consumer can expect that this digital environment will be upheld quasi eternally by the trader. Essential is once again the question whether the access to the digital content is being enabled "on the same type" or in the "same manner"; if it turns out that the industry is widely using this account-verification mechanism and the tying to digital environment, it can be difficult to simply qualify such contracts as "sales-alike". This argument is fostered by Art 8 (2 b) DCD which stipulates:

> *"The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time:*
>
> *(...)*
>
> *(b) that the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, where the contract provides for a single act of supply or a series of individual acts of supply."*

58 Hence, the DCD does not in principle require the trader to uphold quasi "forever" a digital environment, even in the case of a single act of supply – however, the DCD once again refers to the period of time "the consumer may reasonably expect".

59 In practice, we should expect traders to avoid the objective conformity test by seeking explicit consent of the consumer to deviating descriptions concerning their obligations.

3. Overblocking

60 Moreover, concerning digital services contracts, which allow sharing of user-generated content with others (be it on social networks, YouTube, Instagram or other platforms), are also at stake with reference to copyright law. Art 17 of the DSM-Directive provides for a liability of certain host providers (massive online content sharing according to Art 2 (6) DSM-D) in a way that these host providers have to prevent uploading of copyright-violating content from users of these platforms, Art 17 (4 b) DSM-D. Even though at least German courts have been reluctant to qualify these contracts more precisely,[116] it cannot be denied

112 See for example the removal of Microsoft Books, https://support.microsoft.com/en-us/help/4497396/books-in-microsoft-store-faq.

113 Oprysk/Sein (n 4), 608ff with reference to part 5.1. of Amazon Music Terms or part 3 of Kindle Store Terms of Use.

114 Oprysk/Sein (n 4), 617 referring to an empirical study of Perzanowski and Hoofnagle (n. 82) 337ff.

115 For more detailed information on account verification, see Daniela Schulz, 'Der Bedeutungswandel des Urheberrechts durch Digital Rights Management – Paradigmenwechsel im deutschen Urheberrecht?' [2006] GRUR 470, 471ff; concerning the functionality of DRM systems see Matthias-Christian Ott, '*Digital Rights Management*' (2010); Gerhard Fränkl and Philipp Karpf, *Digital Rights Management Systeme – Einführung, Technologien, Recht, Ökonomie und Marktanalyse* (PG Verlag 2004).

116 BGH [2018] NJW 3178, para 18ff; LG Heidelberg [2018] MMR 773, 774; for a contract sui generis: OLG Stuttgart [2020] BeckRS 2019, 5526 para 51; OLG München [2018] MMR 753, para 18; Peter Bräutigam and Bernhard von Sonnleithner, 'Vertragliche Aspekte der Social Media' in Gerrit Hornung and Ralf Müller-Terpitz (eds) *Rechtshandbuch Social Media*

that those digital services also fall under the scope of the DCD as it is sufficient that data of the user is being used in exchange of the service.[117] Hence, users may have a direct contractual claim against the host provider if they can invoke an objective expectation that their content should not be blocked. However, as host providers already have to respect certain limitations in favor of users' objective expectations according to Art 17 (7-9) DSM-D, such as citation, parody, or pastiche, it can be argued that those limitations are also part of objective conformity criteria – thus, making it easier to construe a claim for users which is not provided in the DSM-D.[118]

61 Even though such an approach would allow for contractual claims, we have to bear in mind that host providers can integrate in their standard terms and conditions restrictions for uploading, which they are already doing concerning fake news or humiliating messages.[119]

II. Re-Use of digital content after termination of the contract

62 Moreover, copyright license clauses often transfer a vast manner of copyrights on content which has been created by the user / consumer (user-generated content) to providers, such as social networks or game operators. Many licenses extend this transfer of rights to an indefinite time even after the termination of the contract, thus enabling the provider to use the digital content produced by a user for a longer time than the contract actually lasts.[120] In addition, these providers restrict the use of digital content by a user / consumer by means of copyright license clauses after the termination of the contract.

63 The DCD provides for rules on the termination of the contract and the fate of digital content. In particular, Art 16 DCD also encompasses user-generated content. Concerning personal data, Art 16 (2) DCD refers to the GDPR, which prohibits the further use of personal data once the justification for processing data has ended. This includes the withdrawing consent of the users (Art 7 (3) GDPR) or the termination of the contract, Art 6 (1 b) GDPR. Moreover, Art 16 (3) DCD stipulates that non-personal data has to be returned to the user/ consumer so that the trader cannot use these data after termination of the contract. However, Art 16 (3) DCD also provides for some important exceptions,

> *"except where such content*
>
> *(a) has no utility outside the context of the digital content or digital service supplied by the trader;*
>
> *(b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader;*
>
> *(c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or*
>
> *(d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content."*

64 These exceptions aim at user-generated content which is regularly (but not always) being used in the specific digital environment provided by the trader/ service provider or has been generated jointly with others (lit d). On the other hand, the further use of digital content by the trader is in general not allowed so that corresponding clauses in copyright licenses would be void according to Art 16 (2, 3) DCD.[121] Especially due to the exceptions in Art 16 (3) (a) and (b), there is a risk that the rights of consumers are unduly restricted, as these exceptions are very

(Springer Berlin 2015) ch 3.2.1 who call it a "social-media"-contract; for a mixed contract Gerald Spindler, 'Löschung und Sperrung von Inhalten aufgrund von Teilnahmebedingungen sozialer Netzwerke' [2019] CR 238, 239; in this direction also Daniel Holznagel, 'Put-back-Ansprüche gegen soziale Netzwerke: Quo Vadis?' [2019] CR 518, 519.

117 Cf. Kuschel/Rostam (n 8) para 24.

118 Cf. Kuschel/Rostam (n 8) para 26.

119 OLG Dresden [2018] MMR 756, 758 ff; coming to the same result LG Frankfurt [2019] MMR 770, 771; Gerald Spindler (n 115), 238ff; Daniel Holznagel, 'Overblocking durch User Generated Content (UGC) – Plattformen: Ansprüche der Nutzer auf Wiederherstellung oder Schadensersatz?' [2018] CR, 369, 371ff.

120 Cf. Kuschel/Rostam (n 8) para 30 referring for instance to the license-clause § 4 of Epic Games Store-EULA, <https://www.epicgames.com/store/de/eula> accessed 25 November 2020, see also Ehle/Kreß (n 45) 730; for more examples see the license-clauses in Facebooks terms of service clause 3.3.1 (last updated: 22 October 2020) <https://www.facebook.com/legal/terms/update> accessed 25 November 2020, YouTubes terms of service (last updated: 22 July 2020) <https://www.youtube.com/static?gl=DE&template=terms&hl=de> accessed 25 November 25 2020 and Steam's subscriber agreement clause 6. A. (last updated: 28 August 2020) <https://store.steampowered.com/subscriber_agreement/#6> accessed 25 November 2020.

121 Cf. Kuschel/Rostam (n 8) para 34.

extensive[122] - it will be the task of the national courts to interpret them in such a way that the obliged parties cannot always evade the obligations of the GDPR by invoking these exceptions. In this respect, it is appropriate to ask whether the consumer can reasonably claim that there is a utility for the data outside the specific digital content, the mere declaration of the trader that there is no further use should not be sufficient.[123] Irrespective of the question of how far the restriction on use according to Art 16 (3) DCD and its exceptions legally reach, it remains doubtful to what extent compliance will be verifiable in practice.[124]

III. Deviation of objective conformity test (Art 8 (5) DCD)

65 Art 8 (5) DCD requires the expressly and separately declared acceptance by the consumer of any deviation from the objective conformity. Obviously, Art 8 (5) DCD has been conceived of as a permission for the trader to supply digital content subject to restrictions on the basis of intellectual property. As *Staudenmayer* pointed out, "a trader, who is supplying digital content created by a third party and is therefore a mere (sub)license holder and subject to restrictions imposed by the developer of the content, should not be left in a dilemma whereby on one hand he has to conform to the restrictions imposed on him, while on the other hand supplying digital content with restrictions placing him in a position of not complying with objective conformity criteria".[125] It has also been argued that the information was actively brought to the consumer so that a mere hyperlink would not be sufficient.[126]

66 Hence, in a case where a consumer cannot reasonably expect any restrictions by EULAs, they have to be accepted in the manner described by Art 8 (5) DCD.[127] However, the final DCD has not picked up the original proposal of Art 6 (2) DCD which emphasized that terms and conditions of the contract have to be stated in a "clear and comprehensive manner". Regarding EULA licenses with sometimes more than 24 pages of terms and conditions, they seemed to be far away from such a transparency test. This becomes even more evident if we take the required "comprehensive" manner into account. However, since EULAs are not part of the contract between supplier/retailer and customer/buyer, their intransparency should not affect conformity of the digital content even if transparency would still be part of the test of Art 8 (5) DCD.[128] Apparently there is no chance to link them both together. Nevertheless, if we consider that reasonable expectations of a customer (consumer) refer also to his contractual obligations as a whole(what he can expect to be confronted with when buying and using digital content), we may argue that these expectations also concern EULA conditions – so that any intransparency of those terms and conditions also affects the conformity of the digital content regarding the contract between the supplier/retailer and the customer, respectively the express and separate consent by the consumer.

67 Moreover, just a mere reference to the EULA of the rightholder in the standard terms and conditions of the trader would not be sufficient under the test of Art 8 (5), which requires consent of the consumer separately and expressly. The parallels to the required consent in the GDPR according to Art 7 (3) GDPR are evident. Even if just ticking a box would meet the standard of Art 8 (5) DCD, it is arguable[129] if the "box" just consists of a link to EULA which can then be read – even though Recital 49 DCD refers explicitly to such an option as the precondition of specific information can be questioned.[130]

D. Conclusion

68 In sum, this short tour d'horizon revealed complex cross-relations between copyright law and contracts on the level of licenses on one hand and contract law on the other hand. The traditional dichotomy between transfer of rights and contractual obligations seems to be seriously disturbed.[131] The

122 Metzger (n 2) 583; differing: Ehle/Kreß (n 45) 730 who assume without any particular reason that the traders often cannot invoke the exception. However, especially the exception of Art 16 (a) DCD seems very appropriate for video streaming offers, for example, when users create their own favorites lists consisting only of platform-exclusive content, this may be mentioned as one of several examples.

123 So correctly Metzger/Efroni/Mischau/Metzger (n 50) para 54.

124 Critical in this respect Schulze (n 55) 719.

125 Staudenmayer (n 38) Art. 8 para 156.

126 Staudenmayer (n 38) Art. 8 para 164.

127 Kuschel/Rostam (n 8) para 14.

128 Concerning the application of the transparency test according to Art 5 Unfair contract terms directive see Staudenmayer (n 38) Art. 8 para 176.

129 Cf. Sein/Spindler (n 29) 374.

130 See also Staudenmayer (n 38) Art. 8 para 169 ff

131 Cf. Christiane Wendehorst, 'Sachverständigenrat für Verbraucherfragen beim Bundesministerium der Jus-

DCD does not affect this complex relationship, but refers to traditional chain models – which, however, are not prone to solve the problems in the triangle between rightholder, retailer, and customer. Even though the DCD now explicitly addresses the objective conformity test and thus allows one to overcome some copyright restrictions, all remedies remain between the contracting partners and do not encompass the rightholder. One potential solution to consider in depth refers to the French model of recourse to every part of the (retail) chain, including the rightholder. A lot of problems are yet to be discussed, such as how the customer can assert remedies against the rightholder on the basis of expectations based on the relationship with the retailer. Moreover, the objective conformity test raises – especially with regard to the relationship with new emerging business models and descriptions of digital content and services – a lot of unsolved questions. Due to a possible deviation from the objective conformity test in Art 8 (5) DCD, we should expect more efforts by traders to enshrine EULAs with rightholders in their contracts – if the requirements of Art 8 (5) DCD remain at the level of just ticking a box.

tiz und für Verbraucherschutz' (2016) <https://www.svr-verbraucherfragen.de/dokumente/verbraucher-recht-2-0-verbraucher-in-der-digitalen- welt/verbraucher-relevante-problemstellungen-zu-besitz-und-eigentums-verhaeltnissen-beim-internet- der-dinge/> accessed 25 November 2020.

Goods With Digital Elements And The Seller's Updating Obligation

by **Piia Kalamees***

Abstract: The updating rules of Directive 2019/771 on certain aspects concerning contracts for the sale of goods are new to most if not all Member States. It is a central issue regarding goods with digital elements as these goods often need to be updated in order to remain conforming to the contract. The article focuses on analysing whether the sellers' updating obligation is well balanced with their respective rights. The article briefly explains the notion of goods with digital elements and thereafter, discusses the subjective and objective requirements for conformity of updates. Questions of which updates the seller is obliged to ensure are provided and how long the updating obligation lasts are being analysed. The article also focuses on the sellers' liability period and rules on burden of proof. Finally, the seller's right of redress is addressed. The article concludes that while the sellers' obligations towards the consumer are provided for in as much detail as the versatile nature of goods with digital elements allows, this is not true regarding the rules on a seller's right of redress.

Keywords: Updates; Sale of Goods Directive; Goods with digital elements; Right of redress

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A. Introduction

1 The provisions of the Directive 2019/771 on certain aspects concerning contracts for the sale of goods[1] (SGD) regarding updates are something groundbreaking in the European contract law[2] and also in many European countries. The updating obligation is a central issue concerning 'goods with digital elements'.[3] The aim of the provisions regarding updates is to keep smart goods in conformity for a certain period of time and not just at the moment of

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1 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. OJ L 136, 28–50.

2 Dirk Staudenmayer in Rainer Schulze, Dirk Staudenmayer (eds), *EU Digital Law. Article-by-Article Commentary* (Nomos 2020) Art 8 para 2, Dirk Staudenmayer, 'Kauf von Waren mit digitalen Elementen – Die Rechtlinie zum Warenkauf' (2019) NJW 2890; Sören Segger-Piening 'Gewährleistung und Haftung im Internet der Dinge – Zugleich eine Analyse der neuen Warenkaufrichtlinie' in Beyer, Erler, Hartmann, Kramme, Müller, Pertot, Tuna, Wilke (Hrsg). *Privatrecht 2050 – Blick in die digitale Zukunft* (Nomos 2019) 108.

3 Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) EuCML 194, 199.

the delivery of the goods.[4] From the SGD, it is clear that the seller of goods with digital elements has the obligation to ensure that the consumer is informed of and supplied with updates.

2 The goal of this article is to analyse whether the updating obligation of the seller as set forth in the SGD is well balanced with seller's respective rights. After a brief explanation on which goods should be considered goods with digital elements, the relevant provisions on updates of the SGD are analysed. The article deals with questions of subjective and objective requirements for conformity of updates in order to ascertain which updates the seller should provide, or ensure will be provided, to the consumer, and for how long. Also, the seller's liability period for updating obligation and questions of burden of proof are addressed. As the regulation of updates is also closely tied to the seller's right of redress and the matters related to it, the article also touches upon this. Finally, there are some conclusions offered to the question raised.

B. The sale of goods with digital elements

3 The SGD and the Digital Content Directive[5] (DCD) were passed at the same time. While the former lays down rules related to the sale of goods, the latter deals with aspects concerning contracts for the supply of the digital content and digital services. Although both directives have a different scope of application, there is one area where there is interplay between them: goods with digital elements. The delineation between these two directives is defined by Article 3(3) of the SGD and Article 3(4) of the DCD.

4 Pursuant to Art 2(5b) of the SGD, goods with digital elements are tangible movable items that incorporate or are inter-connected with digital content or digital service in such a way that the absence of the digital content or the digital service would prevent the goods from performing their functions. The SGD applies to the sale of these goods if the digital content or the digital services are provided with the goods under the sales contract (art 3(3) SGD).[6] If a digital service is supplied but the absence of that content or services does not prevent goods from performing their functions[7] or the digital content is supplied separately from the goods, the DCD is applicable instead of the SGD. If there is doubt about which of the two directives is applicable, then pursuant to Article 3(4) of the DCD and 3(3) of the SGD, the digital content or the digital service shall be presumed to be covered by the sales contract.

5 Therefore, the alternative criteria that need to be met in order for goods to be qualified as goods with digital elements are the following: 1) the digital content must be incorporated in the goods, or 2) the goods must be inter-connected with digital content or a digital service. It is quite clear what incorporated digital content means – broadly speaking, it is a software that is integrated into the goods.[8] The question of what constitutes goods that are inter-connected with a digital content or a digital service is complicated. Some explanation is offered in recital 14 of the SGD. According to that recital, this could be, for instance, the continuous supply of traffic data in a navigation system or the continuous supply of individually adapted training plans in the case of a smart watch.

6 Determining whether an interconnected digital service forms a part of the smart goods is important, among other reasons, for determining the seller's liability for defects of such services under the SGD. The seller is liable if a) the digital service is inter-connected with the goods in such a way that the absence of that digital service would prevent the goods from performing their functions (Article 2(5) (b) SGD); and b) the digital service is provided with the goods under the sales contract (Article 3(3) SGD). Hence, the functions of the goods need to meet the criteria that are determined in the contract or meet the objective conformity criteria set forth in Article 7(1) of the SGD. Additionally, the digital content and the tangible goods need to be sold together.[9] The condition of Article 3(3) of the SGD that the digital content or digital services need to be provided with the goods under the contract is ambiguous. A clear

4 See same opinion on the DCD regulation Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 112.

5 Directive (EU) 2019/770 of the European Parliment and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digitaal content and digital services. OJEU L 136/1.

6 Karin Sein and Gerald 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' (2019) 15 ERCL 271; Jasmin Kühner and Carlo Piltz, 'Der Regelungsmechanismus im Referentenentwurf des BMJV v. 3.11.2020 zur Umsetzung der Richtlinie 2019/770/EU' (2021) CR 16.

7 It is noteworthy that the the SGD does not require that the "main functions" are affected. More on that see Karin Sein '"Goods with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods' <https://ssrn.com/abstract=3600137> accessed 23 February 2021.

8 Sein (n 7) 3.

9 Sein (n 7) 5.

occasion is when the parties to the contract have agreed to provide the digital content or services, but this is not the only case where the SGD is applicable. It is also possible that the digital content or services objectively form part of the contract (Article 7 of the SGD). Whether the supplier of the digital content or services is the seller or a third party, makes no difference – the seller is liable for the sold goods (including its digital part).[10] Recital 14 of the SGD additionally explains that there is no difference if the digital content that fulfils a contractually agreed function is pre-installed or added to the goods later. E.g. if a consumer has bought a fitness tracker and after he has concluded the sales contract needs to install an application to his smart phone for using all the functionalities of the tracker (and agree also to the end user licensing agreement of the producer of the tracker), the application is also considered being a part of the sold smart goods. On the other hand, the SGD does not apply, for example, when a consumer is buying a laptop and software separately,[11] installing separately bought application on their iPad well after they have bought the device, or when the consumer has bought a car with built-in hardware for a navigation system but buys the system (e.g. maps) later from a third person.[12]

C. Updating obligation as part of subjective conformity requirements

7 Pursuant to Article 6 d) of the SGD, in order to conform with the sales contract, the goods shall, in particular, where applicable, be supplied with updates as stipulated by the sales contract. According to recital 28 of the SGD, the sellers may agree with consumers to provide updates for goods with digital elements. Such updates can improve and enhance the digital content or digital service elements of the goods, extend their functionalities, adapt them to technical developments, protect them against new security threats, or serve other purposes. Consequently, sellers may promise to deliver updates that should be considered upgrades, as their purpose is not just keeping the goods functioning according to the contract, but to extend considerably their initial functionalities.[13] Adding just slightly new features should not be considered an upgrade,[14] but it is an update, just not a necessary one, e.g. change of the graphics of an application linked to the fitness tracker. The failure to supply these updates, if agreed upon in the contract, constitutes a non-conformity of the goods. The parties to a sales contract are free to agree on a wide variety of updates, and if the seller does not deliver the updates agreed upon, the goods are non-conforming to the contract, and the seller is in breach of his contractual duties.

8 On some occasions the seller might not want to agree on such updating obligations, because they are not in charge of additional updates/upgrades or even able to provide them. The updates for goods with digital elements are often provided by third parties who are developing (or have commissioned someone to develop) the digital part of the goods (apps, embedded digital content, security updates etc). However, agreements regarding updating obligations can also result from the circumstances of entering into the contract, the information on the sales object or its features presented by the seller to the buyer in the course of preparing the sales contract, and the seller's unilateral statements concerning the features of the goods.[15] For example, if the seller is selling a fitness tracker and on its packaging there is a promise that the software of the tracker will be updated for three years in respect of latest sleep tracking possibilities, the seller is obliged to deliver the promised updates (upgrades).

9 One would expect that the larger sellers of goods with digital elements have regulated this matter in their general terms as the question of updating obligation is very topical in their line of business. By looking at some of such sellers it appears that these agreements are not common. For instance, one of the largest sellers, Amazon, does not regulate this matter in their Conditions of Sale,[16] and neither does Germany's leading electronics seller MediaMarkt.[17]

10 Sein (n 7) 2.

11 Ivo Bach 'Neue Richlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) NJW 1706.

12 See for Estonia Piia Kalamees and Karin Sein, 'Connected consumer goods: who is liable for defects in the ancillary digital service?' (2019) EuCML 14.

13 See also Christina Möllnitz 'Änderungsbefugnis des Unternehmers bei digitalen Produkten. Auslegung und Folgen des § 327f BGB-RefE' (2021) MMR 117.

14 Karin Sein and Gerald Spindler. 'The new Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 ERCL 370.

15 Carvalho (n 3) 198.

16 Amazon.de Conditions of Sale <https://www.amazon.de/-/en/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201909000#> accessed 23 February 2021.

17 <https://www.mediamarkt.de/de/shop/AGB.html>

One would suppose that at least the car dealers selling different models of Volkswagen and Audi would regulate this matter in detail. However, a quick search among such German and Estonian car dealers showed that it is not the case.[18] The examples brought here are chosen because these two industries should have the most interest in regulating the matter in their terms and conditions. These are just few examples to illustrate the situation and a more thorough research of this matter might show that there are sellers who have regulated this matter in the contracts. Yet, the result of this quick search is still surprising. It seems that the updating obligation and its regulation in contracts with consumers is still something rather new for the sellers. This situation will undoubtedly change after the provisions of the SGD have been transposed to the national laws of the Member States.

D. Updating obligation as a part of objective conformity requirements

I. Which updates is the seller obliged to provide?

10 Pursuant to Article 7(3) of the SGD, in the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with the updates, including security updates, that are necessary to keep those goods in conformity, for the period of time (a) that the consumer may reasonably expect given the type and purpose of the goods and digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or (b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for the continuous supply of a digital content or a digital service over a period of time.

11 It has to be noted, however, that according to the wording of Article 7(3) of the SGD, the sellers are not necessarily obliged to provide the updates themself, but they have to ensure that the consumer is informed of them and that the updates are being supplied. This can also be done by a third party,[19] which is often the case in practice. This creates uncertainty for the sellers as they normally are not developing the updates themself and might not have much bargaining power to guarantee that the consumer will receive the necessary updates from the third party. One could imagine, for instance, a local electronics shop selling a wide variety of smart goods (from electrical toothbrushes to smart refrigerators and TVs). The seller in this example might not even have a direct contact with the producer of the goods that they sell and is therefore just forced to rely on the developer of the updates to fulfil their obligations to the consumer. They will be liable viz-a-viz the consumer, pursuant to Article 7(3) of the SGD, despite their lack of control over providing the updates. It does make the situation uncontrollable for the seller in some cases; however, this solution should not be something entirely new to the sellers. For example, small local electronics shops have probably sold ordinary vacuum cleaners for years. The shops normally do not repair the vacuum cleaners themselves and have some agreements with third parties or producers of vacuum cleaners to solve consumer complaints about the lack of conformity. The sellers will undoubtedly have similar agreements with relevant third parties with respect to the updating obligation. What is new to the sellers is the nature of an updating obligation as this needs to be fulfilled continuously maybe through the years. This is more burdensome to the sellers than the repairing obligation known to them until now, as the traditional goods (without digital content) might have never needed repairing, but smart goods definitely need constant (security) updates. However, the goal of the SGD is to provide consumers with a high level of protection (Article 1 of the SGD) and with regard to goods with digital elements the updating obligation is of crucial importance. In order to balance the additional extent of the sellers' obligation the SGD foresees right of redress pursuant to Article 18.

12 Article 7(3) of the SGD mainly raises two questions: which updates should be provided and for how long? It is apparent from Article 7(3) of the SGD that the seller is obliged to provide only updates that are necessary to keep the goods in conformity.[20]

accessed 23 February 2021.

18 For Germany see eg <https://www.held-stroehle.de/images/pdf/AGB_Neuwagenverkaufsbedingungen_2016.pdf, https://www.spindler-gruppe.de/agb/, https://www.autohaus-warncke.de/wp-content/uploads/2019/03/VW_e-Fahrzeuge-Neuwagen-Verkaufsbedingen_Stand_12-2016.pdf> accessed 23 February 2021. Estonian car dealers do not tend to show their general terms and conditions on their websites at all.

19 Christian Twigg-Flesner 'Conformity of Goods and Digital Content/Digital Services' in Esther Arroyo Amayuelas, Sergio Camara Lapuente, *El Derecho Privado En El Nuevo Paradigma Digital* (Colegio Notarial de Cataluna' Marcial Pons 2020) 69. For similar obligation in the DCD see Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 126.

20 Also, recital 30 of the SGD supports this view. Cristiane Wendehorst 'Aktualisierungen und. Andere digitale Dauerleistungen' in Johannes Stabentheiner, Christiane

The seller does not have the obligation to provide consumer with updates that improve the goods with digital elements[21] or that are not necessary for keeping the goods in conformity.[22] The seller is obliged to ensure the supply of such updates or upgrades only if the parties have agreed so in the contract. The seller is obliged by the SGD to make sure that the goods will keep functioning according to the contract even if the digital environment around them changes, but not to improve them.[23] This view is also supported by recital 30 of the SGD which states that the seller's obligations should be limited to the updates which are necessary for such goods to maintain their conformity with the objective and subjective requirements for conformity laid down under the SGD. The European legislator has especially stressed the importance of security updates (Article 7(3) of the SGD). Therefore, the seller of a fitness tracker is obliged to inform and supply the consumer with updates that keep the application functioning according to the contract and the objective requirements of the SGD for conformity. The seller does not have the obligation to improve the digital elements tied to the goods in any way, e.g. adding functionalities to the application.[24] The key issue is the extent of modifications made to the digital part of the goods. If changes are fundamental (functions extended considerably), then they cannot be considered to be updates but should be considered upgrades.[25] The seller does not have the obligation to provide such upgrades to the consumer unless agreed otherwise. To determine whether there is an update or an upgrade, the contents of the update have to be evaluated. If the update is necessary for keeping the goods functioning according to the contract, it is an update. This is the case for example where an update to a fitness tracker is provided in order to eliminate some security threats. However, if there is an update that adds some sleep analysis methodology to the fitness tracker's app this should be considered an upgrade if such functionality was not agreed upon in the sales contract.

II. How long must the seller provide updates?

13 To determine for how long the seller should ensure that the consumer is provided with updates, it is important to differentiate between one-off contracts and contracts for the continuous supply of digital content or a digital service. The rules on updating obligation's durations are different for these two categories.[26] Regrettably, distinguishing between these two categories can be difficult.[27] Buying a photo frame for displaying photos from an SD-card is undoubtedly a one-off contract. Buying an e-book reader with the condition that 10 books per month are available to the consumer for three years free of charge should be considered a continuous supply of the digital content. Having in mind the great variety of goods with digital content, there might also exist numerous cases where the qualification is not as easy as in the previous examples.

14 If the continuous supply of digital content or a digital service is provided for in the contract, Article 7(3)(b) of the SGD refers to the time limits set forth in Article 10(2) and (5). Hence, if the sales contract provides for a continuous supply of digital content or digital services, the seller has to ensure that the updates are delivered to the consumer within two years from the time when the goods with digital elements were delivered. Where the parties of the contract have agreed on a period longer than two years for suppling the digital content or digital services, the seller has an obligation to deliver updates according to the contract.

15 The law is less clear in respect to the duration of the seller's updating obligation when a contract for one-off supply of digital content or digital service (Article 7(3)(a) of the SGD) is at hand.[28] Pursuant to this article, the seller has an updating obligation for a period of time that the consumer may reasonably

Wendehorst, Brigitta Zöchling-Jud (Hrgs), *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 122.

21 For similar regulation on the digital content and the DCD see Sein/Spindler (n 14) 370 and Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 114; Wendehorst (n 20) 122.

22 Wendehorst (n 20) 122.

23 Staudenmayer (n 2) 2890.

24 Staudenmayer (n 2) 2890; Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) VuR 368.

25 See on the same topic about DCD Sein/Spindler (n 14) 370.

26 Article 7(3) of the SGD.

27 Simon Geiregat and Reinhard Steennot 'DCD Proposal: Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds) *Digital Content and Distance Sales. New Developments at EU Level* (Intersentia 2017) 161; Thomas Riehm and Metawi Adrian Abold 'Mängelgewährleistungspflichten des Anbieters digitaler Inhalte' (2018) ZUM 83.

28 For the same problem regarding the regulation of the DCD see Sein/Spindler (n 14) 386.

expect. To determine this period of time, the type and purpose of the goods and the digital elements need to be taken into account, as well as the circumstances and the nature of the contract.

16 There has been some criticism about the rule that makes the seller's liability not dependent on a precise timeframe[29] as it does not give certainty to the parties of the contract. The consumer's reasonable expectations determine whether the seller must provide updates in certain situations. A concrete time limit would likely reduce arguments among sellers and consumers regarding the duration of the seller's updating obligations. At the same time, it is understandably difficult to determine a time limit that would suit all sales contracts of smart goods. This difficulty is the reason behind the current rule of the SGD.[30]

17 An example of goods that require a single act of supply of digital content would be a simple digital photo frame that can be used by just plugging in a USB-stick or using an SD card. The photo frame has embedded digital content, which is necessary for it to function, but it does not need any outside support for proper functioning. In order to determine whether the seller is obliged to provide updates for such goods, it must be considered that it is a photo frame (type of the goods), that this is meant to display photos from a USB-stick or an SD card, and the circumstances and nature of the contract. The latter two criteria might be that the consumer bought the photo frame from an online shop on standard terms, paying 15 euros for the photo frame. From this case, it could be concluded that as the frame should not really need updates for functioning and the consumer should probably not expect to receive any updates. On the other hand, when the consumer buys some expensive device that they are looking forward to using for a long period of time, such as a navigation device, their legitimate expectation would be that the navigation software will be up to date for more than just a few weeks.[31] In this case, it might even be expected that the device be updated during two years. With respect to some other goods, like cars, the period could even be longer. These examples illustrate how the SGD is regulating a very wide variety of smart goods, and that it is truly difficult to delimit the duration for the seller's updating obligation.

18 One has to keep in mind that these examples are drastic – some are really expensive goods that are meant to be used for a long period of time and, the others are goods that could be considered cheap and do not really need to be updated. There is a wide variety of goods between these two extremes. What if the consumer buys a fitness tracker for 200 euros? How long should the seller's updating obligation last?

19 Pursuant to recital 31 of the SGD, the consumer would normally expect to receive updates for at least as long as the seller is liable for the lack of conformity. It has been stated that reading Article 7(3) together with Article 10(1) of the SGD suggests that the consumer's reasonable expectations could not exceed two years in case of one-off contracts.[32] However, if only Article 7(3) of the SGD is looked at, it is obvious that the consumer's reasonable expectations for updating might last much longer than two years, e.g. in the case of heating devices the reasonable expectation could be for ten years.[33] This could also be the same or even longer for smart cars, e.g. 12 years, as this seems to be an average lifespan of a car nowadays.[34] This could be the case especially regarding security updates. It is true that the consumer might have a reasonable expectation to receive at least security updates also, even after the liability period of the seller.[35]

20 At the time of writing this article, it is quite impossible to anticipate the exact time frame for updating some smart goods. As noted before, the solution of the SGD is probably not the best one, but is justified, as contracts for the sale of goods that provide for a single act of supply of digital content or a digital service can be concluded for the sale of a wide variety of goods. An alternative approach that would raise the level of legal certainty would be to foresee a concrete time frame for the updating obligation for one-off contracts. The disadvantage of this solution is, however, that the consumer does often have a reasonable expectation to receive at least security updates for a longer period. If there would be a concrete time-limit set (e.g. 2 years for the updating obligation), then it would prevent consumers from claiming (security) updates for

29 Staudenmayer (n 2) 2891, regarding the DCD see Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 139.

30 Staudenmayer (n 2) 2891.

31 Christiane Wendehorst 'Sale of goods and supply of digital content – two worlds apart?' <https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf> accessed 23 February 2021 14; Carvalho (n 3) 199.

32 Twigg-Flesner (n 19) 70, regarding the DCD the the two-year time frame has, on the contrary, been called a minimum time for updating obligation Kühner/Piltz (n 6) 34. For more on seller's liability see p 6 of this article.

33 Wendehorst (n 20) 130.

34 How Today's Cars Are Built to Last. < https://www.aarp.org/auto/trends-lifestyle/info-2018/how-long-do-cars-last.html> accessed 23 February 2021.

35 Staudenmayer (n 2) 2891.

goods with digital elements that have a longer life span and for which it is reasonable to expect the updates to be provided for a longer period of time. A longer time span would be unfair towards the sellers of such goods. The photo frame, for example, does not need updating and as such, obliging the seller to update goods like this for two years would not be advisable. Therefore, the solution of the SGD currently used must be considered as good as possible. It does leave some uncertainty to both parties to the contract but at the same time it is flexible enough to fit the wide variety of smart goods sold on the market.

E. The consumer's obligation to install the updates?

21 Clearly, the seller has an obligation to provide updates to smart goods to remain according to the subjective and objective requirements. Pursuant to recital 30 of the SGD, there is no obligation for the consumer to install such updates.[36] However, article 7(4) of the SGD states that there are consequences for failing to install updates– the seller will not be liable for any lack of conformity resulting solely from the lack of the relevant update. For the seller to be freed from the liability, two additional conditions need to be met. First, the seller must have informed the consumer about the availability of the update and the consequences of the failure to install it. Secondly, the failure of the consumer to install (including incorrect installation) was not due to the shortcomings in the installation instructions. Therefore, the consumer does not have a direct obligation to install the updates,[37] but if he fails to install the update, and this failure to install is not caused by the update itself or its installation instructions, the seller is no longer liable for the non-conformity of the goods.

22 For the seller not to be liable for the non-conformity of smart goods, the non-conformity has to result solely from the lack of a particular update. If there are any other reasons for the non-conformity of the goods, the seller might still be liable. This might be the case, for example, where the consumer has not installed the required update, but the goods have partially become non-conforming because of some bug in their hardware.

23 Article 7(4) of the SGD is quite understandable from the consumer's point of view. As the digital environment is often changing rapidly, it might be that a certain update makes the consumer lose some required functionalities on his device. It may be something as simple as being able to play their favourite game on their computer or to use some apps' functionalities on their smartphone. The current provisions leave the consumer an opportunity not to accept and install such updates that would bring about detrimental consequences to him.

24 The quite clear regulation on the consumer's choice regarding the installation of the updates might become complicated in situations where the update is necessary for keeping the goods in conformity with the contract but needs actions from the consumer which the latter is not willing to take. This would be the case if there is an operation system update, while in order to install it, the consumer needs to delete some of the applications on their phone, as otherwise there would not be enough disk space. If in this situation the consumer chooses not to install the update and later there is a security violation, it is questionable whether the consumer could revert to remedies against the seller. The answer should still be that if the seller has informed the consumer of the availability of the update and the possible consequences of not installing it, and the security breach is caused by the fact that the update was not installed by the consumer, the seller should not be held liable for the lack of conformity of the goods. Otherwise, it would be left solely to the discretion of consumers whether the seller is liable or not.

25 The SGD does not provide sellers with a right to modify the digital content of smart goods. By contrast, Article 19 of the DCD includes such a right, stating that in case of continuous supply of digital content or services, the trader may modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity with the contract. Article 19(2) of the DCD also grants the consumer a right to terminate the contract under certain conditions if the modifications have negative impact on consumers interests. Suggestions have been made that the SGD should include a similar article in order to grant the seller a right to modifications.[38] It is quite difficult to see why this would be necessary. Foremost, it would bring about the necessity to differentiate between the physical and the digital part of the goods. It would not be advisable to allow sellers to modify the physical part, e.g. to paint a car brought to maintenance in a different colour. Terminating the contract in case of smart goods would just bring about too many difficulties, e.g. taking back the physical goods, reselling them if possible etc, for the seller and would often not grant the consumer a higher level of protection.

36 Tonner (n 24) 368.

37 Tonner (n 24) 368. For similar regulation on the DCD see Sein/Spindler (n 14) 370.

38 Staudenmayer (n 2) 2891; Axel Metzger 'Verträge über digitale Inhalte und digitale Dienstleistungen' (2019) JZ 578.

F. Liability rules regarding updates

26 According to Article 10(2) of the SGD, in the case of contracts for continuous supply of the digital content or digital service over a period, the seller is liable for any lack of conformity that becomes apparent within two years of when the goods with digital elements were delivered. If a contract provides for continuous supply of the digital content or digital service for more than two years, the seller is liable for the time he is under an obligation to supply the digital content or digital services. The seller is therefore liable for the time they must supply the digital content or digital services.[39]

27 While the rules on liability for updates for contracts of continuous supply of the digital content (Article 10(2) of the SGD) are well explained and take into account the nature of such contracts,[40] the situation for one-off contracts is not as clear-cut as it might appear at first sight. The sale of the navigation system discussed in chapter D.II. is a one-off contract, but the device needs to be updated in order for it to fulfil its functions. According to Article 10(1), the seller of such a device should be liable to the consumer during two years. The second sentence of that article adds that this time-limit is also applicable to goods with digital elements, but without prejudice to Article 7(3) of the SGD. Recital 31 of the SGD states that the seller is liable for the lack of conformity that exists at the time of delivery, and that they are liable for the defects for two years. Further down the recital, it is stated, however, that a consumer would normally expect to receive updates for at least as long as the period during which the seller is liable for a lack of conformity. In some cases, especially with regard to security updates, the consumer's reasonable expectations could extend beyond that period.

28 This leaves open the question of whether the general two-year period should be considered from the time of the delivery of the smart goods or from the time of providing a certain update. If an update is provided right before the end of the two-year liability period and causes the smart goods to be non-conforming to the contract in month 26, should the liability period start all over for this last update? This should be the case, pursuant to the second sentence of Article 10(1) that refers to Article 7(3) of the SGD, which in turn states that, "without prejudice to this article, the two-year liability period is applicable also to goods with digital elements." It is true that the updating obligation is not a separate obligation of the seller and its purpose is to ensure that the smart goods remain in conformity for the time reasonably expected by the consumer.[41] At the same time, a rule that would limit sellers' liability in case of one-off contracts only to two years starting from the delivery of the physical part of the goods, would make the contents of Article 7(3) meaningless, as there are smart goods such as smart cars which consumers may reasonably expect to receive updates for a much longer period of time.

29 As an example, one can imagine that the consumer has bought some smart goods that they can reasonably expect to be updated during 5 years. The seller stops providing updates 2.5 years after the delivery of the smart goods or a faulty update is provided to the consumer 2.6 years after the delivery. If the seller's liability was limited to two years, this would mean that the consumer could only invoke remedies against the seller during this time. The consumer would have reasonable expectations to receive updates, but no options to enforce their respective rights.[42] Therefore, the second phrase of Article 10(1) should be understood as laying down that the seller is liable for two years starting from the time when the update was provided to the consumer. In the case of goods with a longer lifespan, this would imply that the seller could be liable for ten or more years.[43]

30 This is also supported by recital 37, which states that the relevant time for establishing conformity of a digital content or a digital service element should not be a specific moment in time but rather a period of time, starting from the time of the delivery. That period of time should be equal to the period during which the seller is liable for the lack of conformity. Despite the somewhat ambiguous wording of Article 10(1) of the SGD, the seller's liability, as a rule, lasts if the consumer can reasonably expect to receive necessary updates plus two years.

31 At the same time, Article 10(3) of the SGD leaves open an opportunity for Member States to maintain or introduce time limits longer than those referred to in paragraphs B. and C. of this article. For this reason, Member States may, for instance, determine some longer time frame in their national laws for the updating obligation liability of one-off contracts. This could be three or four years or whatever time limit a member state finds appropriate. Although it might raise the level of protection for the consumers, it will not create a situation where the consumer's interests would be protected in all situations. The consumer

39 Wendehorst (n 20) 131.

40 Wendehorst (n 20) 131.

41 See comments on the DCD for a similar matter Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 113.

42 Twigg-Flesner (n 19) 70. For the similar situation regarding the DCD see Sein/Spindler (n 14) 386.

43 Wendehorst (n 20) 130.

could have a legitimate interest to receive security updates or some other updates for a period that is even longer than that which had been provided for in national law. However, a longer liability period for the seller undoubtedly raises the level of consumer protection as the consumer has an opportunity to exercise his rights for a longer time.

G. The burden of proof

32 The burden of proof is regulated in Article 11 of the SGD. The general rule is that any lack of conformity that becomes apparent within one year from the delivery of the goods is presumed to have existed at the time of delivery. There are some exceptions to this rule (e.g. Article 11(1) of the SGD). Hence, the consumer has the obligation to prove that there is a lack of conformity in the one-year time frame following the supply. If they are able to do that, the seller is obliged to prove that this lack of conformity has emerged after the delivery of the goods. This rule is already well-known from the Consumer Sales Directive[44] and should generally be suitable in cases where the smart goods with a digital content are sold under the one-off contract. It has to be noted, however, that the SGD does not regulate the meaning of "delivery" as this definition is left to national laws.[45] Nonetheless, Recital 39 of the SGD explains that goods with digital elements should be deemed to have been delivered when both the physical and the digital component for one-off contracts has been delivered. Regarding the contracts that provide for the continuous supply of a digital component, they are deemed to be delivered when the supply of the digital content or the digital service over a period of time has begun.

33 This rule on the burden of proof creates rather confusing situations regarding updates. Who should prove what if a consumer has bought a fitness tracker and is reasonably expecting to receive updates for at least two years, when half a year after receiving the tracker, the provided updates are faulty? In this case, the consumer must prove that there exists a lack of conformity of the goods.[46] Next, it is incumbent upon the seller to prove that the lack of conformity did not exist at the time of delivery of the goods to be freed from their liability. This situation could be considered somewhat absurd, as generally the updates for goods are developed and provided well after the sale. So, if the lack of conformity becomes apparent within one year after the delivery of the goods, the presumption of its existence applies. However, if the lack of conformity becomes apparent one year after the delivery of the goods but less than a year from the update, the question remains whether the presumption of lack of conformity at the time of delivery applies. On either occasion, the seller might be able to prove that the lack of conformity did not exist at the time of the delivery of the goods, as the update was designed and installed much later. Regarding a similar provision of the DCD (Article 12(2)), a suggestion has been made that it should be presumed that the lack of conformity is a result of at least one update.[47] In light of the text of Article 12(2) of the DCD, this suggestion is reasonable as pursuant to this article the burden of proof is on the trader for a lack of conformity that became apparent within one year from the time when the digital content or digital service was supplied. As updates are digital content in the meaning of Article 2(1) of the DCD, the text of the DCD allows such a conclusion. The situation is different regarding Article 11(1) of the SGD though, as pursuant to this article, the burden of proof is incumbent upon the seller for one year from delivery of the goods. "Goods" are defined in Article 2(5) of the SGD as tangible movable items and tangible movable items that incorporate or are inter-connected with digital content or digital service. Therefore, an analogous conclusion with the DCD cannot be made regarding the burden of proof in Article 11(1) of the SGD. This means that if a year from delivery of the smart goods has passed, the burden of proof is on the consumer.[48]

34 Member States also have the opportunity to extend this period up to two years (Article 11(2) of the SGD). This rule makes a uniform approach to the burden of proof between the Member States impossible.[49]

35 Article 11(3) of the SGD includes an important specification relating to the sale of smart goods. According to this article, in case the smart goods are sold pursuant to a contract that provides

44 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. OJ L 171, 12–16. Fryderyk Zoll in Schulze/Staudenmayer. *EU Digital Law. Article-by-Article Commentary* (Nomos 2020) Art 12 para 6.

45 See recital 38 of the SGD.

46 See further for the same question regarding the DCD Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 113.

47 Zoll in Schulze/Staudenmayer (n 44) Art 12 para 31.

48 Brigitta Zöchling-Jud 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrect' in Johannes Stabentheiner, Christiane Wendehorst, Brigitta Zöchling-Jud (Hrgs) *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 205, Wendehorst (n 20) 129.

49 See also Bach (n 11) 1708.

for the continuous supply of digital content or a digital service over the period of time referred to in Article 10(2), the burden of proof is incumbent upon the seller for that referred period. This should be understood so that the seller has the obligation to prove that the non-conformity of the goods that becomes apparent in two years was not caused by their actions which includes any provided updates. It must be noted though that if the update was not necessary to keep the goods in conformity and were not agreed upon by the parties, these burden of proof rules do not apply. Whereas the second phase of Article 10(1) only refers to Article 7(3), which solely regulates matters related to necessary updates (i.e. updates that are part of objective requirements for conformity). Therefore, in the case of updates that are not necessary for the smart goods to comply with the objective criteria listed in Article 7(3) of the SGD, the consumer does not have any opportunity to use remedies provided by the SGD.

36 If the seller has agreed to continuously supply digital content or a digital service for more than two years, the seller bears the burden of proof (including for updates) over that time. Returning to the example of a photo frame described above but, this time it is one that stores photos in a cloud and displays them from there. The seller has promised that the cloud service is available to the consumer for three years. Thus, the frame needs an almost constant connection to the Internet and the continuous service for storing the pictures. If such a frame receives an update 2.5 years after the conclusion of the sales contract that disables some of its functions, the seller has to prove that the lack of conformity did not appear within the three years agreed upon. As long as the seller is obliged to update the goods under the contract (in case of continuous supply) he also bears the burden of proof for fulfilling this obligation.[50] This situation is quite understandable and should protect the consumer's interests rather sufficiently.

H. The seller's right to redress

37 As the seller is obliged to ensure that the consumer receives necessary updates, but the seller is often not the developer of such updates and not in control of providing them to the consumer, Article 18 of the SGD provides for rules on the right of redress that should balance seller's obligations and rights. This article grants sellers the right to use remedies against parties in previous links of the chain of transaction. At the same time, the article remains silent on how (e.g. against whom, what actions, and what conditions) this right should be regulated in the Member state's laws.

38 Keeping in mind the purpose of Article 18 of the SGD, the right of redress should provide sellers with good opportunities of making claims against persons liable for defects in updates. Considering the contents of Article 18 of the SGD, this is a goal that could remain unachieved. The right of redress is regulated very generally and the Member States have a lot of discretion on how to implement this principle.

39 What is certain from the text of Article 18 of the SGD, is that the liability of the seller to the consumer must result from an act of omission, including the failure to provide updates, by a person in the previous links of the chain of transactions. Regarding updates, this means that there must be causation between the actions of a third person (not providing updates or providing faulty updates) and the seller's liability to the consumer. If the lack of conformity is caused by the acts or omissions of the seller himself, they obviously should not have the right of redress against the third party.

40 The parties against whom the seller could have a redress claim are the producer of the goods and intermediaries in the chain of transaction. The claim can be made against the party who is liable for the lack of conformity.[51] The wording of Article 18 of the SGD leaves it open whether the seller can pursue remedies directly against the person liable in the chain of contracts or as a redress claim along the chain of contracts. The choice in this regard has been left to the Member States.[52] When making this choice, Member States have to consider that in case of redress claims along the line of contracts there are many factors that may interrupt the remission of liability in this chain, e.g. insolvency of some person, liability clauses, etc.[53] If any of them occurs, the seller is left to bear consequences of some other person's actions. Article 18 of the SGD leaves it also open what should be considered the extent of the claims and what claims the seller could make. Therefore, the Member States have been left with a wide choice for introducing the right of redress into their national laws. It might even be that some Member States do not need to make any alterations to their national

50 Wendehorst (n 20) 129.

51 Andreas Geroldinger 'Die Rolle anderer Glieder der Vertriebskette und Regress ' in Johannes Stabentheiner, Christiane Wendehorst, Brigitta Zöchling-Jud (Hrgs) *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 226.

52 See also for the DCD Damjan Možina in Schulze/Staudenmayer (n 59) Art 20 para 25.

53 Bert Keirsilck 'Right of Redress' in Ignace Claeys, Evelyne Terryn (eds) *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia 2017) 273.

laws to implement Article 18 of the SGD, as they might already fulfil the conditions set forth in this article.[54]

41 Recital 63 of the SGD further explains that the SGD should not affect the principle of the freedom of contract between the seller and other parties in the chain of transactions. Consequently, the right of redress can also be contractually excluded in contracts between different parties in the chain of transactions.[55] If the right of redress is contractually excluded in some or all links in the transaction chain, it would strongly influence the balance of sellers' obligations and rights. The seller would be left to bear the economical consequences of a faulty update that they did not have any connection to. This could often be the case if the seller does not have the same bargaining power as the previous party in the chain of transactions or the producer. Therefore, Member States, when transposing this principle into their national laws, should thoroughly consider how to limit freedom of contract as otherwise it might have undesired effects on sales of smart goods to the consumers. For example, this kind of agreements could be considered invalid if included in standard terms and conditions or limited by rules on validity of such general terms.[56]

42 It is true that the SGD requires full harmonisation (Article 4). However, as the principle of redress regulates matters in B2B relations, it is at least questionable whether this principle also covers such legal relationships.[57] the answer should be negative.[58] Also, the vague contents of Article 18 of the SGD make full harmonisation impossible.[59] All of the aforementioned factors do not allow the seller's rights and obligations tied to updating to be regulated in a similar manner in all Member States. In some, the seller's right of redress might, after implementation of the SGD, be regulated in manner that gives the seller a strong position to make redress claims. This is true for example in Germany, where the seller's right of redress is regulated mostly as mandatory in B2B relationships.[60] In other states, the right might be regulated so that the seller faces many difficulties in making the claim or not being able to make it at all (e.g. when there is such agreement between parties in the general terms and conditions of the relevant contract). For the seller's rights and obligations regarding updating to be balanced, Member States should design their national rules on right of redress as extensively mandatory (e.g. limit the freedom of contract by not allowing to exclude the right of redress in standard terms).

I. Summary

43 The SGD creates many new rules for the Member States regarding the seller's updating obligation. Some of these rules are ambiguous and some intentionally leave much room for Member States to decide how to implement the provisions of the SGD. While the seller's obligations towards the consumer are provided for in as much detail as the versatile nature of goods with digital elements allows, this is not true regarding the rules on seller's right of redress. This creates a situation where the new obligations put on the seller regarding updating might become disproportionate to their rights, depending on how the Member States choose to introduce the right of redress rules into their national laws. The seller's obligations regarding updating are undoubtedly in favour of the consumer and allow a high level of protection of consumer's rights.

44 Pursuant to the SGD, the seller has to ensure the supply of the updates that have been agreed upon in the sales contract and the updates that are necessary to keep goods in conformity. In either case, the seller might be unable to fulfill his obligations on his own. The sellers are often not in charge of developing the updates. At first sight, the situation does not differ much from the current one, where the sellers are liable for defects in goods that are not produced by them. However in hindsight, there are principle differences. While the seller of traditional goods is under an obligation to repair or replace the goods, he may never need to fulfill such obligations as the goods might stay conforming to the contract for the whole duration of seller's liability. Regarding updates for smart goods this is hardly the case – the seller's obligation to ensure that the updates are provided

54 Geroldinger (n 51) 228.

55 Geroldinger (n 51) 231.

56 This is so for example in Austria, see Geroldinger (n 51) 231.

57 See for the DCD Damjan Možina in Schulze/Staudenmayer, *EU Digital Law. Article-by-Article Commentary* (Nomos 2020), Art 20, para 15.

58 Marco B. M. Loos 'Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive.' Center for the Study of European Contract law <http://ssrn.com/abstract=1639436> accessed 18 February 2021.

59 See for the DCD Možina (n 57) 15.

60 Entwurf eines Gesetzes zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Warenkaufrichtlinie.pdf;jsessionid=DA87EC07FDCEDF0FAE1F5117F7A5D556.1_cid334?__blob=publicationFile&v=2> accessed 18 February 2021.

for (at least security updates) exists continuously through the liability period of the seller and might extend even for a longer period of time. Additionally, the rules on duration of the updating obligation leave much room for interpretation, especially in the case of one-off contracts where the time-limit of a seller's obligation is tied to consumer's reasonable expectations. The fact that the burden of proof in the case of updates favours the seller, which is different in respect to other non-conformities of the goods, does not have much effect on balancing seller's rights and obligations. Therefore there have been new and longlasting obligations put on the sellers that they, in most cases, are not in control of fulfilling.

45 To balance the seller's expanded obligations, the SGD provides sellers with a right of redress in Article 18. The intentions of the EU legislator are good and a strong redress right would balance the rights and duties of a seller in a reasonable manner. Although, Article 18 of the SGD leaves discretionary room for the Member States. This could lead to the situation where in some Member States the seller's rights and obligations will be well balanced, while in others this might not be the case. This is not a desired result of implementing the rules of the SGD, as it does not allow the seller's rights to be regulated uniformly in all of the EU. The situation is created by the fact that the right of redress in Article 18 of the SGD is regulating B2B and not B2C relationships and therefore does not fall under the full harmonising nature of the SGD and as such, the rules of Article 18 are stipulated vaguely. This leaves it to the Member States' consideration to truly balace seller's rights and obligations related to his updating obligation. While doing so, Member States should design their national rules on right of redress as extensively mandatory (e.g. limit the freedom of contract by not allowing to exclude the right of redress in standard terms).

Consumer's Remedies For Defective Goods With Digital Elements

by **Alberto De Franceschi***

Abstract: This paper deals with the remedies for lack of conformity under the EU Sale of Goods Directive, focusing in particular on goods with digital elements. Subject of analysis is also the related problem of digital obsolescence and the issue of effectiveness of consumer rights.

Keywords: Sale of Goods; Goods with Digital Elements; Lack of Conformity; Consumer's Remedies; Obsolescence of Goods with Digital Elements; Effectiveness of Consumer Law; Environmental Sustainability

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A. Lack of conformity with the contract and hierarchy of remedies

1 In the event of a lack of conformity[1], the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in Art. 13, dir. 2019/771/EU (hereinafter: SGD)[2]. In accordance with the repealed Directive 1999/44/EC on consumer sales[3], as well as the Directive 2019/770/EU on the supply of digital content and digital services[4], priority should be given to proper performance of the contractual obligations through remedying the non-conforming performance[5].

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1 On the concept of conformity with the contracts, see e.g. C. Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', in E. Arroyo Amayuelas and S. Cámara Lapuente (eds), *El derecho privato en el nuevo paradigma digital* (Marcial Pons 2020), p. 49 et seqq.; W. Faber, 'Bereitstellung und Mangelbegriff', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 63 ff.; C. Wendehorst, 'Aktualisierung und andere digitale Dauerleistungen', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 141 et seqq.

2 See e.g. B. Gsell, 'Rechtsbehelfe bei Vertragswidrigkeit in den Richtlinienvorschlägen zum Fernabsatz von Waren und zur Bereitstellung digitaler Inhalte', in M. Artz and B. Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018), p. 143 et seqq.; B. Gsell, 'Time limits of remedies under Directives (EU 2019/770 and (EU) 2019/771 with particular regard to hidden defects', in E. Arroyo Amayuelas and S. Cámara Lapuente (eds), *El derecho privato en el nuevo paradigma digital* (Marcial Pons 2020), p. 101 et seqq.; B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 157 et seqq.

3 See Art. 3(3) and (5), dir. 1999/44/EC.

4 See Art. 14, dir. 2019/770/EU.

5 See J. Morais Carvalho, 'Sales of Goods and Supply of

2 Therefore, as a general rule, at the first stage the consumer can only ask the trader to bring goods into conformity. Access to the secondary remedies (price reduction or termination of the contract) is only possible under certain conditions, such as: the trader refused to bring the goods into conformity or failed to remedy the lack of conformity in accordance with Art. 14, par. 2 and par. 3 SGD, or the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract (Art. 13, par. 4 SGD). However, the consumer shall not be entitled to terminate the contract if the lack of conformity is only minor (Art. 13, par. 5 SGD)[6]. Furthermore, the consumer has the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligation under the SGD[7]. The limited access to secondary remedies is instrumental not only to favour the preservation of the contract, but also to encourage a sustainable consumption and a longer product durability[8] for the purpose of the realization of a circular and more sustainable economy[9].

3 In the following, the paper analyses and compares the different remedies for lack of conformity of goods with digital elements and also assesses their coordination with other remedies provided by national laws. Furthermore, in the last part, it deals with the problem of obsolescence of goods with digital elements and the related issue of effectiveness of consumer rights (especially) in the digital environment.

B. Repair and replacement

4 In the first instance, the consumer can choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate. Such disproportion shall be evaluated taking into account all circumstances, including the value the good would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be provided without significant inconvenience to the consumer (Art. 13, par. 2 SGD). The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate after taking into account all circumstances (Art. 13, par. 3 SGD).

5 Nevertheless, the seller may try to influence the consumer's choice, but always taking into account the prohibition of unfair commercial practices, and especially the provision contained in Art. 6, par. 1, lit. g UCPD, which qualifies as misleading a commercial practice, "which contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the consumer's rights, including the right to replacement or reimbursement, or the risks he may face". To exercise the right to repair or replacement an informal request to the seller shall be sufficient [10].

6 Repair or replacement shall be carried out free of charge within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity[11] and without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In this regard, the SGD, differently from what provided by Art. 3 of Directive 1999/44/EC[12], determines that the seller may refuse to bring the

Digital Content and Digital Services-Overview of Directives 2019/770 and 2019/771' (2019) 8 EuCML 200.

6 Cf. recital 53 SGD.

7 See Art. 13, par. 6 SGD: "The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment".

8 Recital 48 SGD.

9 See in this regard European Commission, *A new Circular Economy Action Plan For a cleaner and more competitive Europe, 11 March 2020, COM(2020) 98 final.*.

10 See B.A. Koch,'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 182.

11 In this regard, see recital 55 SGD, which states that: "What is considered to be a reasonable time for completing a repair or replacement should correspond to the shortest possible time necessary for completing the repair or replacement. That time should be objectively determined by considering the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement".

12 See B. Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschrift für das Privatrecht der Europäischen Union 115, 129.

goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances (Art. 13, par. 3 dir. SGD)[13].

7 Lack of conformity may regard not only the material part but also the digital element. The final seller will often have no influence on the digital element and the supply of updates in conformity with the contract. In those cases, the possible remedies will often be only price reduction and termination, except the situation in which he will be able to bring a third party to directly intervene on the conformity of digital content and digital services[14].

8 Where the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller, who shall take back the replaced goods at his own expenses (Art. 14 SGD). This provision does not find any correspondence in the dir. 1999/44/EC but does not necessarily imply that the consumer has to return the goods to the seller. This will be the case where repair or replacement has to be executed on a durable good which was installed in the consumers' premises (e.g. a lift). Here, the consumer will merely have to allow the seller or his auxiliary to have access to his premises, so that he can bring the good into conformity. Therefore, making the goods available to the seller is a prerequisite for the execution of the "primary" remedies. This does not apply if the good was destroyed due to reasons for which the consumer is not responsible[15].

9 Similarly to directive 1999/44/EC, the SGD does not take a position regarding the place of performance of the duty to repair or replace; instead, it leaves the solution to this question up to the discretion of the EU Member States' legislators[16].

10 The duty to repair or replace "free of charge" means free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials (Art. 2, par. 1, n. 14 SGD)[17]. This fundamentally reproduces the rule contained in Art. 3, par. 4, dir. 1999/44/EC. Gratuitousness represents the essential character of the so-called primary remedies. As underlined by the ECJ with regard to dir. 1999/44/EC, the trader shall bear all costs related to replacement or repair and not only those expressly mentioned in Art. 2, par. 1, n. 14 SGD[18], without the possibility to ask the consumer to pay them in advance or to reimburse them at a later stage. In the case of replacing a good not in conformity with the contract, the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates. Furthermore, a seller who has sold consumer goods which are not in conformity may not require the consumer to pay compensation for the use of those defective goods until their replacement with new goods[19]. This said, the solution adopted in Art.

13 In this regard see J. Stabentheiner, 'Hintergründe und Entstehung der beiden Richtlinien und die Bemühungen der österreichischen Ratspräsidentschaft um Konsistenz und Vereinfachung, in J. Stabentheiner, C.Wendehorst and B. Zöchling-Jud (eds), p. 22; B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C.Wendehorst and B. Zöchling-Jud (eds), p. 185.

14 So C. Wendehorst, 'Aktualisierungen und andere digitale Dauerleistungen' in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 132.

15 See in this regard B. Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschrift für das Privatrecht der Europäischen Union 115, 129.

16 See recital 56 SGD. Therefore, it will be necessary to apply the principle stated by ECJ Case C-52/18 *Christian Fülla* v. *Toolport GmbH* [2019], according to which Art. 3, par. 3, dir. 1999/44/EC must be interpreted as meaning that the Member States remain competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be appropriate for ensuring that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In that regard, the national court is required to make an interpretation in accordance with Directive 1999/44, including, as necessary, amending established case-law if that law is based on an interpretation of national law which is incompatible with the objectives of that directive.

17 Cf. also recital 49 SGD.

18 See e.g. ECJ Case C-65/09 and C-87/09 *Weber GmbH* v. *Wittmer* and *Putz* v. *Medianess Electronics GmbH* [2011], par. 50.

19 See already on this point ECJ Case C-404/06 *Quelle AG* v. *Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008], par. 31. Cf. in this regard T. Möllers and A. Möhring, 'Recht und Pflicht zur richtlinienkonformen Rechtsfortbildung bei generellem Umsetzungswillen des Gesetzgebers' [2008] Juristenzeitung 919 et seqq.; O. Mörsdorf, 'Verpflichtung des Käufers zur Zahlung eines Nutzungsentgelts im Rahmen der Neulieferung einer mangelhaften Kaufsache', [2008] Zeitschrift für Wirtschaftsrecht 1409 et seqq.; C. Herresthal, 'Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf' [2008] Neue jur. Wochenschr. 2475 et seqq.; H. Ofner, 'Kein Nutzungsentgelt für den Verkäufer bei Austausch der nicht vertragsgemäßen Sache' [2008] Zeitschr. Rechtsvergl. 57 et seqq.; C. Schneider and F. Amtenbrink, '«Quelle»: The possibility, for the seller, to ask for a compensation for the use of goods in

14, par. 4, dir. SGD refers in this regard only to the "normal use", providing that the consumer shall not be liable to pay for normal use made of the replaced goods during the period prior to their replacement. This leaves an open door to claims by the seller if the replaceable good is in conditions which are not compatible with a "normal use". When this is not the case, the seller may ask for compensation for the loss of value of the replaced good[20]. As the SGD did not expressly regulate such cases, it will be necessary to refer to Member States' national law[21]. This shall also apply when the good was meanwhile sold or modified by the consumer.

11 More generally, lacking a detailed regulation of replacement, it is necessary to clarify whether the substantial integrity of the good not in conformity with the contract shall be a prerequisite for replacement. In this regard, Art. 82, par. 1 of the Vienna Convention on the International Sale of Goods contains a solution: the buyer loses the right to declare the contract void or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, except when: (a) the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity[22]. Nevertheless, considering the different scope of application of the Vienna Convention, the abovementioned provision cannot be applied to the SGD.

12 In this regard one shall consider also Art. 14, par. 2, dir. 2011/83/UE (hereinafter: CRD), which provides a set of duties on the consumer in the event of withdrawal from distance contracts, stating that the consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish their nature, characteristics and functioning, and, furthermore, that the consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with Art. 6, par. 1, lit. h CRD. Extending the same principle, the eventually diminished value of the goods shall not preclude the consumer from accessing the remedies for lack of conformity according to the SGD. Otherwise, a ground for exclusion of the right to repair or replacement would be unduly introduced, thereby contrasting with Art. 13 and 14 SGD. It is worth considering that the new rules on sale of goods explicitly exclude (although only regarding replacement) the consumer's duty to pay for the normal use of the goods before the seller brought them into conformity[23]. Nevertheless, the same rule shall apply to the case of repair.

13 Furthermore, Art. 14, par. 3 SGD partly codified the ECJ case law relating to the dir. 1999/44/EC, by providing that where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation[24]. In

replacement of products not in conformity with the contract' [2008] Revue européenne de droit de la consommation 301 et seqq.; G. Schulze, 'Kein Nutzungsersatz bei Ersatzlieferung: Anmerkung zu EuGH, Urteil vom 17.4.2008, C-404/06 – Quelle' [2008] in Zeitschr. für das Privatrecht der europäischen Union 128 et seqq.; S. Lorenz, 'Anmerkung zu EuGH, U. v. 17.04.2008 - Rs. C-404/06' [2008] Deutsches Autorecht 330 et seq. In this sense see ECJ Case C-65/09 and 87/09 *Weber GmbH* v. *Wittmer* and *Putz* v. *Medianess Electronics GmbH* [2011], par. 50.

20 In this regard see C. Herresthal, 'Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf' [2008] Neue jur. Wochenschr. 2475, 2476.

21 See ECJ Case C-489/07 *Pia Messner* v. *Firma Stefan Krüger* [2009], par. 30, according to which the provisions of the second sentence of Article 6, par. 1 and Article 6, par. 2 of Directive 97/7/EC on the protection of consumers in respect of distance contracts must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

22 See in this regard C. Fountoulakis, *sub art. 82 CISG*, in I. Schwenzer (ed), *Commentary on the Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016), par. 1 et seqq.

23 Cf. also recital 57 SGD.

24 See ECJ Case C-65/09 and C-87/09 *Weber GmbH* v. *Wittmer* and *Putz* v. *Medianess Electronics GmbH* [2011], par. 58-62.

any case, the seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances (Art. 13, par. 3 SGD).

14 Repair and replacement shall be carried out within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity (Art. 14, par. 1, lit. b SGD). Such a provision is largely unsatisfying. In the concrete case, for the purpose of the abovementioned provision it shall not be enough that the consumer informed the seller about the lack of conformity. Indeed, the "reasonable period of time" shall start from the moment in which the consumer has informed the seller about the lack of conformity, the consumer has made the goods available to the seller and has communicated to him the choice made between repair or replacement[25]. The EU legislator stated that what is considered a reasonable period of time for completing a repair or replacement should correspond to the shortest possible time necessary for completing the repair or replacement. That time should be objectively determined by considering the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement[26]. According to recital 55 SGD, when implementing the Directive, Member States should be able to interpret the notion of reasonable time for completing repair or replacement, by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products. Nevertheless, it does not seem appropriate that Member States follow the aforementioned provision. Firstly, it is extremely difficult to identify *ex ante* a "reasonable time" for the repair or replacement. Secondly, it also seems difficult – and it would probably generate considerable inequalities – to provide fixed periods with regard to specific categories of products[27]. It seems therefore appropriate that the concrete identification of the "reasonable period of time" shall be left to scholars and the judicial practice.

15 With regard to the concept of "significant inconvenience", already contained in directive 1999/44/EC, some commentators claimed that the notion of inconvenience shall include all inaccuracies of the performance different from the unreasonableness of the period of time used for the purpose of repair or replace the good. According to this opinion, "significant inconveniences" should therefore exist whenever the seller, while repairing the good, was not able to fully restore the conformity of the good, as well as in the case in which he, while replacing the good, was not able to deliver to the consumer a good which is not in conformity with the contract[28].

16 However, it seems more appropriate to refer the concept of "inconveniences" to all discomforts caused by the actions necessary for repair or replacement of the good, independently from the circumstance that the conformity was or not restored. Such an interpretation seems to be confirmed also by the case law of the ECJ and by the solution currently codified in Art. 14, par. 3 SGD[29]. In this regard, the EU legislator could have given more substance to the notion of "significant inconveniences", by providing a maximum number of attempts by the seller to bring the good into conformity, even if the abovementioned "reasonable period of time" has still not lapsed[30].

17 The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including the significance of the lack of conformity and the value the goods would have if there were no lack of conformity (Art. 13, par. 3 SGD).

18 First, the remedy is impossible when the consumer asks for replacement of a good which is unique. In the case of defects of title, impossibility can be identified when goods are subject to a public restraint, or the elimination of such a restraint depends on the will of a third person. In case the seller does not have the skills or the necessary means for repairing or replacing the goods, he shall ask a third party to bring the good into conformity.

This will likely be the case with goods containing digital elements, especially updates, as in the

25 In this sense see also B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 184.

26 So recital 55 SGD.

27 B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 185.

28 A. Zaccaria and G. De Cristofaro, *La vendita di beni di consumo* (Cedam 2002), p. 89 et seq.

29 ECJ Case C-65/09 and C-87/09 *Weber GmbH* v. *Wittmer* and *Putz* v. *Medianess Electronics GmbH* [2011] par. 52-62.

30 Relating to the directive proposal, see for this solution e.g. G. Howells, 'Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods' in A. De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016), p. 153.

majority of cases the seller will not be able to supply them[31].

19 The excessive onerousness shall be evaluated taking into account all circumstances mentioned above with regard to impossibility[32]. As for example regarding goods with digital elements, the hardware replacement should be considered as disproportionate if the lack of conformity is due "only" to the software and would be easily solved by means of an update to the digital element[33].

C. Termination and price reduction

20 In addition to the cases of impossibility and disproportion of both primary remedies, the consumer will also have access to the remedies of price reduction and termination in cases in which: *a*) the seller did not carry out repair or replacement free of charge, within a reasonable period of time or without any significant inconvenience to the consumer (art. 14 SGD), or refused to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate; *b*) a lack of conformity appears despite the seller having attempted to bring the goods into conformity; *c*) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or *d*) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer (art. 13, par. 4 SGD). In any case, the consumer shall not be entitled to terminate the contract if the lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller (art. 13, par. 5 SGD).

21 Particularly regarding goods with digital elements, it is questionable whether a lack of conformity in the safety of digital content, whose design enhances the risk of contamination through a virus which is suitable to damage it, may be considered as "only minor". In the author's opinion, such question deserves a negative answer.

22 Furthermore, digital content allowing third parties to access consumer's personal data may present another lack of conformity. This defect may not be considered "only minor" as data protection is guaranteed as fundamental right according to Art. 8 of the Charter of Fundamental Rights of the European Union; therefore, its violation may never be considered "only minor".

23 The operativity of the secondary remedies, both the right to price reduction and the right to termination, can be exercised by a unilateral extrajudicial declaration, by means of which the seller expresses his decision to demand the price reduction or termination[34].

24 Regarding the judicial exercise of secondary remedies, the ECJ stated, in consideration of dir. 1999/44/CE, that if a consumer seeks in legal proceedings only rescission of the contract, but such rescission cannot be granted because the lack of conformity is minor, it requires a national court to take an appropriate measure to enable the consumer to enforce his claims under the Directive. It is for national law to determine which procedural measure can be taken to achieve this. The rights of defence of the other party must, however, be taken into account in this connection[35]. It is reasonable to affirm that such solution shall apply also to the SGD.

25 With specific regard to price reduction calculation, differently from dir. 1999/44/EC, which did not address the issue, the SGD contains an express regulation of such aspect, stating that it shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity (Art. 15 SGD).

26 However, despite the apparent clarity of the new rules on sales, the calculation of the price reduction may not be always easy for goods with digital elements[36]. This is the case, for instance, when the

31 Cf. B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 183.

32 See Art. 13, par. 2 SGD and recital 49 SGD; cf. in this regard the critical remarks by B. Gsell, 'Rechtsbehelfe bei Vertragswidrigkeit in den Richtlinienvorschläge zum Fernabsatz und zur Bereitstellung digitaler Inhalte' in M. Artz and B. Gsell (eds), p. 147 et seq. relating to the original directive proposal, which still did not mention the "absolute disproportion".

33 Cf. B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 183, fn. 139.

34 See Art. 16, par. 1 SGD.

35 In this sense see ECJ Case C-32/12 *Soledad Duarte Hueros* v. *Autociba SA* e *Automóviles Citroën España SA* [2013] *Foro it*., 2013, 12, IV, c. 509.

36 T. Riehm and M.A. Abold, 'Mängelgewährleistungspflichten des Anbieters digitaler Inhalte' [2018] *Zeitschr. für Urheber- und Medienrecht* 87, who, with regard to cases of instant supply, qualify the future updates as *"unentgeltliche Dauerschuldkomponente"*.

price of the good was determined as a whole and it is therefore difficult to clearly assess which part of it shall be attributable to the digital content. More generally, the difference between the value of a good with a non-updated digital element and a good with an updated digital element is even more difficult to be determined than the difference between the value of two goods without digital elements. To highlight the uncertainties connected to the calculation of the price reduction, one may, for example, think of a heating system with digital elements in which one year after the delivery, a digital bug makes it possible for a third party to have access to the owner's personal data. Let's consider that the repair of such good is not possible and that replacement is disproportionate. In this example, it is questionable how the value of such defective heating system shall be determined, because it is not clear if and how the bug impacts the consumer concretely. For example, one may say that the commercialization of such system is unlawful and therefore that its value is zero; dealing with the same case, one may instead affirm that such system has only minor defects[37].

27 Furthermore, the European legislator expressly provided that where the lack of conformity relates to only some of the goods delivered under the sales contract and there is a ground for termination of the sales contract pursuant to Art. 13, the consumer may terminate the sales contract only in relation to those goods, and in relation to any other goods, which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods (Art. 16, par. 2 SGD)[38].

28 Where the consumer terminates a sales contract as a whole or in relation to some of the goods delivered under the sales contract, the seller shall bear the costs for the return of the goods (Art. 16, par. 3, lit. a SGD). As an alternative, the seller shall reimburse to the consumer the price paid for the goods upon receipt of the goods or of evidence provided by the consumer of having sent back the goods (Art. 16, par. 3, lit. a SGD). In this regard, it was rightly highlighted that such duty would include not only the delivery costs, but also all costs for the removal of goods. This solution shall be derived from Art. 14, par. 3 SGD, which regulates – with limited regard to repair and replacement – the costs of removal of the non-conforming goods, and the installation of replacement goods or repaired goods[39]. However, in the author's opinion, this provision shall be interpreted extensively and applied also in case of termination. In this regard, it would be appropriate that the Member States' legislators expressly clarify this aspect when implementing the SGD.

29 The SGD does not contain provisions relating to a possible duty of the seller to refund to the consumer necessary, useful or even only luxury expenditures he may have made for the returned good. In this regard, recital 60 SGD provides that the Directive should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive, such as the consequences of the decrease of the value of the goods or of their destruction or loss[40]. From a systematic point of view, it is worth mentioning that, according to Art. 14, par. 4 SGD, the consumer shall not be liable for normal use made of the replaced goods during the period prior to their replacement. For reasons of systematic consistency, it seems appropriate to extend the same solution for the "normal use" made of the replaced goods during the period prior to contract termination. A further element in this direction can be found in Art. 13, par. 3, lit. d of the Proposal of a Directive on certain aspects concerning contracts for the online and other distance sales of goods[41], which provided that where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract, he shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods. This proposal was not adopted in the final text of the SGD. Nevertheless, taking into account the aforementioned reflections, it can be considered that in case of termination, the consumer shall not pay for the normal use made of the goods during the period prior to the termination. This is also when the consumer asks for termination, he will have already suffered significant inconveniences caused by the lack of conformity. In this regard, to justify the request of termination a non "minor" lack of conformity is required, which in most cases already limited the significant expectations of the consumer to have access to the utilities deriving from the good.

37 So C. Wendehorst, 'Aktualisierungen und andere digitale Dauerleistungen' in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 132.

38 Recital 58 SGD.

39 In this sense B. Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschr. für das Privatrecht der Europäischen Union 115, 131.

40 Cf. recital 15, dir. 1999/44/EC.

41 COM/2015/0635 final.

D. Time limits

30 Regarding time limits for remedies, the seller is responsible for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time (Art. 10, par. 1 SGD). This shall also apply to goods with digital elements without prejudice to Article 7, par. 3 SGD. In the case of goods with digital elements, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Furthermore, where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract (Art. 10, par. 2 SGD)[42].

31 The rules provided by Art. 10 SGD may cause a significant fragmentation of the solutions adopted by national legal systems. Even though the aspects regulated in that provision are of crucial importance for the European economy, the EU legislator decided to adopt only a minimum harmonization approach. This emerges in particular from Art. 10, par. 3 SGD, according to which Member States may maintain or introduce longer time limits than those referred to in paragraphs 1 and 2[43]. If, under national law, the remedies of repair, replacement, termination and price reduction are also subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of Art. 10, and which becomes apparent within the period of time referred to in those paragraphs (Art. 10, par. 4 SGD). However, Member States may only maintain or introduce a limitation period for the remedies provided for in Article 13, but ensuring that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of Art. 10, and which becomes apparent during the period of time referred to in those paragraphs (Art. 10, par. 5 SGD).

32 Here the SGD does not clarify the meaning of the central expression "becoming apparent" of the lack of conformity, and in particular whether it refers to the objective manifestation of the lack of conformity or to the moment in which the consumer discovers the lack of conformity. From a systematic perspective (see above sub C.), it seems that the relevance shall be attributed to the objective manifestation of the lack of conformity.

33 Regarding the two years time limit mentioned in Art. 10, par. 1 SGD, recital 41 SGD adds, considering the national rules implementing dir. 1999/44/EC, that a large majority of Member States have provided for a period of two years, and in practice that period is considered reasonable by market participants, so that it should be maintained and should apply also in the case of goods with digital elements. Therefore, differently from what provided in Art. 5, par. 1, dir. 1999/44/EC, Art. 10, par. 1 SGD shall allow national legislators to provide a single time limit, without the necessity to insert an additional time limit, in which the consumer shall exercise the remedies provided for by the SGD.

34 As already provided in Directive 1999/44/EC, in the case of second-hand goods, the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period, provided that such shorter periods shall not be less than one year (Art. 10, par. 6 SGD)[44].

35 If the lack of conformity becomes apparent within one year of the time when the goods were delivered, it shall be presumed (*praesumptio iuris tantum*) to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity (Art. 11, par. 1 SGD). In this regard, the EU legislator provided that instead of the one-year period, Member States may maintain or introduce a period of two years from the time when the goods were delivered (Art. 11, par. 2 SGD). This contributes to the fragmentation of national solutions despite the alleged goal of full harmonization. A different rule applies to goods with digital elements where the sales contract provides for the continuous supply of the digital content or digital service over a period of time. In this case, the

42 Cf. B.A. Koch, 'Das System der Rechtsbehelfe', p. 208, who criticises the different regulation of this aspect in the SGD and in the dir. 2019/770/EU, as in both cases the rules regard digital content and digital services.

43 See B. Gsell, 'Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects', p. 103.

44 See on this extensively B. Gsell, 'Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects' in E. Arroyo Amayuelas and S. Camara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 101 et seqq.

burden of proof with regard to whether the digital content or digital service was in conformity within the period of time referred to in Art. 10, par. 2 SGD shall be on the seller for a lack of conformity which becomes apparent within the period of time referred to in that article (Art. 11, par. 3 SGD)[45].

36 Similarly to Directive 1999/44/EC, the SGD does not clarify the meaning of "becoming apparent" with the lack of conformity. In this regard, it seems reasonable to refer to the objective recognizability of the lack of conformity and not to the subjective knowledge of the consumer. This can be argued *e contrario* looking at the formulation of Art. 12 SGD which regrettably[46] allows Member States to maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to inform the seller of a lack of conformity within a period of at least 2 months, referring to the date on which "the consumer detected" such lack of conformity[47].

E. The further remedies enforceable by the consumer in case of lack of conformity

37 Differently from what dir. 1999/44/EC[48] provided, the SGD aims full harmonisation with national laws, unless otherwise provided by the same directive.[49] The Directive shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in the same directive, or the right to damages (Art. 3, par. 6 SGD). The SGD shall also not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days (Art. 3, par. 7 SGD). This leaves the question open if and to what extent the consumer may access different remedies provided by national law[50]. This requires some further reflections. First, the SGD's aim at a "tendential" full harmonisation means that the consumer is not allowed to by-pass the system of remedies provided for in the directive to access other remedies provided by national law if the SGD remedies are.

38 However, the consumer will have immediate access to further remedies, different to those provided in the SGD, e.g. compensation. With specific regard to compensation, it may seem quite unclear whether this remedy can also be enforced as an alternative to remedies already provided in the same directive for counterbalancing the decreased value of the good deriving from the lack of conformity. Considering the full harmonisation character of the SGD, the compensation for such loss of value cannot be enforced while it is still possible to ask for repair, replacement, price reduction or termination. On the contrary, the compensation for other prejudices – different from those consisting in the loss of value due to the lack of conformity – caused by the lack of conformity may be enforced immediately after its manifestation and cumulatively to those provided by the SGD for the lack of conformity.

39 The SGD does also not affect national rules that do not specifically concern consumer contracts and provide for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract, namely national provisions which may lay down specific rules for the seller's liability for hidden defects[51]. The Directive should also not affect national laws providing for non-contractual remedies for the consumer, in the event of lack of conformity of goods, against persons in previous links of the chain of transactions, for example manufacturers, or other persons that fulfil the obligations of such persons[52]. Furthermore, the SGD should not affect the freedom of Member States to allow consumers to choose a specific remedy if the lack of conformity of the goods becomes apparent shortly after delivery, namely national provisions which provide for a right for the consumer to reject goods with a defect and to treat the contract as

45 For a critic see B. Jud, 'Beweislast und Verjährung', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 203 ff.

46 Such provision gives rise to relevant criticisms, as it favours the fragmentation of the national solutions. For a critic see also B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 212.

47 See also B. Jud, 'Beweislast und Verjährung', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 209.

48 Art. 8, par. 2, dir. 1999/44/CE.

49 See Art. 4 SGD and Recital 47 SGD.

50 T. Riehm, 'Regelungsbereich und Harmonisierungsintensität des Richtlinienentwurfs zum Waren-Fernabsatz' in M. Artz and B. Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt*, p. 80 et seqq.

51 See B. Gsell, 'Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects', in E. Arroyo Amayuelas and S. Camara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 103 et seqq.

52 Recital 18 SGD.

repudiated or ask for immediate replacement, within a specific short period of time after the delivery of the goods, which should not exceed 30 days[53].

40 Such wide freedom attributed to EU Member States to regulate these relevant aspects may endanger the functioning of the remedy system and seems in the author's opinion not compatible with the declared goal to fully harmonize national legislations.

F. The obsolescence of goods with digital elements challenging the effectivity of consumer rights and the environmental sustainability

41 In the digital economy a well-known problem takes a new shape; planned obsolescence increasingly impacts everyday life, undermining the performances of our smart devices, from mobile phones to personal computers, connected cars and smart homes. This shatters the very basis of consumer law, challenges its effectiveness, and raises crucial issues that require innovative solutions. Addressing the legal implications of this phenomenon has become a necessity[54]. Current sanctions and the approach of the EU legislator on this point show a lack of effectiveness, leaving open some fundamental questions. Is actual consumer law fit enough to tackle planned obsolescence? Can unfair trading law contribute to improving the effectiveness of consumer contract law in solving the problem of planned obsolescence? Other major issues concern the growing tension with the goal of achieving sustainable development and a circular economy[55]; ensuring the longer durability of consumer goods is indeed crucial for achieving more sustainable consumption behaviour, waste reduction and environmental protection.

42 Various attempts to tackle the phenomenon of planned obsolescence have started at both national and EU levels. In some European Member States, discussions are under way concerning possible solutions.[56] For instance, in 2015 the French legislator introduced in the *Code de la Consommation*, a specific prohibition of planned obsolescence – providing for its breach, *inter alia*, a criminal law sanction[57] – which was modified in 2016.[58] UK law also has some scope for tackling early obsolescence as the *Consumer Rights Act* already mentions durability as a criterion for the satisfactory quality test.[59]

43 As well the SGD delivers a contribution in this direction: among the objective criteria of conformity, the EU legislator expressly lists durability (Art. 7, par. 1, lit. d SGD). This rule should be complementary to those of Directive 2005/29/EC on unfair commercial practices (especially to those on misleading commercial practices) and to those of Directive 2011/83/EU on consumer rights. In particular, European rules on unfair commercial practices play a crucial role in ensuring the effectiveness of the SGD, and specifically in tackling the phenomenon of planned obsolescence, as they cover traders' behaviour before, during and after a commercial transaction in relation to a product. Indeed, with particular regard to the practices of the major players in the global market, it seems that private law rules are not effective enough in influencing traders' behaviour to solve the above-mentioned problem.

44 On this point, it may be useful to observe some case law. In 2018, the Italian Competition Authority (hereinafter: ICA) fined, under two separate decisions

53 Recital 19 SGD.

54 See most recently e.g. C. Hess, *Geplante Obsoleszenz* (Nomos 2018), 29 et seqq.; cf. T. Brönnecke and A. Wechsler (eds), *Obsoleszenz Interdisziplinär* (Nomos 2015).

55 See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0098>.

56 See for an overview S. Wrbka, 'Warranty Law in Cases of Planned Obsolescence' (2017) 6 EuCML 67 et seqq.

57 See as an example L213-4-1 *Code de la Consommation*: "L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement. L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300 000 € d'amende. Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits" (see <https://www.legifrance.gouv.fr>).

58 Art. L-441-2 *Code de la Consommation*: "Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement" (see <https://www.legifrance.gouv.fr>).

59 Art. 9 *Consumer Rights Act 2015*: "The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods: [...] (e) durability".

– both confirmed in 2020 –, *Apple*[60] and *Samsung*[61] for unfair commercial practices concerning software updates which seriously impaired the functioning of certain models of mobile phones. The two big firms were fined 10m and 5m Euros respectively. Such decisions immediately gained worldwide resonance. In particular, the ICA ascertained that the two companies had carried out misleading and aggressive commercial practices, thereby breaching the implementing provisions of Arts. 5, 6, 7 and 8 of Directive 2005/29/EC on Unfair Commercial Practices (hereinafter: UCPD) in relation to the release of firmware updates for their mobile phones. These caused serious malfunctions, significantly reducing their performance and, as a consequence, accelerated their replacement with more recent products.

45 In the *Apple* case, the ICA ascertained the unfairness of two commercial practices. The first one concerned situations in which consumers who purchased iPhone 6, 6Plus, 6s and 6sPlus, were insistently asked to update their operating system to iOS 10 and subsequently to iOS 10.2.1 which modified functional characteristics and significantly reduced performance. This was done without customers being adequately informed in advance about the inconvenience that the installation of these updates might cause and giving only limited and belated advice about how to remedy these shortcomings, for example by means of a downgrading or battery substitution. In addition, it was ascertained that *Apple* used undue influence over consumers as it induced them to install a firmware update by means of insistent request to download and install updates, as well as by not providing adequate assistance to consumers who wished to restore the previous functionality of their devices. This speeded up the replacement of such devices with new iPhone's models. This practice was fined under Art. 5, 6, 7 and 8 UCPD[62]. Furthermore, the Italian Competition Authority fined *Apple* according to the implementing provision of Art. 7 UCPD for misleading omissions concerning the lack of information relating to duration, handling and costs for substitution of the iPhone 6, 6Plus, 6s and 6sPlus batteries, with specific reference to the case in which, after the above mentioned updates, the performance significantly decreased and, as a consequence, consumers were induced to purchase a new phone instead of being appropriately informed about the opportunity to replace the battery.

46 In the *Samsung* case, the ICA ascertained an unfair commercial practice according to the implementing provisions of Art. 5, 6, 7 and 8 UCPD, as the trader developed and insistently suggested to customers of the Samsung Galaxy Note 4 to proceed to firmware updates based on Android's Marshmallow: such updates modified the phone's functionalities, by sensibly reducing performances and preventing consumers from assuming a conscious decision as to whether or not to install new updates to their device. Additionally, it was ascertained that *Samsung* deliberately decided not to provide assistance for the products, which were no longer under warranty, requiring high costs for repair and not providing the downgrade to the precedent firmware version, thereby intentionally accelerating the products' substitution.

47 Both Apple and Samsung were also required, according to Art. 27 para 8 of the Consumer code, to publish an amending declaration on the Italian homepage of their websites, with a link to the respective ICA decision.

48 The ICA's *Apple* and *Samsung* cases highlight fundamental criticisms concerning the effectiveness of current European consumer and market law. First of all, the decisions raise serious doubts concerning the aptitude of the existing penalties laid down in way of implementation of the UCPD for effectively tackling the challenge of planned obsolescence, especially in the digital economy. And, furthermore, they raise the question of how consumer (contract) law could be improved in order to react to and ideally prevent the above-mentioned phenomenon in the future.

49 Concerning the first point, it is particularly questionable whether a penalty up to 5m Euros (the maximum provided for by Art. 27 para 9 of the Italian Consumer Code, implementing Art. 13 UCPD) is sufficient to effectively dissuade tech giants like *Apple* and *Samsung* from adopting unfair practices. In this regard, Art. 13 UCPD provides that Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and that "these penalties must be effective, proportionate and dissuasive". First, from a systematic point of view, the fact that the European legislator did not provide clear harmonised penalties for breaches of unfair commercial practices opened the door to the fragmentation of national solutions resulting from the implementation of UCPD. That fragmentation impairs consistency and the realisation of an efficient EU-wide strategy against

60 See Italian Competition Authority, 25 September 2018, PS11039, *Apple*, <http://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf>.

61 See Italian Competition Authority, 25 September 2018, PS11039, *Samsung,* <http://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf>.

62 See on those provisions M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016), 10 et seqq.

unfair practices[63]. Secondly, effectiveness and dissuasiveness can be achieved mainly through proportionality of penalties. In order to better substantiate the concept of proportionality, the penalty shall in the author's opinion be linked to the annual turnover of the trader being sanctioned for an unfair commercial practice. Rather than fixing an amount of money as the highest possible penalty, a link to annual turnover would allow the trader's size, market power and – above all – market impact to be taken into account. This would avoid both "over-" and "under-sanctioning".

50 With particular regard to the practices of the major players in the global market, it seems that private law remedies are not effective enough for influencing traders' behaviour to solve the problem. Therefore, a consistent and effective EU-wide set of public law penalties would be needed. This would also ensure the effectiveness of private consumer law and encourage fair trading behaviour. It is not by chance that *Apple* significantly modified its practices in a virtuous way after the lodgement of the abovementioned Italian case, in order to comply with the provisional requirements of the ICA.[64] While the average consumer is often dissuaded from bringing a matter before a civil court, the compelling pressure generated by prospective or actual proceedings before a competition authority like the ICA (which has the power to impose public law penalties) is often sufficient to ensure a better enforcement of consumer private law rights.

51 A good example of this is represented by the results of the enforcement of Art. 6 para 2 lit. g UCPD, which qualifies as a misleading commercial practice deceiving or likely to deceive the average consumer in relation to their rights to replacement or reimbursement under the Consumer Sales Directive, or the risks they may face. Such rule is proving – at least in Italy – to be key in compelling businesses to acknowledge consumer rights. If the perspective of being brought before a civil court is frequently not enough to dissuade the trader from misleading the consumer about their contractual rights, the parallel "risk" to undergo an investigation by the competition authority (with the risk of a pecuniary penalty up to 5m Euros, and especially – as this has an impact on the traders' image – of the publication of the decision or a corresponding corrective statement, according to Art. 27 para 7 Consumer code, so that the practices cease their negative effects) creates a relevant deterrence against unfair commercial practices. This synergy should in the authors' opinion be improved by the EU legislator.

52 A useful example in this direction can be found in Art. 2, par. 6 of Directive 2019/2161/EU, regarding the amendments to Art. 13 of Directive 2005/29/EU, where it provides that Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned. Without prejudice to that Regulation, Member States may, for national constitutional reasons, restrict the imposition of fines to: (a) infringements of Articles 6, 7, 8, 9 and of Annex I to this Directive; and (b) a trader's continued use of a commercial practice that has been found to be unfair by the competent national authority or court, when that commercial practice is not an infringement referred to in point (a).

53 In order to enhance the effectivity of consumer rights and, inter alia, of the durability of goods with digital elements, the rule contained in Art. 2, par. 6 of Directive 2019/2161/EU should be ideally extended beyond the scope of application of Article 21 of Regulation (EU) 2017/2394, thereby including all unfair commercial practices.

54 More detailed consumer contract law rules can indeed have a straight-jacket effect, especially if done on a fully harmonised basis. Also, from a consumer's perspective, additional rights may be of little use if enforcement is going to be difficult, slow, or both. The proposed amendment to the UCPD and its implementing provisions might be a better and more effective solution.

G. Concluding remarks

55 Regarding remedies for lack of conformity, the SGD borrows several solutions from the repealed Directive 1999/44/EC on consumer sales. In accordance with the latter as well as the Directive 2019/770/EU on

63 Cf. the reports on the implementation of the UCPD published in EuCML-Issues 5/2015, 6/2015 and 2/2016.

64 Cf. the example of Article L213-4-1 *Code de la Consommation*: "L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement. L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300 000 € d'amende. Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits" (see <https://www.legifrance.gouv.fr>). Such article has been later modified.

the supply of digital content and digital services, priority should be given to proper performance of the contractual obligations by bringing the goods into conformity.

56 The SGD does not affect the freedom of Member States to regulate aspects of general contract law, or the right to damages. This leaves the question open on if and to what extent the consumer may recur to different remedies provided by national law. In this concern, it seems reasonable that the consumer shall at least not be allowed to by-pass the system of remedies provided for in the SGD to access other remedies provided by national law if the remedies provided for by the directive are still enforceable. The EU legislator also decided to not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days, and also to determine the length of limitation periods. Also, the maintenance or introduction of an obligation to notify the detection of a lack of conformity is left in the hands of national legislators. This delivers a contribution to the fragmentation of the national solutions resulting from the implementation of the SGD, thereby impairing consistency and the realisation of an efficient EU market for goods with digital elements.

57 Furthermore, from a systematic point of view, the disruption brought about by the (too often planned) obsolescence of goods with digital elements shatters the very basis of consumer law, challenges its effectiveness, and raises some crucial issues that require innovative solutions. Addressing the legal implications of this phenomenon has thus become a necessity. Current sanctions and the approach of the EU legislator on this point so far show a lack of effectiveness, leaving open some fundamental questions. This offers a great chance to re-configure consumer law, enhancing its role of protecting consumers and stimulating fair market behaviour, and at the same making it an instrument for achieving the goal of more sustainable development. Consumer law has a crucial role to play in the years to come, broadening its goals from those of an instrument for just protecting consumers and regulating the market, to those of a system which also orientates and stimulates more responsible environmental behaviour by all market players.

The Digitalisation Of Cars And The New Digital Consumer Contract Law

by **Peter Rott***

Abstract: Cars are paradigmatic for the digitalisation of goods. Therefore, smart cars are chosen as an example to illustrate the application of the new rules of the Sale of Goods Directive (EU) 2019/771 and the Digital Content and Services Directive (EU) 2019/770 to goods with digital elements and to goods with incorporated and inter-connected digital content or services as supplied by the trader or by third parties. The article flags the demarcation between the two Directives and discusses potential grounds for non-conformity of smart cars with the contract. It then focuses on the consequences that the inclusion of incorporated and inter-connected digital content or services may have on the remedies that the consumer has available. It also briefly touches on the issue of damages that may be of great relevance in practice but that the two Directives do not tackle. The article concludes that although the allocation of liability with the seller would seem to make the consumer's life easier, different rules for hardware and digital content and services within the Sale of Goods Directive can lead to complications. The parallel application of the Sale of Goods Directive and the Digital Content and Services Directive exacerbates this issue where the consumer acquires digital content and services separately. Vice versa, the seller would seem to have a vital interest to not have many third parties (beyond the manufacturer) being involved with the car, if only for reasons of cybersecurity.

Keywords: Smart car; Goods with digital elements; Incorporated and inter-connected digital content or services; Sale of Goods Directive; Digital Content and Services Directive; burden of proof

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A. Introduction

1 One main objective of the new Sales of Goods Directive (EU) 2019/771[1] (SGD) and even more of the Digital Content and Digital Services Directive (EU) 2019/770[2] (DCSD) is to make EU consumer contract law fit for the digital market[3] by introducing or clarifying the related consumer rights.

2 Given the fact that a large part of sales law litigation relates to cars,[4] not only since the Volkswagen diesel scandal, this article focuses on the implications that the two directives have on the car industry, and vice versa, on consumers that purchase cars. Cars

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1 [2019] OJ L 136/28.

2 [2019] OJ L 136/1.

3 See recital (5) SGD and recital (5) DCSD. Another objective is sustainability, which is however less visible in the actual rules; see Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) Verbraucher und Recht 363.

4 See only Peter Rott, 'German case law two years after the implementation of the Directive 1999/44/EC' (2004) German Law Journal 237.

are paradigmatic for the digitalisation of goods and for their interconnectivity with third party content and services. The relevant data flows have therefore been intensely discussed by data protection lawyers,[5] whereas access to and evidential value of data that is generated in cars is an issue of relevance when it comes to accidents.[6]

3 Data protection is, however, not the theme of this article which rather deals with malfunctioning of all kinds; although, a car may also not be in conformity with the contract because it sends more personal data to the seller or third parties than is necessary and consented to by the consumer. After an introduction to the various ways by which cars are nowadays digitalised (B.), this article first deals with the demarcation of the scopes of application of the two Directives, which follow the same concepts but differ in their details (C.). It then discusses various scenarios of non-conformity (D.) and analyses the related remedies under the applicable directives, using German case law under the old Directive, due to its abundance, to illustrate problems and possible solutions (E.). Complementing the analysis, the article looks for solutions outside the two directives where they do not provide for a remedy (G.), before it offers some conclusions (H.).

B. The digitalisation of cars

4 Cars have been digitalised for a long time. Software is employed for essential internal functions of the car, such as engine control, and for manifold assistant systems, such as parking assistants. Consumers can also interact with their cars with gadgets such as car keys with remote control functions, and more recently, systems have been developed by which the consumer can interact with cars via apps over the internet (provided the consumer and the car both have access) or via human-machine interface (HMI) built into the car.[7] Contact to the outside world has been established for a long time via navigation systems that rely on GPS data. Cars nowadays must also be equipped with an eCall system that automatically calls an emergency number in the event of a serious accident.[8] The high tide is reached with more or less automated or autonomous cars[9] where the internal digital system (so-called telematics box) constantly interacts with external systems and transmits data into and out of the car. According to the United Nations Economic Commission for Europe (UNECE), cars today contain up to 150 electronic control units and about 100 million lines of software code.[10]

5 Notably, a multitude of players may be involved in the digitalisation of cars. Traditionally, mass-market cars have been distributed through independent car traders, the sellers, whereas the consumer has not had a contractual relationship with the manufacturer. One of the exceptions is Tesla that distributes its cars online to customers and concludes with each customer a contract which includes Tesla's obligation to provide updates. For online services, the situation has somewhat changed. Such digital services, usually sold in service packages, are often distributed directly by the manufacturers themselves. Examples are the ConnectDrive system of BMW, Me connect of Mercedes Benz and We Connect of Volkswagen.[11] And when it comes to non-essential features such as a navigation system, or elements of 'infotainment', other third-party suppliers may be directly or indirectly involved.

6 All digital features are not necessarily available at the time of the sale or the delivery of the car. One can imagine new features, such as seat heating that is controlled via an app where those seats are built into the car at a later stage. The same applies to digital services: the car as delivered may, in principle, only provide for the connectivity for a navigation system or for infotainment, whereas the relevant system

5 See, for example, Alexander Roßnagel and Gerrit Hornung (eds), *Grundrechtsschutz im Smart Car* (Springer, 2019).

6 See, for example, Daniela Mielchen, 'Verrat durch den eigenen PKW – wie kann man sich schützen?' (2014) Straßenverkehrsrecht (SVR) 81; Thomas Balzer and Michael Nugel, 'Das Auslesen von Fahrzeugdaten zur Unfallrekonstruktion im Zivilprozess' (2016) Neue Juristische Wochenschrift 193; Christian Armbrüster, 'Automatisiertes Fahren – Paradigmenwechsel im Straßenverkehrsrecht?' (2017) Zeitschrift für Rechtspolitik 83, 85.

7 See Truiken Heydn, 'Internet of Things: Probleme und Vertragsgestaltung' (2020) MultiMedia und Recht 503.

8 See Regulation (EU) 2015/758 concerning type-approval requirements for the deployment of the eCall in-vehicle system based on the 112 service, [2015] OJ L 123/77.

9 On the various degrees of autonomy see, for example, Paul T. Schrader, 'Haftungsrechtlicher Begriff des Fahrzeugführers bei zunehmender Automatisierung von Kraftfahrzeugen' (2015) Neue Juristische Wochenschrift 3537, 3540; Keri Grieman, 'Hard Drive Crash' (2018) JIPITEC 294.

10 UNECE, UN Regulations on Cybersecurity and Software Updates to pave the way for mass roll out of connected vehicles, https://www.unece.org/info/media/presscurrent-press-h/transport/2020/un-regulations-on-cybersecurity-and-software-updates-to-pave-the-way-for-mass-roll-out-of-connected-vehicles/doc.html.

11 See Elisa May and Justus Gaden, 'Vernetzte Fahrzeuge' (2018) Zeitschrift zum Innovations- und Technikrecht 110, 111.

can be added by the consumer from a provider of her own choice.[12] These different circumstances are considered in the following analysis of the new Directives and their application to the car sector.

C. Which Directive applies to which aspect of digitalisation?

7 The European Commission has placed much emphasis on the demarcation of the scopes of application of the mutually exclusive directives.[13] That demarcation is of utmost importance for the consumer as we shall see in the following.

I. Goods with digital elements

8 The Sale of Goods Directive obviously applies to the car as such. The Directive also applies to "goods with digital elements" that come under the notion of "goods", according to Article 2(5)(b) SGD. Goods with digital elements are defined as "tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions." A car with elements such a digital engine control or a navigation system is obviously still a good. Nobody would have doubted that even before the adoption of the Sale of Goods Directive.

II. Incorporated and inter-connected digital content or services

9 There is, however, the issue of the classification of the digital elements themselves that is addressed in Article 3(3) sentence 2 of the Directive. According to this sentence, the Sale of Goods Directive also applies to "digital content or digital services which are incorporated in or inter-connected with goods in the meaning of point (5)(b) of Article 2, and are provided with the goods under the sales contract, irrespective of whether such digital content or digital service is supplied by the seller or by a third party." This is a major difference to the current law of most Member States where in particular, digital services would be regarded as service contracts with usually only fault-based liability in place.[14]

1. Necessary for performing the functions of the good

10 The reference to Article 2(5)(b) means that incorporated and inter-connected digital content or services only fall into the scope of application of the Directive, if "the absence of that digital content or digital service would prevent the goods from performing their functions".

11 This is obvious when the good in question (here: a car) does not work at all without its operational system or for example,with a keyless car where the digital key does not work.

12 But how about a navigation system? Cars can indeed still operate without one! The same applies to an infotainment system. We therefore must take a closer look at the definition and its legislative history. In its first proposal of 2015,[15] as well as in the amended proposal of 2017,[16] the European Commission only touched on the issue in recital (13) according to which the proposed directive "should apply to digital content integrated in goods such as household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods."

13 The criteria of "main functionalities" and "subordination" were criticised in academic writing as being unclear.[17] It is, for example, debateable whether

12 Normally, however, there is no such choice, and the connected services are usually provided by the car manufacturer.

13 On the legislative history of the demarcation see Jasper Vereecken and Jarich Werbrouck, 'Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content?' (2019) 30 Indiana International and Comparative Law Review 53, 67 f. On alternative proposals by academic authors see Karin Sein and Gerald 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' (2019) European Review of Contract Law 257, 269 ff.

14 For German law, see for example Heydn, n 7, 508.

15 COM(2015) 635.

16 COM(2017) 637.

17 See, for example, Michael Grünberger, 'Verträge über digitale Güter' (2018) 218 Archiv für civilistische Praxis 213, 287; European Law Institute, *Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers* (2016), available at https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Unlocking_the_Digital_Single_Market.pdf, 10. See also the comments of the Dutch Senate of 29 March 2016, Council doc. ST 7757 2016 INIT.

a navigation system belongs to the main functionalities of a car,[18] although it seems that some drivers and passengers are nowadays unable to use traditional maps. Be that as it may, these criteria are not present anymore in the definition of goods with digital elements. This leads to the first conclusion that the notion of "performing their functions" does not require them to be main functions.[19] Moreover, the definition of goods with digital elements suggests that a good may have to perform more than one function ('performing their *functions*').[20]

14 Which functions then does a car have to perform? The answer can be found in the Directive itself: (1) the functions that the parties have agreed on (see Article 6(a) and (b) SGD)[21] and the functions that are normal for goods of the same type or that the consumer can reasonably expect (Article 7(a) and (d) SGD) and that the parties have not explicitly excluded (Article 7(5) SGD).[22] This conclusion is confirmed by recital (14) SGD that refers to a contractually agreed function and by recital (15) SGD that refers to the normal functions of goods that the consumer can reasonably expect, and to public statements about the good and its digital features.

15 Thus, where a car is sold or advertised as providing for a navigation system, the relevant digital content and service comes under the scope of the Sale of Goods Directive according to Article 3(3) sentence 2 SGD. Some uncertainty remains with new smart products as their "normal" functions are somewhat dynamic.[23]

16 However, a navigation system (and more so with an autonomous car) needs more than hardware and digital content to digest data that is sent from the outside as it also needs the external data itself. Thus, Article 3(3) sentence 2 SGD also mentions interconnected digital content or services (in the absence of which the good would be prevented to perform its functions). This would include, for example, traffic data for a navigation system, as recital (14) SGD confirms. In other words, the seller would have to make sure that data flows and that incoming data is in conformity with the contract.

2. Provided with the goods under the sales contract

17 Article 3(3) SGD additionally requires that the digital content or service be "provided with the goods under the sales contract".

18 Again, the digital features do not need to be expressly agreed upon in the contract, they can also objectively form part of the contract. Thus, the objective criteria for the conformity of goods with the contract (Article 7 SGD) affect the scope of application of the Directive. As mentioned above, recital (15) SGD refers to the normal functions of goods that the consumer can reasonably expect, and to public statements about the good and its digital features.

19 Moreover, the SGD may apply where the incorporated or inter-connected digital content or digital service is not supplied by the seller itself but is supplied, due to the sales contract, by a third party. What matters is only that the provision of the digital content or service forms part of the contract which is not defeated by the fact that the consumer may have to accept a licensing agreement (EULA) with the third party (see recital (15) SGD). Thus, it does not matter whether the digital elements of the navigation system are supplied by the seller of the car, or by its manufacturer, or by another third party.[24] The inclusion of third-party digital content and digital services into the contract relationship with the seller of the good is perhaps the most important feature of the Directive, as it means that the seller is responsible for their functioning and the consumer does not need to deal with different suppliers:[25] a one-stop mechanism, as it is known, for example, from product liability law. It is then

18 See also Pia Kalamees and Karin Sein, 'Connected Consumer Goods: Who is Liable for Defects in the Ancillary Service?' (2019) Journal of European Consumer Markets Law 13, 14.

19 See also Karin Sein, '"Goods with Digital Elements" and the Interplay with Directive 2019/771 on the Sale of Goods' (2020), available at https://ssrn.com/abstract=3600137, 3.

20 Italics added.

21 See also Tonner, n 3, 367.

22 See also Sein and Spindler, n 13, 272; Gerald Spindler and Karin Sein, 'Die endgültige Richtlinie über Verträge über digitale Inhalte oder Dienstleistungen' (2019) MultiMedia und Recht 415, 416; Sein, n 19, 4; Lea Katharina Kumkar, 'Herausforderungen eines Gewährleistungsrechts im digitalen Zeitalter' (2020) Zeitschrift für die gesamte Privatrechtswissenschaft 306, 321.

23 See also Sein and Spindler, n 13, 272; Spindler and Sein, n 22, 417; Kumkar, n 22, 318.

24 On the latter situation in the case of Renault cars and navigation systems provided by TomTom see Kalamees and Sein, n 18, 14.

25 See also Dirk Staudenmayer, 'Kauf von Waren mit digitalen Elementen – Die Richtlinie zum Warenkauf' (2019) Neue Juristische Wochenschrift 2889; id., 'Die Richtlinie zu den digitalen Verträgen' (2019) Zeitschrift für Europäisches Privatrecht 663, 672 f.

the seller, through his right of redress under Article 18 SGD, or under specific contractual arrangements with the third party, to take recourse from the third party that may be ultimately responsible for the non-conformity.[26]

20 Finally, recital (14) SGD clarifies that it does not matter whether digital content that fulfils a contractually agreed function is pre-installed or added subsequently. This is meant to prevent circumvention of the rules on non-conformity and remedies. Therefore, sellers cannot avoid their liability by including a term into the sales contract, according to which the consumer can, once the contract is concluded, download the relevant functions from the manufacturer's website.

21 At the other end of the spectrum, an entirely new additional function and the relevant digital content and services that are added subsequently would not fall into the ambit of the original contract. Recital (16) SGD mentions the example of a game application that the consumer downloads from an app store onto a smart phone. In relation to cars, this could be, for example, a newly developed autonomous parking assistant that can be applied via an app on the consumer's smartphone or HMI. Of course, the seller of the car cannot be held responsible for malfunctioning digital elements that the consumer adds unilaterally.[27] In that situation, the Digital Content and Services Directive may apply to the digital content and services.

22 The most complicated situation arises where the sales contract mentions certain functionalities and the good provides for the connectivity of such functionalities but the contract states that they need to be acquired separately from a third-party service provider. In principle, the Directive allows for such a separation, as the second example that the EU legislator gives in recital (16) SGD illustrates: the parties can agree that the consumer buys a smart phone without a specific operating system and the consumer subsequently concludes a contract for the supply of an operating system from a third party. Indeed, the consumer may have a particular interest in choosing from a selection of operating systems. According to recital (16) SGD, this separate contract could even be concluded through the seller as intermediary of the third-party service provider. This would take the digital service out of the scope of the sales contract and therefore out of the Sale of Goods Directive also. It may then fall into the scope of the Digital Content and Services Directive which would be the ideal solution for a seller who wants to avoid liability for the digital content and service.

23 Clearly, there is a tension between this rule and the mandatory nature of the Sale of Goods Directive under Article 21 SGD. The exceptional character of the exclusion of third party digital content and services from the sales contract suggests that the separation must be "genuine" rather than an artificial separation of contracts that circumvents the general one-stop concept of the Sale of Goods Directive.

24 For example, one could see an artificial separation of contracts if the consumer needed to register for the built-in service package on the manufacturer's website to obtain the service free of charge. The mere fact that the consumer could obtain the service for free shows that the provision of the service forms part of the sales contract. This would even apply where the service was only temporarily for free, whereafter the consumer would have to pay for it.

25 Similarly, the separation of contracts would seem to be artificial where the consumer has no choice concerning the third-party digital content or service provider when it is pre-determined in the sales contract. This interpretation would be in line with other areas of EU consumer law. For example, under the Consumer Credit Directive 2008/48/EC,[28] the concept of "linked credit agreements" is meant to prevent the artificial separation of contracts that form a "commercial unit".[29] Under the Consumer Rights Directive 2011/83/EU,[30] "ancillary contracts"[31] share the fate of the main contract even

26 For considerations concerning the right of redress see Vereecken and Werbrouck, n 13, 71 f.

27 See also Spindler and Sein, n 22, 417; Sein, n 19, 5.

28 [2008] OJ L 133/66.

29 A linked credit agreement is defined as a credit agreement where: (i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and (ii) those two agreements form, from an objective point of view, a commercial unit. A commercial unit shall be deemed to exist where the supplier or service provider finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement, or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement, see Article 3(n) of Directive 2008/48/EC, for the consequences of a linked contract see Article 15 of Directive 2008/48/EC.

30 [2011] OJ L 304/64.

31 An ancillary contract is defined as a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods

if the ancillary goods or services are provided by a third party.

III. Separately acquired digital content or services

26 As Directives (EU) 2019/770 and 2019/771 are mutually exclusive, the Digital Content and Services Directive only covers digital content and digital services that does not come under Article 3(3) sentence 2 SGD, see Article 3(4) DCSD. In particular, this would be third-party digital content and digital services that are not foreseen in the sales agreement but that the consumer acquires separately.[32] Again, examples could be a navigation system or an infotainment system.

27 If the (genuinely) new additional function and the relevant digital content and services come with a good (e.g. heat-able seats which replace the original seats), the new package would, of course, come under the Sale of Goods Directive; however, with a new sales contract, potentially with a new seller.

IV. Why does it matter?

28 The consequence is that different rules may apply to the same problem such as the malfunctioning of the navigation system, although the European Commission has made an effort to streamline the relevant rules of the two directives.[33] It was, however, a deliberate decision of the EU Commission and the Council (against the position of the European Parliament)[34] to place embedded software under the rules on the sale of goods together with the goods it is embedded in.[35]

29 In principle, the two Directives follow the same structure, and they have introduced almost identical rules on conformity and remedies.[36] There are, however, some differences between them. For example, only the Sale of Goods Directive leaves Member States the option to maintain or introduce a notification period, and only the Digital Content and Services Directive knows the trader's right to modify the digital content or digital service.[37]

30 The most crucial point, however, is determining the addressee of potential remedies, as mentioned above. Whereas under the Sale of Goods Directive the consumer must only approach the seller for all problems, in case of the parallel application of the Sale of Goods Directive (to the car) and the Digital Content and Services Directive (to additional digital content and services), the consumer has different contract partners to turn to. The latter may be particularly burdensome if the additional digital content or services are provided by a trader outside the EU which is another reason why circumvention of the Sale of Goods Directive must be prevented.[38]

D. Types of non-conformity

31 One can think of a great variety of problems caused by the digital elements of a car. Obviously, the most dramatic situation is where the software of an automated or autonomous car fails and causes an accident. The accident may also be caused by a hacker's attack.[39] A navigation system with an incorrect map may lead the (inattentive) driver

are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader, see Article 2(15) Consumer Rights Directive.

32 See Tonner, n 3, 367. The application of free and open-source software, to which the Digital Content and Services Directive does not apply (as Art. 3(1) DCSD requires a price to be paid), is unlikely in relation to cars.

33 See Staudenmayer, 'Die Richtlinie zu den digitalen Verträgen', n 25, 667 f.

34 See EP doc. A8-0375/2017, 100 f.

35 See Council Policy Note 9261/18 of 24 May 2018, 4 f.

36 See also Ivo Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) Neue Juristische Wochenschrift 1705. For a thorough analysis of the Digital Content and Services Directive see Sein and Spindler, n 13; id., 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) European Review of Contract Law 365. See also Dirk Staudenmayer, 'Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte' (2019) Neue Juristische Wochenschrift 2497.

37 For an analysis of the differences see Tonner, n 3, 369; Sein, n 19, 8.

38 See also Sein, n 19, 6.

39 On the various ways by which hackers can take control of a car, see Hervais Simo, Michael Weidner and Christian Geminn, 'Intrusion Detection – Systeme für vernetzte Fahrzeuge – Konzepte und Herausforderungen für Privatheit und Cybersicherheit' in Roßnagel and Hornung (eds), n 5, 311, 320 ff; Manuela Martin and Kathrin Uhl, 'Cyberrisiken bei vernetzten Fahrzeugen – (Produkt-)Haftungsrechtliche Fragestellungen im Zusammenhang mit Hackerangriffen' (2020) Recht – Automobil – Wirtschaft 7, 8.

into a canal rather than on a road, or make her miss an important appointment. Concerning privacy and economic interests, the car may transmit data to third parties without the consent of the driver or owner which could allow these third parties to personalise insurance tariffs or trace the movements of the driver. Moreover, software can be used by a third party to turn off the car externally (e.g. to take the car hostage for an unpaid bill). Software could even be manipulated to deceive type approval authorities, and cars could fail to meet the relevant legislative standards on, for example, NO_x emissions.

32 In brief, both the Sale of Goods Directive and the Digital Content and Services Directive apply subjective and objective criteria on conformity. Compared to the Consumer Sales Directive 1999/44/EC, the objective criteria have been strengthened in that they are only ruled out by the agreement of the parties if the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity and the consumer expressly and separately accepted that deviation when concluding the sales contract (Article 7(5) SGD and Article 8(5) DCSD).

33 All the aforementioned digitalisation issues are relevant for the conformity of the car with the contract. Next, the article considers the situation of a car with digital elements that comes entirely under the Sales of Goods Directive before briefly addressing the cumulative application of the Sale of Goods Directive and the Digital Content and Services Directive.

I. Non-conformity of the car under the Sale of Goods Directive

1. Defects affecting the main functions of the car

34 It is obvious that a deficient operation system of a car disrupts its conformity with the contract. Importantly, the consumer does not need to show what exactly is wrong with the car. It suffices to show that the car, or a specific feature of it, does not work for whatever reason; this could be a hardware or a software defect.[40] This view was confirmed, in the context of the reversed burden of proof under Article 5(3) of Directive 1999/44/EC, in the case of *Faber*[41] where a car caught fire. The Court of Justice concluded that it was not for the consumer to show why the car caught fire but that the simple fact that it did made it defective.[42]

2. Defeat devices

35 A defeat device is a car software that interferes with or disables emissions controls under real-world driving conditions, even if the vehicle passes formal emissions testing. Defeat devices, in particular those used by the Volkswagen group, have featured prominently in the case law of the courts of many Member States in the past few years. The decisions in which courts have held cars with defeat devices not to be in conformity with the contract are countless. Importantly, this is not only because the promised environmental advantages of the allegedly cleaner diesel cars are not present but also because of the legal risks related to the potential withdrawal of the admission of the car to the road.[43]

3. Safety and security

36 Cars must be safe. In this regard, compliance with legislation and technical standards is of particular importance as Article 7(1)(a) SGD confirms. Notably, the new Type Approval Directive (EU) 2019/2144[44] requires a number of digital safety features that will become mandatory in 2022, such as warning of driver drowsiness and distraction (e.g. smartphone use while driving), intelligent speed assistance, reversing safety with camera or sensors, and data recorder in case of an accident ('black box').

37 Security has always been an element of conformity as well.[45] It is now explicitly mentioned in Article

40 See, for example, OLG Köln, 12 December 2006 – 3 U 70/06 (2007) Neue Juristische Wochenschrift 1694. See also Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) Journal of European Consumer and Markets Law 194, 200.

41 CJEU, 4 June 2015 – C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV*, ECLI:EU:C:2015:357.

42 For more details, see Peter Rott, 'Improving consumers' enforcement of their rights under EU consumer sales law: Froukje Faber' (2016) Common Market Law Review 509.

43 See BGH, 8 January 2019 – VIII ZR 225/17 (2019) Neue Juristische Wochenschrift 1133.

44 [2019] OJ L 325/1.

45 See also Benjamin Raue, 'Haftung für unsichere Software' (2017) Neue Juristische Wochenschrift 1841, 1843; Sebastian Rockstroh and Christopher Peschel, 'Sicherheitslücken als Mangel' (2020) Neue Juristische Wochenschrift 3345, 3348; Thomas Riehm and Stanislaus Meier, 'Rechtliche Durchsetzung von Anforderungen an die IT-Sicherheit'

7(1)(d) SGD as one of the elements of objective conformity with the contract. In particular, this includes cyber security[46] which means that the car, or rather its software, must be shielded against third-party attacks by hackers that try to take control of the car.[47]

38 In this context, the obligation under Article 7(3) SGD to inform the consumer of and supply her with updates, including security updates, that are necessary to keep the car in conformity plays a major role. Indeed, software may have been secure at the time of the delivery of the car but have become insecure afterwards due to technological development.

39 Beyond these observations, the details are quite unclear. For example, it has always been discussed whether consumers may reasonably expect absolute security,[48] or whether they expect software to be "hackable".[49] Moreover, it may be unclear at which point in time a car needs a security update and, consequently, whether an update is provided too late. The correct answer seems to be that consumers may expect a reasonable level of security. The industry standard (ISO/SAE 21434 - Road Vehicles – Cybersecurity Engineering) that the Society of Automotive Engineers (SAE) elaborated in cooperation with the International Standardisation Organisation (ISO)[50] could serve as a minimum standard, at least for cars that are sold after that standard has been adopted.

(2020) MultiMedia und Recht 571, 573; Thomas Söbbing, 'Security Vulnerability: Ist eine Sicherheitslücke in einer Software ein Mangel i.S.v. § 434 BGB?' (2020) IT-Rechtsberater 12.

46 See also Staudenmayer, 'Kauf von Waren mit digitalen Elementen', n 25, 2891.

47 Another target of hackers may be personal data, see Maria Fetzer and Peter Hense, '"Ein Auto, ein Computer, ein Mann" – Connected Cars zwischen infantiler Vision und Consumer Privacy' (2020) Datenschutz-Berater 144.

48 See Raue, n 45, 1843.

49 For that latter approach see a recent judgment of OLG Köln, 30 October 2019 – 6 U 100/19 (2020) MultiMedia und Recht 248, although in relation to an inexpensive smartphone. The case was not a sales law case but turned on the question of whether the seller had omitted to give the consumer essential information in terms of Article 7 of the Unfair Commercial Practices Directive 2005/29/EC. See also the critique by Thomas Riehm and Stanislaus Meier, 'Anmerkung' (2020) MultiMedia und Recht 250.

50 See Martin and Uhl, n 39, 9.

Moreover, in June 2020, UNECE adopted two new UN Regulations on Cybersecurity and Software Updates.[51]

4. The digital brick

40 Apart from hackers, the seller could interfere with the car by way of a so-called digital brick.[52] A digital brick allows the seller to switch a digital device off remotely, for example, to enforce an (alleged) claim against the consumer. In a case before the LG Düsseldorf, the Verbraucherzentrale Sachsen successfully challenged a contract term by RCI Banque S.A. that leased car batteries to consumers.[53] The term allowed RCI Banque S.A. to stop the reload of the battery in case of its own termination of the contract with the consumer. Similarly, one could think of such software allowing the car manufacturer to switch off the car if the consumer does not pay for her subscription for connected car services. If such a system were present in a car without consent and even knowledge of the consumer, this would render the car nonconforming with the contract.

5. Unlawful data export

41 Finally, the situation where the car sends data to third parties without the consent of the driver or the owner appears to be, first and foremost, an issue of data protection law. The situation has, however, also been discussed in the context of sales law. In a decision of 2015, the OLG Hamm accepted that in principle the integration into the car of a device that sends unauthorised data to an insurance company would make the car defective (although in this case the court concluded that there was no such device).[54]

42 The Digital Content and Services Directive explicitly addresses that issue. According to Recital (48) DCSD, "[f]acts leading to a lack of compliance with requirements provided for by [the General Data Protection] Regulation (EU) 2016/679, including core principles such as the requirements for data minimisation, data protection by design and

51 For details see UNECE, n 10.

52 See also Christiane Wendehorst, 'Die Digitalisierung und das BGB' (2016) Neue Juristische Wochenschrift 2609, 2612.

53 LG Düsseldorf, 11 December 2019, 12 O 63/19, available at http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2019/12_O_63_19_Urteil_20191211.html.

54 OLG Hamm, 2 July 2015 - 28 U 46/15 (2016) Zeitschrift für Datenschutz 230.

data protection by default, may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity provided for in this Directive." One of the examples presented in Recital (48) DCSD is the situation where the trader of an online shopping application fails to take the measures provided for in the General Data Protection Regulation for the security of processing of the consumer's personal data and as a result, the consumer's credit card information is exposed to malware or spyware. According to the EU legislator, that failure could also constitute a lack of conformity of the digital content or digital service within the meaning of this Directive, as the consumer would reasonably expect that an application of this type would normally possess features preventing the disclosure of payment details.

43 Although the Sale of Goods Directive does not present a corresponding recital, there is no reason why the reasonable consumer expectations towards data security of embedded software or towards digital content that comes under the Sale of Goods Directive should be any different. The difference is not the result of a deliberate choice,[55] rather it seems that the corresponding situation under the Sale of Goods Directive was simply overlooked.

6. Practical problems

44 One practical problem is that, as a starting point, non-conformity must be present at the time of delivery (Article 10(1) SGD). However, this is different where, as in the case of goods with digital elements, the sales contract provides for a continuous supply of the digital content or digital service over a period of time. In that situation, the seller is also liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered, Article 10(2) SGD.[56] Consequently, it is essential for the seller's liability whether the defect is in the digital content or service, or in the hardware.

45 For example, let us assume that brakes failed so that a car crashed and burned out. How shall the consumer find out whether the problem was with the physical properties of the brakes or with the related software?

46 Of course in the first year, the extended reversal of the burden of proof, now Article 11 SGD, is of help.[57] This rule is certainly even more consumer-friendly than the old six months period of Article 5(3) of the Consumer Sales Directive. Importantly, as mentioned above, the Court of Justice in its *Faber* decision turned against a narrow interpretation of that rule. The consumer only had to show that the good was not in conformity with the contract which was fairly easy after the burn out as cars are not supposed to catch fire. Then, it is on the seller to show that the cause of the fire had not been present in the car at the time of delivery.

47 If the defect becomes apparent after more than a year, the burden of proof is still on the seller if the sales contract provides for the continuous supply of the digital content or digital service over a period of time. However, the reversal of the burden of proof only relates to the conformity of the digital content or service with the contract and not to the good. Thus, the demarcation of the potential causes of non-conformity becomes relevant again, as well as the question of who must prove whether the physical or the digital elements caused the problem.

48 According to traditional rules of civil procedural law, it would be for the consumer to show which of the two rules apply. This may be easy in the case of a failing infotainment system but very difficult in the case of a digitally operated part of the car. It therefore seems to be justified to extend the logic of the Court of Justice in *Faber* that the seller has to prove the software was still in conformity with the contract and therefore, the problem was caused by the hardware or the consumer. This should be possible for the seller as software is not susceptible to wear and tear. If the trader succeeds in showing the software conformed with the contract after the expiry of one year, the consumer will have to prove that the hardware was nonconforming with the contract at the time of delivery.

II. Non-conformity under the Digital Content and Services Directive

49 As mentioned above, the conformity requirements of the Sale of Goods Directive and Digital Content and Services Directive are substantially the same. Thus, the above considerations relating to the non-conformity of digital content and services apply.

50 In practical terms, problems may arise when it is unclear why, for example, the car was hacked. Was it the original embedded digital content of the car or its connectivity, or was it digital content that was added

55 See also Sein and Spindler, n 36, 372, who can see „no real policy reason behind that".

56 For detailed analysis see Vereecken and Werbrouck, n 13, 73 ff.

57 Ibid., 77 f.

later by a third party under a separate contract? Whereas in the case of the car with embedded digital content, a solution by way of the reversal of the burden of proof appears to be possible, in the case of two separate contracts the consumer would have to pick the right defendant for a claim which is more complicated. The consumer would certainly need to consult an (expensive) expert.

51 Thus, from a consumer perspective, there are strong arguments not to have different providers of digital content and services related to a car, although this situation could of course be exploited by the seller or the manufacturer of the car through charging higher prices.

E. Remedies

52 The new directives have, in principle, retained the remedies of the Consumer Sales Directive 1999/44/EC with further concretisation and they have made the hierarchy between the remedies mandatory for the Member States.[58] Moreover, in the context of digitalisation, in the case of goods with digital elements, Article 7(3) SGD and Article 8(2) DCSD have introduced an obligation to ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, whereby the details of that obligation differ in accordance with the contractual agreement.[59]

I. Remedies under the Sale of Goods Directive

53 If the car (including its digital elements as well as digital content and service that are incorporated in or inter-connected with goods and are provided with the goods under the sales contract) is not in conformity with the contract, the seller must repair or replace the car, according to Article 13(2) SGD.

1. Repair

54 Repairing the car would mean updating the relevant software which the seller probably cannot do but the manufacturer should be able to do.[60] Surely, the seller cannot simply plead impossibility if he cannot repair, i.e. update, the software himself; rather, as Article 7(3) SGD indicates, the seller must ensure the supply of relevant updates to the consumer (by the manufacturer or other third parties). Authors therefore suggest that the seller should try to get the manufacturer to conclude an additional contract with the consumer related to software updates;[61] this does not, however, release the seller from his own obligation.

55 Ultimately, if the third party, for whatever reason does not supply the required update and the car manufacturer does not either, it will usually be disproportionate for the seller to develop an update himself, and he will have the right to reject repair under Article 13(3) SGD.[62]

2. Replacement

56 Whether or not replacement is possible will depend on the nature of the problem. Of course, the seller could replace the whole car, which is of no use if all cars of the same type use the same defective software. The separate replacement of a navigation system that is not deeply integrated with other functions would seem to be possible as there are several systems on the market, whereas the replacement of an integrated parking assistant system may be impossible.

3. Reduction in price and termination

57 If the seller fails to repair or replace the car, or rejects to do so, the consumer will be left with the choice between reduction in price and termination of the contract (Article 13(4) SGD), whereby the termination of the contract is only possible where the defect is not considered minor (see Article 13(5) SGD).

58 What defects are minor has already been discussed under the Consumer Sales Directive, and the Sale of Goods Directive brought no further clarification. In relation to cars, safety-relevant elements, such as defective brakes, or defective software of a brake assistant, for that matter, are not minor. Where non-essential features are at stake, other criteria

58 For details, see Vereecken and Werbrouck, n 13, 78 ff.

59 For details, see Pia Kalamees, p. 156 in this volume; Robert Schippel, 'Die Pflicht zur Bereitstellung von Software, Updates and Upgrades nach der Richtlinie über digitale Inhalte und Dienstleistungen (2020) Kommunikation & Recht 117.

60 See also Schippel, n 59, 119.

61 See Heydn, n 7, 508.

62 See also Kalamees and Sein, n 18, 14; Sein and Spindler, n 36, 376.

come into play. In relation to a defective navigation system, the OLG Köln focused on the costs of the navigation system and its repair or replacement in relation to the price of the car. In the case at hand, the costs of the navigation system of 2.390 Euros plus the repair costs exceeded 5% of the purchase price of the car, thus the defect was not considered minor.[63] In contrast, the OLG Düsseldorf considered the defective remote control in the steering wheel of the infotainment system as minor non-conformity as it was still possible to control the infotainment system with a button elsewhere. Therefore, the safety of driving was only slightly affected; as the remote control was of course meant to allow the driver to use the infotainment system without turning his eyes off the road.[64]

59 The issue was also vividly discussed in relation to defeat devices where the seller, or rather the manufacturer, provided a software update. First instance courts were divided on the matter[65]. Over time, however, courts including those of higher instance leaned towards non-minor classification of the non-conformity, as doubts had arisen about negative consequences of the software update for fuel consumption and other emissions. Moreover, the loss of market value remained with the affected cars.[66]

II. Remedies under the Digital Content and Services Directive

60 The remedies under Article 14 DCSD mirror the ones under Article 13 SGD, whereby digital content can be brought into conformity by way of an update or replacement of the software. Of course, the mere digital content provider cannot be asked to replace the hardware and thus, the car or its components. Otherwise, a reduction in price and termination of the contract come into play, as under the Sale of Goods Directive.

63 OLG Köln, n 40.

64 OLG Düsseldorf, 8 January 2007 – I U 177/06 (2008) Neue Juristische Online-Zeitschrift 601.

65 See the references in Carl-Heinz Witt, 'Der Dieselskandal und seine kauf- und deliktsrechtlichen Folgen' (2017) Neue Juristische Wochenschrift 3681, 3684.

66 For an overview, see Kolja van Lück, 'Kaufrechtliche Ansprüche des Käufers im Diesel-Abgasskandal' (2019) Verbraucher und Recht 8, 10 f.

F. Damages

I. Damages under sales law

61 One of the risks related to defective software is the risk of an accident and thus, the risk to suffer damages beyond the vehicle itself. Like the Consumer Sales Directive 1999/44/EC, the new directives do not cover damages resulting from defective goods, digital content or digital services but leave that issue with Member States. The reason is simply that the laws on damages of Member States differ so greatly that chances to find common ground were considered slim. The most relevant difference relates to fault. For example, English law imposes strict liability on the seller even when it comes to damages in principle; whereas German law is fault-based concerning damages under sales law (even though it is for the seller to prove that he has not acted negligently).[67]

62 The fault-based system has severe implications. The seller is only liable for the breach of his contractual obligation to deliver goods in conformity with the contract if an ordinary, diligent seller had known of the defect, or discovered it. According to established German case law, however, a retailer that only passes on goods received from the producer or another supplier is under no obligation to examine or test the goods.[68] As long as there is no reason to doubt the conformity of the goods with the usual quality, there is no negligent act. Nor is the seller vicariously liable for actions nor omissions of suppliers, or even the producer, as these are not vicarious agents.[69]

63 When it comes to embedded or inter-connected digital content or digital services that are related to a car, the seller who is not identical to the manufacturer will rarely ever be liable for damages.[70]

II. Damages resulting from digital content or digital services

64 When damage results from digital content or digital

67 See § 280 para. 1 BGB.

68 See BGH, 25 September 1968 – VIII ZR 108/66 (1968) Neue Juristische Wochenschrift 2238.

69 See BGH, 21 June 1967 - VIII ZR 26/65 (1967) Neue Juristische Wochenschrift 1903; BGH, n. 45, 2239; BGH, 18 February 1981 - VIII ZR 14/80 (1981) Neue Juristische Wochenschrift 1269.

70 See also Rockstroh and Peschel, n 45, 3350.

services that are not embedded in the car itself, the question is primarily what type of contract is at stake. In that sense, the old and fierce debates about the contractual classification of digital content and services that enticed the European legislator to introduce a classification neutral system of remedies[71] may well prevail at the national level.

65 Digital services under the Digital Content and Services Directive would surely be classified as services, where damages are usually fault-based. As to the classification of digital content that is supplied online, the Member States have taken different approaches until now, ranging from sales contracts to service contracts.[72]

66 But even the classification of the whole package of the good, its embedded software and integrated and interconnected digital content and services as sales law under the Sales of Goods Directive does not necessarily apply to the national regimes relating to damages. In contrast, some of these elements would likely be classified as services for that purpose with the result that liability for the service components could remain fault-based even in Member States that apply strict liability to damages under sales law.

G. The broader perspective

67 The seller's liability (with its limitations) is only part of the picture. Where the seller is not liable for damages or when the seller goes bankrupt, as happened to some major car traders in Germany due to the Volkswagen scandal, the potential liability of other actors – the car manufacturers and third parties providing digital content or services – comes back to the fore. The relevant areas of law are product liability law and general tort law, where much is still unclear in relation to digital content and digital services.

68 In particular, controversy exists surrounding whether or not software is a product in the terms of Article 1 and 2 of the Product Liability Directive 85/374/EEC,[73] and, if it is regarded as a product in principle, whether this also applies where software is transmitted online or only applied remotely in terms of software as a service.[74] This problem has of course been known for many years[75] but the European Commission has still not presented a proposal for an amendment of the Product Liability Directive.[76] At the national level, Member States can apply their product liability laws to software through a concretising implementation of the Product Liability Directive or as an extension of the product liability regime to items that are not covered at all by the Directive. However, many Member States have not taken an express position to the issue yet either.

69 Beyond product liability law, general tort law provides for a more flexible answer to damages caused by defective software but it is generally fault-based. Moreover, the consumer again faces the problem of identifying the right defendant where multiple players are involved.

H. Conclusions

70 The Sale of Goods Directive bundles in the person of the seller liability for non-conformity of goods including its embedded digital content as well as digital content and services which are incorporated in or inter-connected with goods and are provided with the goods under the sales contract. This even applies to digital content or a digital service that is supplied by a third party. In the case of cars, this would appear to cover most of the digital content and services. It has the advantage that the consumer

71 See recital (19) DCSD.

72 See Marco B.M. Loos et al., *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts* (2011), available at https://op.europa.eu/de/publication-detail/-/publication/4fee0cc7-5f4d-46c5-897b-48844f07f027.

73 According to Art. 2 of Directive 85/374/EEC (as amended), product means all movables, even though incorporated into another movable or into an immovable.

74 For recent overviews of the discussion, see Charlotte de Meeus, 'The Product Liability Directive at the Age of the Digital Industrial Revolution: Fit for Innovation?' (2019) Journal of European Consumer and Markets Law 149; Peter Rott, 'Produkthaftung im Zeitalter der Digitalisierung' in Anja Hentschel, Gerrit Hornung and Silke Jandt (eds), *Mensch – Technik – Umwelt: Verantwortung für eine sozialverträgliche Zukunft, Festschrift für Alexander Roßnagel* (Nomos, 2020) 639; both with further references.

75 See, for example, the 5th Report from the Commission on the application of the Product Liability Directive, COM(2018) 246, 2, and the Staff Working Document Liability for emerging digital technologies, SWD(2018) 137, 9 ff.

76 For the latest considerations of the European Commission see its Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics, COM(2020) 64; on which see Friedrich Graf von Westphalen, 'Produkthaftungsrechtliche Erwägungen beim Versagen Künstlicher Intelligenz (KI) unter Beachtung der Mitteilung der Kommission COM(2020) 64 final' (2020) Verbraucher und Recht 248; Astrid Seehafer and Joel Kohler, 'Künstliche Intelligenz: Updates für das Produkthaftungsrecht?' (2020) Europäische Zeitschrift für Wirtschaftsrecht 213.

has one addressee of their claim who must sort out the problem with the manufacturer or other third parties, although different rules for hardware and digital content and services may still complicate the enforcement of remedies. On the other hand, the consumer does not have a contractual relationship with the third party which may be detrimental when it comes to damages claims. Manufacturers may be included in the contractual relationship via guarantees, which is clearly beneficial for consumers.

71 Despite the liability risk, it does not seem to be a promising marketing strategy to offer cars with limited digital content and only connectivity for third-party content (thereby decreasing the liability of the seller), as the consumer would seem to prefer to have at least the essential digital content from the same supplier. At the same time, third party digital content seems to increase the risk for the car seller in the case of non-conformity that the seller has not caused In the case of a security gap, for example, the seller must identify the right defendant for a redress claim. Thus, sellers would logically to try to involve the fewest number of third parties, ideally only the manufacturer. Indeed, this is currently the rule as the consumer has limited choice between different service packages provided by the car manufacturer. Other third parties mainly get involved with older cars that were not equipped with relevant digital features when they were produced.[77] This may, in turn, have negative effects on competition between digital content and service providers around cars and therefore on consumers, when it comes to price levels. Thus, the new liability regime may well produce effects on the market structures around smart cars.

77 See, for example, the CarConnect offer by Deutsche Telekom, https://www.telekom.de/hilfe/mobilfunk-mobiles-internet/carconnect/was-ist-carconnect?samChecked=true.

Interplay Of Digital Content Directive, European Electronic Communications Code And Audiovisual Media Directive In Communications Sector

by **Karin Sein***

Abstract: In the near future, several new EU law acts such as the new Digital Content Directive (DCD), Electronic Communications Code (EECC) as well as the revised directive on audio-visual media services (AMVD) will be applicable to the communication sector. These directives are partly mutually exclusive but partly also cumulatively applicable. The article examines the complicated demarcation and interplay between these three directives, including their complicated interaction in case of bundle contracts, concentrating primarily on contract law issues. It shows, inter alia that subjecting number-dependent interpersonal communications services as a subtype of electronic communications services to the EECC and number-independent interpersonal communications services to the DCD results in different contractual remedies for consumers which cannot be easily justified. The article also argues that certain provisions of AMVD should be considered as part of objective conformity criteria under the DCD, entitling consumers to use contractual remedies if the content requirements are not complied with. Finally, the new rules on bundle contracts allowing consumers to terminate the whole bundle even if only one part of the bundle is affected constitute a considerable improvement in the consumer's contractual rights compared to the previous rules.

Keywords: digital content directive; European electronic communications code; number-dependent and number-independent interpersonal communications services; OTTs; audio-visual media directive

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A. Introduction

1 The telecom industry is facing a considerably changed legal landscape: by the end of 2020 the new Directive on Electronic Communications Code (EECC)[1] must be transposed into national law. Among many other detailed rules, the new code also contains a chapter on end-user rights with several mandatory contract law provisions. These provisions, mostly maximum harmonizing, set forth rules on pre-contractual information obligations, contract termination, and bundle contracts (e.g., a fixed-fee package for digital TV, internet access and mobile phone subscription).

2 Apart from the new code, several services offered by telecoms or other electronic communications providers may also fall within the scope of the new Digital Content Directive[2] (DCD) to be implemented

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1 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L321/36 (ECC).

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 (DCD).*

in Member States by summer 2021 and to be applied from 2022. The Digital Content Directive is not applicable to electronic communications services (e.g., internet access contracts[3]) apart from number-independent interpersonal communication services but does apply to digital television services,[4] as well as to different apps or video-on-demand services offered by telecom companies. These services are often offered in a bundle or package together with other telecom services that are subject to the EECC. Moreover, the new Directive on Audiovisual Media Services (AVMD)[5] lays down additional rules for certain core services of telecoms and other communications providers. These developments raise the question of the scope and interrelationship of the new EU rules in the context of telecoms and the communication industry in general.

3 In this context one must keep in mind that with the emergence of new digital interpersonal communication services, the old electronic communications rules aimed mainly at telecommunication services have now been broadened in their scope and are targeted at the electronic communications sector in general. Application of the electronic communication rules to digital interpersonal communication services poses the question whether services such as Skype, Facebook or WhatsApp fall into the scope of the DCD, electronic communication code, audio-visual media rules, or possibly all of them and what are the legal consequences of being subject to one or another legal regime? Which set of contractual remedies – the ones of the DCD or the end-user rights under EECC can consumers use if there is an irregularity in the service? Can breach of AVMD rules under certain circumstances be qualified as a breach of the digital services contract entitling consumers to use contractual remedies under the DCD? Finally, which rules and how do they apply if there is a complex relationship of bundle contract including different telecommunication services, digital TV and other services? Are the interests of consumers better protected under the new contract law rules?

4 To answer these questions, this article first defines the notion of electronic communications services as this is an essential precondition for delineating the scopes of the EECC and DCD (B.); then demarcates the scopes of the DCD and EECC, assesses the legal consequences of their application, and explores their interaction in case of telecom bundle contracts (C.). Finally, the article analyzes the co-application of the DCD and AVMD in the digital communication sector (D.).

B. Definition of electronic communications services and its evolution

I. Definition of an electronic communications service under the Framework Directive

5 Defining electronic communications services is an essential precondition for delineating the scopes of the EECC and DCD as article 3(5)(b) DCD excludes electronic communications services as defined in art 2 p 4 EECC from the scope of the DCD. Thus, the general rule is that electronic communication services are outside the scope of the DCD. However, OTT-s ('over-the-top' services)[6] or, more precisely, number-independent interpersonal communications services, are within the scope of the DCD as art 3(5)(b) makes an exception for number-independent interpersonal communications. Although the European Commission's proposal of the DCD excluded also the number-independent electronic communications services from its scope and left them subject to the telecommunications law, due to consumer protection purposes the legislator decided that the digital content directive should cover also these widely used services.[7] Therefore, in order to define the scope of the DCD we must look, first, at the definition of electronic communications services and then, second, at the definition of number-independent interpersonal communications as a subtype of electronic communication services.

3 See DCD, art 3(5)(b) and recital 19.

4 DCD, recital 31.

5 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69 (AVMD).

6 On the notion and different subtypes of OTTs, see Marcin Rojszczak, 'OTT regulation framework in the context of CJEU Skype case and European Electronic Communications Code', (2020) Computer Law and Security Review 3-4. He points out that there is no universally accepted definition of an OTT. The Body of European Regulators for Electronic Communications (BEREC) defines an OTT as "content, a service or an application that is provided to the end user over the public Internet." and differentiates between three different types of OTTs. BEREC Report on OTTs BoR (16) 35, 3.

7 Dirk Staudenmayer in in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020), art 3 paras 96-99.

6 In order to understand how and why the notion of the electronic communications service under EU law has evolved and changed over the years, it is first necessary to examine the definition of an electronic communication service the "old" Framework Directive.[8] Article 2(c) of the framework directive defined an electronic communications service as a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting. Thus, the decisive criterion defining its scope was purely a technical one, depending on whether the main object of the service is the conveyance of signals.[9] This principle was clarified in two decisions of the Court of Justice of the European Union (CJEU) dealing with digital communication services.

7 First, the *SkypeOut* judgement[10] clarified that an interconnected VoIP (Voice over Internet Protocol) service such as SkypeOut[11] is an electronic communications service within the meaning of the framework directive and thus must comply with its provisions. The CJEU based its argumentation mostly on the fact that SkypeOut has promised – for a remuneration – its end-users the possibility to call the fixed or mobile numbers on the "public switched telephone network" (PSTN) and has concluded contracts with the authorized telecommunications services providers in order to facilitate that.[12] Therefore, the services of these telecommunications services can be attributed to the SkypeOut.[13]

8 In the *Gmail* case, by contrast, the CJEU found that web-based email services, which do not provide internet access, do not constitute electronic communications services within the meaning of the framework directive because their services do not consist "wholly or mainly" of the conveyance of signals. Whereas SkypeOut had promised its users the connectivity to the PSTN numbers, in the *Gmail* case the Court did not see any element to establish Google's responsibility vis-à-vis the email account holders for the conveyance of signals necessary for that account's functioning.[14]

II. Definition of an electronic communications service under EECC

9 Previously, we saw that the decisive question under the Framework Directive for qualifying a service as an electronic communications service is a technical one, i.e., whether its main object is the conveyance of signals. OTT services were therefore outside of its scope although consumers as well as businesses were increasingly relying upon such services instead of telephony and other traditional communication services. Consequently, OTTs were rapidly becoming fierce competitors of traditional telecom operators.[15] At the same time they were not subject to the same legal rules. This was found problematic due to several reasons. For example, BEREC brought out that there is lack of clarity and certainty as to which OTT services are covered or not covered by the telecommunications rules and that national regulators are therefore often not able to collect necessary information from these service providers.[16] The European Commission stressed the necessity for equal treatment and a level playing

8 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33.

9 Mario Martini in Hubertus Gersdorf and Boris P Paal (eds), *Beck'scher Online-Kommentar zum Informations- und Medienrecht* (28th edn 1.8.2019, CH Beck 2019) TMG § 1 paras 13ff.

10 Case C-142/18 *SkypeOut* EU:C:2019:460. The case is discussed in-depth by Rojszczak (n 6) 5-9. From the German perspective, see also Jürgen Kühling, Tobias Schall and Corinne Ruechardt, 'Are Gmail, WhatsApp and Skype "Electronic Communications Services" within the Meaning of the Framework Directive?' (2016) 17(5) Computer Law Review International 134–140.

11 The CJEU also used the notion of OTT in the descriptive part of the judgement: "The service provided by SkypeOut is an 'over the top' service – a service available on the internet without the involvement of a traditional communications operator." *SkypeOut* (n 10) para 9. Later on, however, the CJEU does not use this notion anymore.

12 What mattered for the CJEU was the fact that it is Skype Communications which is responsible for the VoIP service which it provides to its clients and subscribers in return for payment. *SkypeOut* (n 10) para 40.

13 *SkypeOut* (n 10) paras 38ff.

14 Case C-193/18 *Gmail* EU:C:2019:498, paras 34ff.

15 Explanatory memorandum to the proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) COM/2016/0590 final, 2. Mobile operators have claimed that their revenues have been declining due to the new players such as Skype or WhatsApp. Martin Cave, Christos Genakos, Tommaso Valletti, 'The European Framework for Regulating Telecommunications: A 25- year Appraisal' (2019) 55 Rev. Ind. Organ. 47, 52.

16 BEREC report (n 6) 37.

field for market players[17] that would also guarantee equal rights for end-users. Still another important reason for widening the definition of electronic communication services was the intention to subject OTTs to the data protection regime of the e-privacy directive, subjecting them, for example, to obligations of confidentiality of the communication, notification of data breach, and traffic data erasure.[18]

10 The new EECC, therefore proceeds from a functional approach and is not purely based on technical parameters[19] but rather on the end-user's perspective.[20] Article 2(4) EECC defines electronic communications service as a service normally provided for remuneration via electronic communications networks, which encompasses – with the exception of services providing or exercising editorial control over content transmitted using electronic communications networks and services – the following types of services: (a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of regulation (EU) 2015/2120; (b) interpersonal communications service; and (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting. Consequently, the notion of electronic communications services under the EECC also includes other communication-enabling services than these which consist wholly or mainly in the conveyance of signals.[21] When compared to the previous definition of electronic communications services under the Framework Directive, the new definition of electronic communications service includes also interpersonal communications services (OTTs) – a development that has been seen as one of the major changes in the new EECC.[22]

11 Therefore, whether VoIP services such as Skype can be qualified as an electronic communications service within the meaning of EECC no longer depends upon whether this service consists mainly or wholly in the conveyance of signals.[23] Rather, the legal consequences now depend upon whether an electronic communication service such as Skype or SkypeOut is an interpersonal communications service as a subtype of electronic communications service[24] and if yes, whether it is a number-dependent or a number-independent one. Interpersonal communications service is defined in art 2(5) EECC as a service normally provided for remuneration[25] that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s)[26] and does not include services which

17 Explanatory memorandum (n 15) 2. BEREC, however, admitted that while level playing field was preferable there can also be compelling reasons for different regulatory treatment. BEREC report (n 6) 4, 37.

18 Rojszczak (n 6) 10-11. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201, 37–47.

19 This is seen as a positive development in the legal literature. See e.g., Gerd Kiparski, 'Der Europäische Telekommunikations-Kodex – Ein neuer Rechtsrahmen für die elektronische Kommunikation' (2019) 3 Computer und Recht 180.

20 Recital 15 of EECC stresses that "while 'conveyance of signals' remains an important parameter for determining the services falling into the scope of the directive, the definition should cover also other services that enable communication" as from an end-user's perspective it does not make any difference whether a provider conveys signals itself or whether the communication is delivered via an internet access service.

21 Martini (n 9) TMG § 1 para 13f.

22 Giparski (n 19) 180.

23 Markus Ludwigs and Felix Huller, 'OTT-Kommunikation: (Noch) Keine TK-Regulierung für Gmail & Co' (2019) 15 Neue Zeitschrift für Verwaltungsrecht 1099.

24 See EECC, art 2(5) and 2(4)(b).

25 It is interesting to note that the concept of remuneration (counter-performance) is considerably wider under the EECC than under the DCD. Under the DCD, personal data obtained by cookies does – as a rule – not amount to counter-performance, nor does being exposed to advertising. See DCD, recital 25. Critical on excluding cookies (and being exposed to the advertisements) from the scope: European Law Institute (ELI), 'Statement on the European Commission's proposed directive on the supply of digital content to consumers' (ELI 2016) 15–16; Axel Metzger, Zohar Efroni, Lena Mischau, Jakob Metzger, 'Data-Related Aspects of the Digital Content Directive' (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 96. On the concept of data as counter-performance, see Carmen Langhanke and Martin Schmidt-Kessel, 'Consumer Data as Consideration' (2015) Journal of European Consumer and Market Law 218 et seq; Axel Metzger, 'Dienst gegen Daten: Ein synallagmatischer Vertrag' (2016) 216 Archiv für die civilistische Praxis 817 et seq. By contrast, recital 16 of the EECC considers information collected and transmitted by cookies as well as end-users being exposed to advertisements as remuneration.

26 Recital 17 EECC cites linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines as examples which cannot be qualified

enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.[27] Looking at this definition, Skype-type services clearly qualify as interpersonal communications services within the meaning of art 2(5) EECC. Whether they will also be subject to the rules of the DCD depends upon whether they can be qualified as number-dependent or number-independent, as will be shown in the next chapter.

C. Delineation between the scopes of the DCD and EECC and its legal consequences

I. Defining the scopes of the DCD and EECC

12 We saw that the classification of an electronic communications service under the Framework Directive depended on the technical design of the service with the consequence that without knowing the technical design of a certain service, consumers are not able to determine whether the sector-specific regime is applicable to it or not.[28] The new functional approach of the EECC is, as such, easier to understand for the consumers. However, I will show that determining the scopes of the EECC and the DCD in the case of digital communication services is still complicated, to say the least, and leaves consumers in considerable uncertainty as to which legal rules are applicable to their contracts.

13 Complication is due to the fact that under the new set of rules an OTT is also a digital service offered by a trader to consumers and can thus, in principle, also be subject to the DCD. We saw above that while electronic communications services are outside the scope of the DCD, number-independent interpersonal communications services are still within (art 3(5)(b) DCD).[29] In order to demarcate the scopes of the DCD and EECC it is hence important to distinguish between number-independent and number-dependent interpersonal communications services:[30] an OTT is subject to the DCD only if it can be qualified as an number-independent interpersonal communications service as defined in art 2(7) EECC. According to art 2(7) EECC number-independent interpersonal communications service is an interpersonal communications service, which does not connect with publicly assigned numbering resources; namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans. The defining criterion here is the connection with the international numbering plans and whether the service enables end-users to reach persons to whom such numbers have been assigned[31]: if such a connection does not exist, the interpersonal communications service is number-independent and falls within the scope of the DCD.

14 It should be stressed, however, that mere use of a phone number as an identifier[32] should not be considered to be equivalent to the use of a number to connect with publicly assigned numbers: therefore, it should not be considered sufficient in itself to qualify a service as a number-based interpersonal communications service.[33] Services like SkypeOut do enable communication with numbers in national or international numbering plans – even if only with the help of other service providers. Consequently, such services are number-based interpersonal communications services as they enable end-users to reach persons to whom such numbers have been

as inter-personal electronic communications services. Similarly, the CJEU stated in *SkypeOut* that certain services offered by Skype such as screen-sharing services, instant text messaging, file sharing and simultaneous translation cannot be classified as 'electronic communications services' as they do not consist wholly or mainly in the conveyance of signals; *SkypeOut* (n 10), para 42.

27 An example of a feature that could be considered to fall outside the scope of the definition of interpersonal communications services might be a communication channel in online games, depending on the features of the communication facility of the service. See EECC, recital 17.

28 Andreas Grünwald and Christoph Nüßing, 'Kommunikation over the Top Regulierung für Skype, WhatsApp oder Gmail?' (2016) 2 Multimedia und Recht 91, 95.

29 See art 3(5)(b) DCD, which includes interpersonal communications services within the scope of DCD.

30 Such distinction has been criticized because of its merely technical nature and failure to take into account the end-user perspective. Joachim Scherer, Dirk Heckmann, Caroline Heinickel, Gerd. Kiparski, Frederic Ufer, DGRI-Stellungnahme zum Richtlinienvorschlag über europäischen Kodex für elektronische Kommunikation (2017) Computer und Recht 197, 198.

31 EECC, recital 18.

32 This is the case of e.g., WhatsApp where end-users are identified by their phone numbers. It is probably not different in the case of WhatsApp Business, which can be used with a landline (or fixed) phone number but does not enable to call PTSN numbers. Therefore, WhatsApp Business should also be qualified as a number-independent interpersonal communications service falling within the scope of the DCD.

33 EECC, recital 18.

assigned.[34] Putting it simply: if such a service allows me to call the landline and mobile numbers then it is a number-dependent electronic communications service with the consequence of being subject to the EECC and outside the scope of the DCD. On the other hand, if my mobile phone number is used only to identify me and I am reached not via my phone number but rather as a Skype or WhatsApp user[35] then the service is a number-independent interpersonal communications service and subject to the DCD.

15 For example, while Gmail was not considered an electronic communications service under the Framework Directive[36], it clearly falls under the notion of the interpersonal communications service of the EECC as recital 17 EECC cites all types of emails, messaging services, or group chats as typical examples of interpersonal communications services. This includes services like Facebook Messenger, Zoom or Microsoft Teams. Under the new rules, Gmail, including its chat-function or Google Hangouts feature, as well as other listed examples are to be considered number-independent interpersonal communications services within the meaning of the EECC.[37]

16 As number-independent interpersonal communications services such as Facebook Messenger, Zoom or WhatsApp also constitute digital services within the meaning of the digital content directive they also fall within the scope of the DCD.[38] Consequently, number-independent interpersonal communications services are within the scope of the DCD as well as within the scope of the EECC. Number-dependent interpersonal communications services such as SkypeOut, by contrast, are only subject to the rules of the EECC so that the potential overlap between the DCD and EECC does not occur.

II. Legal consequences of falling within the scope of the DCD or EECC

17 After clarifying the scopes of application of both directives to the interpersonal communication services, it is now important to explore and compare the legal consequences of their application. Although both number-dependent as well as number-independent interpersonal communications services fall within the scope of the EECC, not all of its provisions are applicable to the number-independent interpersonal communications services. To start with, only number-dependent interpersonal communications services may be subject to the general authorization requirement set forth by Member States.[39] They are also part of the emergency communications, the single European emergency number, and public warning system.[40] These rules are not applicable to the number-independent interpersonal communications services as they do not benefit from the use of public numbering resources and they do not participate in a publicly assured interoperable ecosystem.[41]

18 Many end-user rights provisions also apply only to (publicly available) number-based interpersonal communications services.[42] For example, provisions regulating contract duration as well as to the obligation to give yearly tariff advice (art 105 EECC), transparency (art 103(1) EECC), the obligation to provide access free of charge to at least one independent comparison tool (art 103(2) EECC), contract termination (art 105), number portability (art 106(3) EECC), or bundles (art 107 EECC[43]), are explicitly not applicable to number-independent interpersonal communications services.[44] This solution was partly justified by the need to ensure consistency between the two directives: as the legislative procedure for DCD and EECC ran partly

34 EECC, recital 18.

35 Which also requires installation of such software to my computer or phone.

36 *Gmail* (n 14), para 42. This approach was questioned as being too simplistic by Axel Spies, see Axel Spies, 'Gmail ist kein TK-Dienst' (2019) 8 Multimedia und Recht 514.

37 Similarly for Gmail Gera P. Van Duijvenvoorde, 'Towards implementation of the European Union Telecom Code: ex ante reflections' (2020) 26(7) CTLR 205, 207.

38 See DCD, art 3(5)(b).

39 EECC, art 12(2). This means that in the end the outcomes of the *Gmail* and *SkypeOut* cases would be the same under the EECC as they were under the Framework Directive. Ludwigs and Huller (n 23) 1101.

40 EECC, arts 109–110.

41 EECC, recital 18.

42 Duijvenvoorde (n 37) 207.

43 Giparski finds this exclusion problematic from the consumer protection perspective. See Giparski (n 19) 186.

44 Such a distinction is criticized by Scherer, Heckmann, Heinickel, Kiparski, Ufer (n 30) 201.

in parallel, the legislator decided to exclude number-independent interpersonal communications services from art 105 EECC in order to avoid an overlap.[45]

19 As shown above, number-independent interpersonal communications services fall within the scope of the DCD. Under the DCD, digital service providers including those providing number-independent interpersonal communications services are obliged to comply with the mandatory objective conformity criteria (art 8 DCD)[46] and are exposed to liability and consumers' remedies if they are in breach of them (art 11 et seq DCD). The end-users of number-dependent interpersonal communications services falling within the scope of the EECC do not have the possibility to use such mandatory contractual remedies and they are subject to the national contract law rules. Still, art 105(4) EECC gives them a right to terminate the service without an additional charge should such a service fail to reach the performance stated in the contract. Here it is hard to see an objective justification for such different treatment of a consumer's contractual rights; connection to public numbering plans and resources can hardly explain differences in the rules for price reduction, for example.

20 On the other hand, number-independent interpersonal communications services benefit from a more generous modifications regime – they are entitled to modify their services under the conditions of art 19(1) DCD and consumers may terminate their contracts only if such modifications have a considerable negative impact on them.[47] By contrast, other public electronic communications services, including number-dependent interpersonal communications services face the possibility of termination in all cases where they change their contractual conditions, unless these changes are exclusively to the benefit of the end-user, are of a purely administrative nature, and have no negative effect on the end-user, or are directly imposed by Union or national law.[48] To put it simply: Skype users must tolerate slightly negative modifications, SkypeOut users not. Again, it is hard to see a justification for such different treatment.

21 In order to avoid lock-in effects and enable a change of communications service provider, art 105(1) EECC allows fixed-term contracts only up to 24 months with the possibility for the Member States to foresee even shorter maximum contractual commitment periods. Moreover, there are also limitations as to the automatic prolongation of the contract.[49] The digital content directive applicable to the number-independent interpersonal communications services, by contrast, does not contain such limits as art 16 of the Commission's proposal of DCD was dropped during the legislative process.[50] Hence, number-independent interpersonal communications service providers may use longer fixed-term contracts[51] or foresee their automatic prolongation unless this is precluded under national law.

22 As to the security standards, digital communications services subject to EECC such as SkypeOut have no updating obligation,[52] but must of course follow the stricter safety rules under art 40 EECC obliging publicly available electronic communications services to take appropriate and proportionate technical and organizational measures to appropriately manage the risks posed to the security of networks and services. Here the applicability of stricter security standards does not depend upon whether an interpersonal communication service is number-dependent or number-independent but rather whether it is a publicly available electronic communications service. Therefore also number-independent interpersonal communications services, such as WhatsApp, qualifying as a publicly available electronic communications service can be subject to security rules of art 40 EECC.[53] By contrast, number-independent interpersonal communications services which do not qualify as publicly available electronic communications services must exercise only lighter security

45 Staudenmayer (n 7) art 3 para 98.

46 Compliance with objective criteria is mandatory for the trader under art 22 DCD and deviation from them is possible only by express and separate agreement (art 8(5) DCD). On the standards of such express and separate agreement, see Staudenmayer (n 7) art 8 paras 161-177.

47 DCD, art 19(2).

48 EECC, art 105(4).

49 EECC, art 105(3).

50 Originally, art 16(1) DCD-COM also aimed at avoiding lock-in effects and allowed consumers to terminate the contract after a 12-month period. Staudenmayer (n 7) art 3 para 98. See more on this issue in Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15(4) European Review of Contract Law 365, 389–390; European Law Institute, 'Statement of the European Law Institute on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers COM (2015) 634 final' (2016) 60–62.

51 In this sense, see also Giparski (n 19) 185.

52 C.f. DCD, art 8(2).

53 At the same time, WhatsApp is also subject to the updating obligation of the DCD.

measures as these service providers normally do not exercise actual control over the transmission of signals over networks and therefore the degree of risk for such services can be considered lower than for traditional electronic communications services.[54]

23 Subjecting all publicly available interpersonal communications services to the security standard of art 40 EECC was justified by public policy reasons,[55] that is the need to manage the risks posed to the security of networks and services.[56] As security is also one of the objective conformity criteria explicitly mentioned in art 8(1)b DCD[57] including the fit-for-purpose rule under art 8(1)(a) DCD which builds, inter alia, upon Union law rules and technical standards, one can assume that the objective security standard of DCD for number-independent interpersonal communication services as digital services coincides with the one of art 40 EECC. Hence, although number-independent interpersonal communications services are subject both to the security standards of art 40 EECC and art 8 DCD, the standard should be the same under both rules unless the service provider has promised higher security standards in the contract.

24 As a side remark: there is also no difference concerning the data protection standards. Both number-dependent as well as number-independent interpersonal communication services must comply with the data protection requirements of the e-privacy directive, including the principle of confidentiality of communications as *lex specialis* to those of the General Data Protection Regulation (GDPR).[58]

54 EECC, recital 95.

55 Explanatory memorandum (n 14) 4.

56 Art 40(1) EECC.

57 On security as objective conformity criteria under the DCD see Sein and Spindler (n 50) 369.

58 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, 1–88. As noted above, this was one of the main reason for widening the definition of electronic communication services under the EECC. See Rojszczak (n 6) 10-11. He also raises an interesting question of whether the communication with voice assistants should be subjected to the same legal regime. Ibid, 14.

III. Consumer's remedies in case of a bundle contract

25 In the telecom world, digital services are often offered in a bundle for a fixed price comprising, for example, internet access, digital TV, and mobile phone subscription. Sometimes such a bundle may also involve sale of tangible goods, be it a TV box, mobile phone or a smart TV where the fixed monthly fee also includes payments for the consumer good. Bundling allows telecom providers to offer additional goods or services to the customer in addition to the main product or service, thereby possibly opening up additional markets, creating efficiency gains through synergy effects with the result of lower prices and enhancing customer loyalty.[59] On the consumer's side, however, it also creates lock-in effects and legal uncertainty as to whether and how problems concerning one bundle component affect the whole contract. The issue becomes even more complicated if components of a bundle contract are subject not only to national contract law but also to one or more EU sector-specific instruments.

26 For example, if we have a telecom bundle involving internet access, digital TV and mobile phone subscription, the digital TV part clearly falls within the scope of the DCD[60] while the other parts do not. For bundle contracts the general rule under art 3(6) DCD is that in such cases the DCD only applies to the elements of the contract concerning the digital content or digital service and the other elements are governed by the rules applicable to those contracts under national law or, as applicable, other Union law governing a specific sector or subject matter.[61] Thus, in case of a bundle contract consisting of internet access, digital TV and mobile phone subscription, internet access and mobile phone subscription are subject to the national rules implementing the EECC. This does not pose problems concerning contractual remedies such as price reduction or damages; for example, should one defective part of the bundle entitle the consumer to reduce the price, the reduced price will only apply to that part of the bundle.

27 The question becomes more complicated when we look at the possibility and consequences of terminating the whole bundle. In many cases the telecom company would not be breaching every part of the bundle but just one of them: let us assume that there is a defect in the rented TV box. In such cases

59 Peter Rott, 'Bündelverträge aus verbraucherrechtlicher Perspektive' (2018) 11 Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 1010, 1011.

60 DCD, recital 31.

61 DCD, recital 33.

we wonder about the impact of termination of one part of the bundle on the other parts of the bundle. Can you terminate the internet access and digital television subscription in case of a defective TV box? Or, if you terminate the digital TV part of the bundle due to the constant quality problems, what will then happen to the internet access or mobile phone subscription, and finally, to the rental of a TV box?

28 As a starting point, art 3(6) DCD avoids a clear answer and leaves it to the applicable national law. However, it makes a reservation for cases which are governed by art 107(2) EECC in order to avoid conflicting rules.[62] This reservation is applicable if the bundle comprises at least an internet access service or a publicly available number-based interpersonal communications service.[63] In case of such bundles, art 107(2) EECC entitles the consumer to terminate the contract with respect to all elements of the bundle if he has a right to terminate any element of the bundle because of a lack of conformity with the contract or failure to supply. In other words: when one element of the bundle consists in digital content/digital service, art 3(6) DCD gives precedence to art 107(2) EECC. Consequently, if the consumer may terminate the digital TV contract part due to the lack of conformity under art 14 DCD[64] then he can also terminate the whole bundle, including the rental of the TV box.[65] Similarly, if the consumer may terminate the rental of a defective TV box[66], he may also end his contract concerning other services. This is clearly a major development for consumer rights as compared to the previous legal regime.

29 Apart from termination, there may also be overlap or conflict between the DCD and EECC concerning the rules on modifications. In order to ensure consistency with the sector-specific provisions of the EECC, art 3(6) DCD declares art 19 DCD, i.e., the rules on modifications of digital content or digital services, not applicable if a bundle includes elements of an internet access or a number-based interpersonal communications service. Instead, the relevant provisions of EECC should apply to all elements of the bundle, including the digital content or digital service.[67] The main rule on contract modifications for electronic communications providers is found in art 105(4) EECC which, first, lays down notification obligation and its modalities[68] and, second, entitles consumers to terminate the contract without any costs when the trader notifies him of changes in the contractual conditions, unless the proposed changes that are exclusively to the benefit of the consumer, are of a purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law.[69]

30 Thus, if a digital service such as digital TV forms part of a telecom bundle, the consumer benefits from the easier termination possibility in case of modifications in the contract. It also shows that in such bundle cases the European legislator considers sector-specific telecom contract rules to be more appropriate than the consumer contract law rules based on the "digital object" of the contract.

31 Finally, when establishing the liability of the telecom provider in case of a bundle contract, one can also argue that if the consumer's internet access and rented TV box all stem from the same telecom provider then the consumer's cooperation obligation under art 12(5) DCD in order to determine whether his problem with the digital TV quality lies in his digital environment should in practice be reduced to a minimum. Article 12(5) DCD obliges the consumer to cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the

62 Art 3(6) third sub-paragraph DCD provides: "Without prejudice to Article 107(2) of Directive (EU) 2018/1972, the effects that the termination of one element of a bundle contract may have on the other elements of the bundle contract shall be governed by national law."

63 EECC, art 107(1).

64 This is normally possible only if the trader has first got a possibility to cure and if the lack of conformity is not minor. See DCD, art 14(4) and (6). For more on termination and its consequences under the DCD see, Sein, Spindler (n 50) 377-383; Axel Metzger, Zohar Efroni, Lena Mischau, Jakob Metzger (n 25) 102–105.

65 Here art 105(6) EECC forbids the trader to demand any compensation from the end-user other than for retained subsidised terminal equipment.

66 Again, this is only possible if the seller has had a possibility to cure the defect or replace the defective product and if the lack of conformity is not minor. See art 13(4) and (5) of the new Consumer Sales Directive. Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

67 See DCD, recital 33.

68 The trader must notify at least one month in advance in a clear and comprehensible manner on a durable medium, see art 105(4) EECC. The right to terminate the contract must be exercised within one month after notification.

69 This is considerably different from the principle found in art 19(2) DCD, which entitles the consumer to terminate only if the modification negatively impacts the consumer's access to or use of the digital content or digital service, unless such negative impact is only minor.

digital content or digital service at the relevant time lay in the consumer's digital environment. Breach of the cooperation obligation – provided that the trader informed the consumer of such obligation in a clear and comprehensible manner before the conclusion of the contract – leads to a shift of the burden of proof with regard to whether the lack of conformity existed at the relevant time[70] and places it on the consumer.[71] As art 12(5) DCD limits the cooperation obligation to the technically available means which are least intrusive for the consumer and if both the internet access as well as the TV box are provided by the same telecom operator then in most cases the telecom operator should be able to detect the cause of the problem of the digital TV quality without requiring much cooperation from the consumer.

D. Co-application of the DCD and audio-visual media rules in digital communication sector

32 The question of co-application of the DCD and the revised Audiovisual Media Directive rises in cases where a digital services provider is at the same time acting as a content provider and not only as a communication service provider. This may occur, first, in cases where a telecom company is not only offering internet access and digital TV services, but also produces its own content or even its "own channel".[72] When offering their own content, telecom companies are acting as audiovisual media service providers within the meaning of art 1(1)(a)(i) AVMD as they are providing programs under their editorial responsibility.[73] Consequently, they become subject to the audio-visual media rules. At the same time such digital TV services are also subject to the DCD as clarified by recital 31 DCD.

33 Second, the question of the interrelationship of both of the directives also arises in case of the so-called new media players. Recital 1 of the revised AVMD acknowledges that "new types of content, such as video clips or user-generated content, have gained an increasing importance and new players, including providers of video-on-demand services and video-sharing platforms, are now well-established." True, AVMD remains applicable only to those services the principal purpose of which is the provision of programs in order to inform, entertain or educate.[74] However, if the provision of programs and user-generated videos constitutes an essential functionality of social media services and video-sharing platforms, they are also included in the scope of AVMD, because they compete for the same audiences and revenues as audiovisual media services.[75] This includes service providers such as Netflix, YouTube and Facebook. This type of digital service, if offered on contractual basis for a counter-performance, clearly also falls within the scope of the DCD[76] and therefore the co-application of both directives is also of relevance for these big communication market players.

34 In these cases, communication providers must comply with all rules, be it the DCD or AVMD[77] whereby art 3(7) DCD declares the AVMD as a sector-specific regulation to be *lex specialis*, there is, in my view, also a specific link between these directives as the revised AVMD lays down certain public law requirements for TV programs or other

70 See DCD, art 11(2) and (3). C.f. Sein and Spindler (n 50) 387-388.

71 See, on that, Zoll (n 7) art 12 paras 28-30. C.f. also on the Commission's proposal of the DCD Simon Geigerat and Reinhard Steenot, 'Proposal for a directive on digital content – Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia Cambridge 2017) 156-159.

72 At least in Estonia, most telecoms are also offering specific content that they have produced themselves ("own TV channels"). See e.g. Elisa channel, https://www.elisa.ee/et/uudised/elisa-tuli-valja-oma-ajaviitekanaliga and Telia Inspira channel, https://www.telia.ee/uudised/telia-hakkab-eestis-edastama-oma-telekanalit.

73 Audiovisual media service is defined as a service where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.

74 AVMD, recital 3.

75 AVMD, recitals 4 and 5. On these see Lorna Woods, 'Video-sharing platforms in the revised Audiovisual Media Services Directive' (2018) 23(3) Communications Law 127 – 140 and Commission's Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive. [2020] OJ C 223, 3–9.

76 See DCD, art 3(1).

77 Similarly, for previous regulatory framework see Jan Oster, *European and International Media Law* (Cambridge University Press 2019) 272, 273.

content, including provisions aimed at avoiding hate speech or terrorist information, content not suitable to minors, as well as certain information and accessibility obligations.[78] These requirements could be considered as objective conformity criteria within the meaning of art 8(1)(a) DCD. According to this provision, in order to be in conformity with the contract, digital content and digital services must be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account any existing Union law.[79] The provisions of the AVMD can be in my view considered such Union law, thereby setting the standards for conformity and leading to the contractual remedies if they are not complied with.[80] Another case of non-conformity in practice relevant for digital content-providing services is addressed in recital 51 of DCD stating that short-term interruptions of the supply of a digital service should be treated as instances of lack of conformity if those interruptions are more than negligible or recur. Consequently, consumers are entitled to use contractual remedies, e.g., reduce the price for the time of such interrupted use of content service.

35 As indicated above, telecom companies also often offer bundle contracts where the complementary application of the EECC may come into play as it applies to the internet access provision, whereas the content-provision or video-sharing platform services part of the bundle are subject to the rules of the DCD and AVMD.[81] In case of such mixed services, the scope of applicable rules must be determined separately for each functionally definable service component.[82] Should the lack of conformity – be it interruptions of the service or breaches against the standards set for the content by AVMD – entitle the consumer to termination under art 14 DCD, then art 107(2) EECC allows termination of the whole bundle contract, including e.g. the rental of a TV box or installment sales of a smart TV.

E. Conclusions

36 In the near future, communication services will be subject to several new legal acts such as the new Digital Content Directive, the European Electronic Communications Code, as well as the revised Directive on Audiovisual Media Services. These directives are partly mutually exclusive but partly also cumulatively applicable. Number-dependent interpersonal communications services as a subtype of electronic communications services are excluded from the scope of the DCD and subject to the EECC. Number-independent interpersonal communications are subject to the DCD and partly also to the EECC.

37 Whereas the classification of an electronic communications service under the old Framework Directive depended on the technical design of the service, qualification under the new EECC is based on the end-user perspective, i.e., on a functional approach. Even though this functional approach is in principle easier to understand for the consumers, the delineation between the scopes of the EECC and the DCD is still complicated and leaves consumers in considerable uncertainty as to which legal regime is applicable to their communication services contracts. Yet, the legal consequences of falling within the scope of one or the other legal act are significant: only number-independent interpersonal communications services such as e-mail and messaging services are subject to the updating obligations and mandatory consumer contract rules of the DCD. On the other side, only number-dependent interpersonal communications services may be subjected to the general authorization requirement and the public warning system rules of the EECC: this is justified by the fact that only number-dependent services benefit from the publicly assigned numbering resources. Number-independent interpersonal communications service providers may use longer fixed-term contracts or foresee their automatic prolongation (unless precluded under national law) and they also benefit from a more generous modifications regime of the DCD compared with that of the EECC.

38 The contractual remedies of the consumers are different as well: whereas in case of number-independent interpersonal communications services consumers can resort to contractual remedies maximum harmonized in the DCD, consumer's

78 See AVMD, arts 6–6a.

79 For an in-depth analysis of objective conformity criteria, see Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (2020) 2 ERPL 235-237; Christian Twigg-Flesner 'Conformity of goods and digital content/digital services' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526228 24-27; Jorge Morais Carvalho 'Sale of Goods and Supply of Digital Content and Digital Servics – Overview of Directive 2019/770 and 2019/771' (2019) 8 EuCML 198-199.

80 Similarly, Hugh Beale, 'Digital content Directive and rules for contracts on continuous supply' (to be published in this issue).

81 See Martini (n 9) TMG § 1 paras 11-13 for the legal situation before the new directives were adopted.

82 Martini (n 9) TMG § 1 para 11.

remedies for breach of number-dependent interpersonal communications services are subject to national law plus art 105 EECC on termination. It is hard to see an objective justification for such different treatment of a consumer's contractual rights; connection to publicly assigned numbering plans and resources can hardly explain differences in the rules for price reduction, for example.

39 In cases where a digital communications provider acts also as a content provider, the digital content directive is applicable cumulatively with the revised AVMD. The provisions of AVMD concerning the standards of the content are to be considered part of the objective conformity criteria under art 8(1)(a) DCD entitling consumers to use contractual remedies if they are not complied with. Moreover, should the lack of conformity – be it interruptions of the digital TV service or violations against the standards set for the content by the AVMD – entitle the consumer to termination under art 14 DCD, then art 107(2) EECC allows termination of the whole telecom bundle contract, including e.g., the rental of TV box or installment sales of a smart TV. Entitling consumers to terminate the whole bundle contract in cases where only one part of the bundle is affected is a considerable improvement in the consumer's contractual rights compared to the previous rules.

40 All in all, the new directives bring about a considerable extent of contract law harmonization within the field of communications services as both the contractual rules of the DCD as well as the contractual end-user rights of the EECC are mostly maximum harmonizing.[83] Under the former legal regime the end-user rights were formulated on the minimum harmonization principle and there were no European contract law rules applicable to the digital content contracts. At the same time, one must admit that the new rules also make it more difficult to orient oneself in the maze of their scattered and intertwined rules and it is hard to see a convincing policy reason behind the different treatment of a consumer's contractual remedies.

83 This is, however, not always seen as a positive development. For example, BEREC has criticized the maximum harmonization approach because it does not allow flexible reaction to market changes and specific needs of consumers on national markets. Joachim Scherer, Caroline Heinickel, 'Ein Kodex für den digitalen Binnenmarkt', (2017) Multimedia und Recht 76.

Internet Of Bodies: Digital Content Directive, And Beyond

by **Cristina Amato***

Abstract: "Internet of Bodies" (IoB) is the new frontier of digital technologies challenging our lives as individuals and as a society. The European Union has not yet set up a coherent and complete regulatory framework dealing with the "Internet of Everything". This paper aims at describing the possible implications of the new technologies in search for responsible legal reactions. After defining IoB and some uncomfortable problems raised by it, the paper faces the topic of what can law and policy do in order to provide a set of rules adequate for supporting sustainable data-driven technologies. The current legal framework is essentially designed by the Digital Content Directive, the Product Liability Directive and the product safety legislation framed into a multilevel layout, as set up by the New Legislative Framework and by the European Standardization System. The article argues that it is within this regulatory framework that new technologies should be controlled, although a substantial institutional revision of co-regulation in the light of plurality and transparency is still desirable.

Keywords: IoB; Digital Content Directive; Product liability Directive; NLF; ESS

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A. Introduction

1 "... We are unquestionably entering a technological age where the line between the human body and the machine is beginning to blur. Many human bodies will soon become at least occasionally reliant on the Internet for some aspect of their functionality, and the energy of the human body is already being used experimentally to mine cryptocurrency. Just as the Internet of Things has networked our possessions into a 'cloud' of shared gadgetry, so too our bodies are slowly becoming networked into an "Internet of Bodies".[1] Science fiction movies like *The Matrix*[2] or *Brazil*[3] have already introduced humans to the possibility of melding with machines. Although the current representations do not correspond to a waste land picture, the relationship between humans and digital devices may open the curtain on dystopian scenarios. This paper aims at describing the possible implications of the new technologies, in search for responsible legal reactions. It is structured as follows: first, IoB is defined, and its most popular applications shall be listed (**B.**); at a second stage, some uncomfortable problems raised by Internet of Bodies ("IoB") but derived from unresolved questions with the Internet of Things ("IoT") shall be proposed, and related issues specifically linked to IoB shall be stressed (**C.**). Once the descriptive background has been settled, a third section shall deal with the topic of what can law and policy do in order to provide a set of rules for a sustainable technology. Having this goal in mind, the applicability of the Digital Content Directive ("DCD") to IoB will be checked, especially under the effectiveness perspective (**D.**). Because this regulatory solution does not seem to be completely satisfying, a fourth Section introduces

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1 Andrea M Matwyshyn, 'The Internet of Bodies' (2019) 61 Wm & Mary L Rev 90, who claims (at nt 45) the authorship of the phrase "Internet of Bodies".

2 1999, directed by The Wachowskis sisters.

3 1985, directed by T. Gilliam.

a wide definition of security to be found outside contract law and within products' safety legislation, linked to the Product Liability Directive ("PLD") but essentially framed by a multilevel layout, as set up by the New Legislative Framework and by the European Standardization System (**E.**). Final remarks shall underline why this multilevel layout is not completely adequate to the challenges launched by IoB and new digital technologies, rather it needs a substantial institutional revision in the light of plurality and transparency (**F.**).

B. What is the IoB? A World of Fun or Dystopian Stories

I. Functionalities

2 Specialised literature defines IoB as "a network of human bodies whose integrity and functionality rely at least in part on the Internet and related technologies, such as artificial intelligence".[4] A varied scenario opens where chips and bodies stick or blend. The human body becomes the new technology platform depending on bits and the Internet, turning into a "cyborg": a being with both organic and bio mechatronic body parts.[5] The incorporation of technology into human bodies relies on: the widespread availability of high-speed interconnectivity; the faster computational capabilities permitting real-time analysis of Big Data (the so-called 3V's: high volumes, high velocity and high variety); and the lowering costs of chips and sensors with their increasing reliability at the same time.[6] In this scenario we may appreciate the evident advantages for health care and wellness; or we may catch a glimpse to dystopian episodes taken from the Netflix series "*Black Mirror*",[7] and even predict the commodification or thing-ified nature of the human body, where it may serve in a near future as fungible and rentable commodity for physicality or energy extrusion.[8]

3 The "spectrum of technohumanity"[9] ranges from a simple model of the mechanically extended human where our existential nature is still preserved; to a sophisticated model of AI domain where human flesh and organs are permanently embedded into hardware and software. Our human essence thus turning into a semi-digital platform that needs on-going updating, subject to the new generation of hackers' attacks (biohacking and hackathons, or hacking senses; brain jacking).

4 The IoB devices can be diachronically divided into three generations (at **B.II.1.**). Their functionality can be distinguished into: medical devices (e.g. robotic surgery, like in the case of prosthetics that the patient operates on his own from a mobile phone); general wellness (e.g. health monitoring tattoos, temporary tattoos to control various wireless devices, and wearable skin, like super-thin wearable that can record data through skin instead of sensor[10]); educational/recreations devices (e.g. fitness trackers, electronic skin with organic circuit, smart watches, connected glasses or helmets, in-ear translators, and eye-mapping); workers' environment devices (e.g. Amazon's wristband that conducts ultrasonic tracking of workers' hands to monitor performances, Microsfot Brain-Computer Interface that is a direct communication pathway between an enhanced or wired brain and an external device that allow users to operate computer with their thought,[11] and Brain-to-Vehicle (B2V), a new

4 Andrea M Matwyshyn, 'The Internet of Bodies' (2019) 61 Wm & Mary L Rev 77.

5 Manfred E Clynes and Nathan S Kline, 'Cyborgs and space' (1960) Astronautics, September, 26-27 ; S Navas Navarro and S. Camacho Clavijo, *El ciborg humano. Aspectos jurídicos* (Comares, 2018).

6 Scott J Shackelford, 'Governing the Internet of Everything' (2019) 37 Cardozo Arts & Ent LJ 701, 705.

7 Eleonore Pauwels and Sarah W Denton, 'The Internet of Bodies: Life and Death in the Age of AI' (2018) 55 Cal W L Rev 221, 227.

8 As in the case of Human Uber, developed by a Japanese researcher, Jun Rekimoto: it is a special screen strapped to a person's face paid to live on your behalf with your face and dresses: https://www.independent.co.uk/life-style/gadgets-and-tech/news/human-uber-telepresence-robot-ipad-face-carry-round-live-life-pay-service-researcher-a8189836.html; In 2015, the Institute of Human Obsolescence (a Dutch start up) has launched a very peculiar project which is also an art installation: a body suit that harvests excess human body heat to mine cryptocurrency: https://thenextweb.com/cryptocurrency/2017/12/12/startup-uses-body-heat-to-mine-crypto-for-when-robots-take-jobs/#:~:text=IoHO%20created%20a%20body%20suit,potential%20to%20grow%20in%20value.

9 See Andrea M Matwyshyn (2019, nt 1) 166, who identifies five steps on the "spectrum of technohumanity".

10 See "The verge": https://www.theverge.com/2017/7/17/15985940/wearable-electronic-skin-nanomesh-health-monitoring.

11 https://www.microsoft.com/en-us/research/project/brain-computer-interfaces/#:~:text=Brain%2DComputer%20Interface%20(BCI),its%20external%20or%20internal%20environment.

technology presented by Nissan, which connects driver's brain with the vehicle to anticipate the driver's intentions behind the wheel, creating more comfortable and safer driving experiences).[12]

II. The Three IoB Generations

1. IoB Body External

5 The first generation of IoB that can be currently found in the market is "*body external*": technological devices connected to the Internet; they are not embedded in flesh or in organs. They are usually 'self-archival', which means that users stock their own data for their use (i.e. tracking). The most popular IoB devices are Fitbit, the Apple Watch (that identifies irregular heart rhythms, including those from potentially serious heart conditions like fibrillation)[13] and other connected fitness tracking devices, such as smart glasses and breast pumps. Even in the first generation of IoB there is a trend (defined as 'Quantified-Self Movement')[14] to accept, or foster third-party big data research, in health applications[15] as well as in educational settings.[16] Reflection, in addition to tracking, is so far becoming an added value for health care and general wellness. The marketing and use of these types of IoB devices raises the main issues of conformity and serviceability, as well as of data protection;[17] although security problems also appear at this level, as will be argued hereafter. The IoB privacy policy may imply a poor user's consent, especially when personal data are processed by third-party big data processors in the case of interoperational or tethered devices.[18] In such cases the exclusion of "entrusted persons" by users is often functionally impossible or inconvenient. This situation may disarm the DCD defence mechanism that expressly connects objective and subjective conformity to compliance with the requirements of "data protection by design" envisaged by the Regulation (EU) No. 679/2016 ("GDPR").[19]

12 https://global.nissannews.com/en/releases/180103-01-e?source=nng#:~:text=The%20company's%20Brain%2Dto%2DVehicle,trade%20show%20in%20Las%20Vegas.

13 https://www.apple.com/watch/.

14 "This movement promotes the use of devices that not only 'solve problems related to health' but also produce data ... as a way of knowing oneself:" Craig Konnoth, 'Health Information Equity' (2017) U PA L Rev. 1317, 1341-2.

15 Collecting human health data and processing them may generate a picture of our health through detailed information that we would not be able to disclose to a health care provider. Such processes of data collection may dramatically enhance the possibilities to cure human vulnerabilities: Kate Crawford & Jason Schultz, 'BigData and Due Process: Toward a Framework to Redress Predictive Privacy Harms' (2014) 55 BC L Rev 93, 98; Frank Pasquale, 'Grand Bargains for Big Data: The Emerging Law of Health Information' (2013) 72 MDL Rev 682, 684.

16 E.g.: connected brain sensing headbands to monitor students' attention.

17 Andrea M Matwyshyn, 'Unavailable' (2019) 81 U PITT L Rev 349; Id., 'The Security Mistakes Big Companies Make When Buying Tech', WALL ST. J. (Mar. 13, 2017). The safe processing of data by design can be challenged even under the Regulation No 679/2016: the lawfulness of a data processing depends on the data subject consent, or on the legitimate interests pursued by the data controller (art. 6(1)(a) and (f)). As underlined in Recital 47 "The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a *third party*, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where *the data subject is a client* or in the service of the controller".

18 Tethered goods or services "maintain[ing] an ongoing connection between a consumer good and its seller that often renders that good in some way dependent on the seller for its ordinary operation": Chris J Hoofnagle and Aniket Kesari and Aaron Perzanowski, 'The Tethered Economy' (2019) 87 G WASH L Rev 785.

19 DCD Recital 48 gives an example of objective non conformity of a digital device: "if the trader of data encryption software fails to implement appropriate measures as required by Regulation (EU) 2016/679 to ensure that by design personal data are not disclosed to unauthorised recipients, thus rendering the encryption software unfit for its intended purpose which is the secure transferring of data by the consumer to their intended recipient". As a matter of fact, in the IoB magic box the intended purpose of a data encryption software is not only the secure transferring of data, but interoperation with other devices that require de-encryption of the transmitted data: if this is the case, users shall be willing to give their consent to third-party processing.

2. IoB Body Internal

6 The second generation of IoB technologies is "*body internal*": it refers to devices where a portion of them resides inside the body or accesses the body by breaking the skin. Existing examples in the market mainly concern medical devices: pacemakers with digital components; Bluetooth cochlear implants; IoB artificial pancreas with an insulin delivery system for diabetes mellitus that is connected to software and smartphones; chips with cameras for heart surgeries; sensor–enabled sutures with data collectors for healing wounds. Other examples include prosthetics smart products (like bionics arms; electrodes array directly implanted on the brain enabling amputees to move prosthetic digits with their thoughts alone; brain implants to restore sight to the blind; brain implants with four sensor strips wirelessly connected to a computer interface that allows the patient to type out messages using their eyes and brain) and IoB devices hardwired into patients' nerves and muscles (like open-source-smart prosthetics for wounded veterans). When chips enter into human bodies, besides conformity and privacy protection, the slippage from health care to the promotion of wellness through the implant of non–medical devices[20] raises a delicate issue: security, which may affect both the human body as well as public safety.[21]

3. IoB Body Embedded

7 The third generation of interoperating digital technology refers to "*body embedded*" digital devices, like injected or implanted brain computer interfaces (direct cortical interfaces) that work in a bidirectional (read/write) manner externalizing portion of human mind. Current applications of these brain prosthetic components are limited to treating humans with Alzheimer's, Parkinson's, and epilepsy. They also help veterans recover from post-war memory loss and traumatic experiences. Slippage into non-medical uses of third-generation IoB directly leads to the cyborg human where brain enhancement and uploadable knowledge will become added values, thus raising more problematic issues like the loss of control on cognitive processes. This danger deserves deep reflections on private and public fallouts. Medical and non-medical body-embedded IoB raise not only conformity and data protection issues as described above (at. **B.II.1.**), but also serious security issues (at **B.II.2.**) legal questions related to body-property and its disposition,[22] the deterioration of autonomy and heautonomy processes necessary in our understanding of experience and in achieving knowledge and pleasure.[23] The private sphere of human values is not the only topic to be tackled. Tightly linked to the security threat and the loss/decline of reflective judgment is their public impact

20 Existing examples are: a self-implanted chip vibrating whenever the wearer is facing north; a fused implant to brain to have colours transformed into musical tones; digital pills with a 3D printed circuit and a transmitter inside the capsule, connected to a smartphone to monitor gas levels in the human intestinal tracts, and track variability driven from food consumption; swallowable pills patented by British Airways to monitor customer experiences on flights: https://www.independent.co.uk/travel/news-and-advice/british-airways-ba-digital-pill-patent-flight-services-cabin-crew-a7451771.html

21 Security involves mainly two sets of issues, usually separately dealt with by scholars: "pipes" issues, involving "network neutrality" (availability, access and design of high quality, stable Internet infrastructures); "people" issues (economic and social impact of Internet infrastructures on end users): Tim Wu, 'Network Neutrality, Broadband Discrimination (2003) 2 J ON TELECOMM & HIGH TECH L. 141, 145; Frank Pasquale, 'Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries' (2010) 104 NW U L Rev 105, 128; Andrea M Matwyshyn, 'Unavailable' (nt 17) 349; Jamie Condliffe, 'How to Get One Trillion Devices Online' MIT TECH Rev (Sept. 20, 2017), https://www.technologyreview.com/s/608878/how-to-get-one trillion-devices-online/; Eleonore Pauwels and Sarah W Denton, 'The Internet of Bodies: Life and Death in the Age of AI' (2018) 55 Cal W L Rev 230; Id., 'There's Nowhere To hide: Artificial Intelligence and Privacy in the Fourth Industrial Revolution' (2018). https://www.researchgate.net/publication/324451812_Nowhere_to_Hide_Artificial_Intelligence_and_Privacy_in_the_Fourth_Industrial_Revolution

22 Radhika Rao, 'Property, Privacy, and The Human Body (2000) 80 BULRev. 359, 406 f.; Devin Desai, Privacy – Property. Reflections on the Implications of a Post-Human World, 18 KAN. J.L. & PUB. POLY 174 f.

23 Immanuel Kant, *Critique of Judgment* (Nicholas Walkers, tr., Oxford World's Classics, Oxford 2007), *Introduction*, §§ 183-188. Understanding as laws is a (necessary) *a priori* in possession of universal laws of nature. It allows us to form a connected experience from given perception of a nature containing an endless multiplicity of empirical laws. Over and above the understanding as laws, it lays at the basis of all reflections a principle, a *reflective judgment* that attributes to nature a transcendental purposiveness. This judgment too is equipped with an *a priori* principle: it prescribes a law to itself as *heautonomy*, the law of the specification of nature, to guide its reflections upon nature (*autonomy)*, which cannot determine anything *a priori* on the basis of empirical and contingent objects. The law of specification of nature is not prescribed by nature nor by observation: only so far as that principle (heautonomy based on reflective judgment) applies, can we make any headway in the employment of our understanding in experience, or gain knowledge. While we do not gain any pleasure from the perception of categories, the discovery that two or more empirical heterogeneous laws of nature are allied under one principle is a ground for a very appreciable pleasure.

on values affecting the entire society that eventually results into dramatic attacks to deliberative democratic mechanisms.[24]

C. The Dark Side of Interoperability and Tethered Devices

8 Once they meet human bodies, interconnected devices clearly bring along questionable fallouts that have raised serious doubts.[25] Legacies[26] inherited from the IoT become much more threatening; the obsession for connectivity and the corresponding total trust in technology[27] may have disruptive effects on physical integrity of the human body as well as on public security. The "commodification of data" may turn the human body into a "platform" itself, broadcasting huge amounts of personal data and thoughts that – once connected to other body-embedded devices – may not only jeopardize the human bodies' physical integrity, but may facilitate third-party attacks or even the influence on our minds, thus undermining not only our health but even our deliberative internal processes.[28] On the other hand choosing to disconnect an internal or embedded device when an interconnected device is not working better implies a fully informed consent concerning the related obsolescence that shall affect the device. Nevertheless, free choice in a free market cannot be taken for granted.[29] It is doubtful that manufacturers would be willing to disclose updating costs or the prices of fungible goods or services with the same or higher level of interconnectivity, although the DCD prescribes for digital content or services delivered on the market at a "normal" level of conformity for items of the same type (art. 8(1)(a)(b): at **D.IV.**). In the end, the average consumer would suffer (physical) damages related to obsolescence and "digital dementia" by simply accepting to disconnect (or by accepting a poor updating) her device through general terms of use included in the sale agreement.[30] Interconnectivity, interoperability and tethering strategies present a dark side that deserves deep reflections on the private and public risks linked to the functionality of the digital tools we expect to break into the market and into our future. Medical, healthy lifestyle, employment, recreational or educational devices present different impacts on health and wellness that we may consider lead to ethically "tragic choices" in favour of recognised and protected human values by the Treaty and the EU Charter. It is also of the utmost importance that the IoB "cargo" may travel in regulated waters and land in safe harbours. Does the DCD represent the proper and unique toolbox able to steer the ship skilfully, or should we envisage a more complex regulatory system that may provide a responsible "security by design" for IoB future technology?

D. The Current Legal Framework

I. Law of Contract and Law of Tort for the IoB Magic Box

9 The two Directives adopted on the 20th of May in 2019, 2019/770/UE on digital content and digital services ("DCD") and 2019/771/UE on sales of goods ("SGD") have finally completed a path started in 1999 by the European Commission (Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees and the aborted CESL), with the goal of creating a set of rules derived from sales law but bound to become a model for a new approach to contract law2.0.[31] Directive 2019/770/

24 Neil Richards, 'Intellectual Privacy: Rethinking Civil Liberties in the Digital Age' (Oxford University Press, Oxford 2015) 6; Andrea M Matwyshyn 'The Internet of Bodies' (nt 1) 159 f.

25 "Is the human body an existential construct to be protected and preserved, or is it merely an outdated 'operating system' or 'platform' awaiting an upgrade from new technologies"? Andrea M Matwyshyn, 'The Internet of Bodies' (nt 1) 165.

26 Andrea M Matwyshyn, 'The Internet of Bodies' (nt 1) 116 f.

27 The magic world of technology explains users' over-reliance on digital devices, even though they meld with our bodies. This trustworthiness phenomenon in turn generates a "vulnerability by design": manufacturers are not very much concerned with delivering the safest high tech products; they have much more incentives in delivering them as fast as the market demands.

28 "When we build technologies that allow for owing and pawning of (parts of) human bodies – regardless of whether those rights of access are controlled by the public or the private sector – we risk of undermining the process of 'self-self governance' that Kant highlighted as essential to autonomy and freedom": Andrea M Matwyshyn, 'The Internet of Bodies' (nt 1) 163-4.

29 A full informed consent can be envisaged when public figures are involved: Dick Cheney, G. Bush S. vice-President from 2001-2009, obtained technical changes to his interconnected pacemaker because he feared to be attacked and murdered via medical device.

30 Andrea M Matwyshyn, 'The Internet of Bodies (nt 1) 124 f.

31 Sebastian Lohsse and Reiner Schulze and Dick Staudemayer, *Data as Counter Performance - Contract Law 2.0?* (Baden-Baden: Nomos 2019); Cristina Amato, 'Dal diritto europeo dei

UE, in particular, aims to provide a first approach to technology regulation. My argument is that its scope and contents do not cover all the main issues raised by interconnected digital contents or services because on one side it is too detailed; while on the other side, it needs to be integrated by sector-specific regulatory provisions or standards. The contractual approach itself is not adequate to face the "Internet of Everything"[32], as the central notion of conformity in the DCD brings about a trader's liability restoring damages *to* digital devices, not injuries caused *by them*. In the latter case, the law of tort supplies, currently led by PLD, and completed by a multilevel layout concerning product safety that is intended to be superseded by a new regulatory framework facing the fallouts of artificial intelligence and machine learning.

II. Policy and Goals of the DCD

10 The first doubts of the DCD concern the policy to which it is subject to. Art. 1 and Recital 2 refer to regulatory measures establishing or ensuring the functioning of the internal market, protecting consumers, and striking the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises. The IoB world is populated with users. "Consumers" is a term referring to a restricted category of users who do not need protection (as meant in consumers' *acquis communautaire* policy: levelling the playing field) but eventually a barrier against the commodification of their bodies. IoB discipline should thereforestrike the balance between protecting health and enhancing innovation.

11 Harmonization is said to be the goal of the DCD in order to reach a genuine Digital Single Market (Art. 4 and Recital 3); while the future of IoB should look further on to the preservation of shared values, rights and freedoms carved into the Treaty and the EU Charter.[33] Body embedded IoB challenges human dignity (art. 1), physical and mental integrity (art. 3), the right to liberty and security (art. 6), freedom of thought and conscience (art. 10).

III. Scope and Range of Application

12 The second critical observation on the DCD concerns its scope and range of application. Squeezed among several general or specific regulatory instruments, the DCD applies to digital contents supplied by a platform provider that are exchanged for money *or* personal data,[34] independently of the medium used for the transmission of or for giving access to the digital content or service (Recitals 19, 41). Nevertheless, digital contents or services incorporated in or inter-connected with goods shall be covered by the sales of goods contract (art. 3(4)), as regulated by dir. 2019/771/UE, *unless* the good as tangible medium serves *exclusively* as a carrier (art. 3(3)). The DCD range of application (Recital 41) includes computer programmes, applications and also digital services that allow creating, processing, accessing, or storing data in digital form, including software-as-a-service (such as video and audio sharing and other file hosting), taylor-made software and 3D print, and typical IoB body external devices like fitness-trackers[35]. However, there is no certainty concerning chips. They are goods with digital elements and the tangible medium might be considered as an exclusive carrier' nevertheless, art. 3(4) presumes that the digital content or service is covered by the sales contract. The uncertainty in establishing what is covered by the DCD is further complicated by the different regimes applicable to similar digital contents. Medical devices, in particular, are covered by the DCD directive if they consist of health applications that can be obtained by the consumer without being prescribed or provided by a health professional; otherwise they will be covered by sector-specific provisions.[36] Another issue related to the DCD scope concerns data as tradable assets. As mentioned above, the DCD deals not only with digital contents and services paid with money, but also traded with personal data. Nevertheless, the application of the Directive is limited to data processed for *other* purposes than supplying digital contents or services. One example (provided by Recital 25) refers to registration required by traders for security or identification

contratti 1.0. agli *smart contracts'*, in Rossella Cerchia (ed.), Lezioni di dottorato, *forthcoming*.

32 Scott J Shackelford, 'Governing the Internet of Everything' (nt 6) 701 f.

33 COM (2019) 168 final 2.

34 In cases where consumers paid the price *and* gave personal data, no hierarchy of remedies should be in question, but they should all be available (Recital 67).

35 Piia Kalamees and Karin Sein, 'Connected Consumer Goods: Who is Liable for Defects in the Ancillary Digital Service'? (2019) EuCML 13. With reference to the proposals of Directives on digital contents and services, and on sales of goods the Authors underline the unclear liability regime for defective connected goods.

36 DCD Recital 29, which refers mainly to Directive 2011/24/EU and Directive 93/42/EEC (now superseded by Regulation (EU) 2017/745).

purposes. This distinction is questionable on two grounds: first, security in data-driven technologies should always remain a responsible purpose even though data represent the price exchanged for digital contents or services; second, the valid conclusion of a contract through the exchange of personal data is an issue left to Member States' national contract law (see Recitals 24, 25). This legislative choice jeopardizes not only certainty but also, the users' non-discrimination within the internal digital market. More controversial is the connection of personal data as counter-performance with the GDPR as this issue opens up to the consent dilemma. As argued above (at **B.II.1.**) it is difficult for users of digital contents or services to deny their consent to the processing of their data by third-parties, but it is even more problematic for them to withdraw it or restrict the personal data processing in compliance with arts. 7(3) and 18 GDPR. The DCD does not provide any answer, nor can it be inferred from it or the sales law system when the consent we are dealing with concerns interconnected health care devices as correct functioning may undermine the wearer's physical or moral integrity.

IV. The Conformity Requirements: A Short Cover for IoB

13 It is generally acknowledged that the essential feature of the DCD concerns the notion of conformity that - together with the obligation to supply in due time (art. 5) - defines the seller's liability and assigns consumers the corresponding remedies.[37] Within the limits of this intervention, subjective (art. 7) and objective (art. 8) requirements for conformity as well as integration of digital contents and services (art. 9) sketch a complete spectrum of the traders' obligations to comply not only with the *contractual* requirements (functionality[38], compatibility, interoperability[39], updating, fitness for a particular purpose and other features as required by the contract), but also with *statutory criteria,* involving the consumers' digital environment as well.[40] The objective definition of fitness for purpose for which digital content or digital services of the same type would normally be used takes into account any existing Union and national law, as well as technical standards[41] or applicable sector-specific industry codes of conduct (art. 8(1)(a)). By the same token, conformity consisting of accessibility, continuity and security normal for digital content and services of the same type that the consumer may reasonably expect refers to *legal notions* that can be found into Union or national sector-specific regulatory instruments (art. 8(1)(b)). Therefore, these provisions represent the necessary link between the contractual discipline set up in the DCD and a security multilevel system projected into the future of IoB. As a matter of fact, the DCD reveals gaps and inconsistencies that render its regulatory framework inadequate for the complexity of devices interoperating with human bodies. Three features in particular demonstrate this assumption and deserve further development: updating, contracting out and modifications aimed at maintaining conformity.

14 Regarding the first, it is considered both as a subjective requirement for conformity and as an objective one (arts. 7(d), 8(2)); although the consumer remains *free* to install or not install updates (Recital 47). While the recognised freedom of the consumer may have limited impact where body external IoB non-medical devices are involved (like fitness trackers or smartwatches[42]), the same cannot be said when the updating concerns self-implanted healthy lifestyle chips, electronic skin with organic

37 Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771 (2019) 5 EuCML 194 f.; Jozefien Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' (2020) 2 ERPL 259 f.

38 Absence or presence of Digital Rights Managements (Recital 43).

39 Successful functioning could include, for instance, the ability of the digital content or digital service to exchange information with such other software or hardware and to use the information exchanged (Recital 43).

40 See Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (2020) 2 ERPL 236, according to whom conformity has essentially an objective meaning referred to statutory criteria, while subjective criteria required by the contract are provided in addition.

41 "When applying the rules of this Directive, traders should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used and machine-readable format for retrieving the content other than personal data, which was provided or created by the consumer when using the digital content or digital service, and including on the security of information systems and digital environments, whether established at international level, Union level or at the level of a specific industry sector. In this context, *the Commission could call for the development of international and Union standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of this Directive*" (Recital 50).

42 The impact on body external devices may turn to be substantial, when security jeopardized by data breach is involved: see nt. 72.

circuit, wearable skin, or ingested digital pills. More dramatically, medical devices (e.g. pacemakers with digital components) provided by health care professionals and not covered by the DCD, as well as rules and prescriptions on updating and producer's liability should be found in sector-specific provisions and in the law of tort.

15 Regarding contracting out, art. 8(5) of the DCD excludes the lack of conformity and the trader's liability in contract if the consumer expressly and separately accepted that a particular characteristic of the digital content or service was deviating from the objective requirements for conformity. This provision represents an easy way out for traders that may be accepted in (certain) situations where an IoB body external device has been purchased, like in the case of a fitness tracker;[43] but it casts serious doubts when the objective requirement of conformity waived by the consumer regards the security of self-implanted medical devices (like pills) or external healthy lifestyle devices (like pump breasts or wearable skins). On the other hand, security as well as functionality, compatibility, accessibility, and continuity affecting body internal or body embedded medical devices provided and implanted by health care professionals should be dealt with outside the law of contract.

16 The third critical feature of the DCD concerns modifications aimed at maintaining conformity (art. 19, Recital 75). On one side, the trader is allowed - under certain conditions listed at art. 19(1) - to modify digital content or digital services provided that the contract gives a valid reason for such a modification (art. 19(1)(d)) and, unless the trader has enabled the consumer[44], to maintain (without additional costs) the digital content or service in conformity even without the modifications. Once again, this mechanism implies a high level of freedom and true informed consent on the side of IoB users, which is not necessarily the case in a high technology and data-driven market that may already have blurred individual heautonomy.

17 A last but supportive thought on the DCD is devoted to the incorrect integration of the digital content or service into the consumer hardware and software environment. This requirement for conformity is particularly interesting in the IoB world, as it cannot be waived by consumers nor contracted out by traders. Together with a crucial subjective requirement for conformity that is interoperability, it positively affects IoB products that perform their functions with alternative hardware/software already possessed by the IoB user.

V. The Effectiveness of Traditional Sales Remedies on IoB Devices

18 The remedies mentioned by the DCD take over the remedies and their hierarchy already put forward by the Directive 1999/44/EC with the necessary adaptions required by the digital object of these products. Therefore, instead of repair or replacement, art. 14 entitles the consumer "to have the digital content or service brought into conformity" provided that it does not bring disproportionate costs, thus leaving the trader with the task of reaching the statutory goal regarding the nature and functionality of the digital content. As in Directive 1999/44/EC, consumers are entitled to the reduction of price (but only if the lack of conformity is not minor) and termination of the contract only when conformity cannot be achieved, as in the instances expressly provided by the law (art. 14(4)). In the IoB world, these remedies should be considered "a first step"[45] as in most cases, reduction of price or termination of the contract in particular may be at odds with the nature and functionality of non-medical internal or embedded devices (see nt 20)[46]. As already observed, IoB medical devices implanted by health care professionals are not covered by the DCD. Related remedies against producers' or distributors' liability shall follow sector-specific provisions and the law of tort.

43 It is doubtful that the user's acceptance of a deviation from objective requirements for conformity shall bring no injury to her when certain body external devices connected to human brain are involved, as in the case of Microsoft Brain-Computer Interface or the Brain-to-Vehicle (B2V) Nissan model (at **A.I.1.**).

44 This possibility may be given to users through Digital Rights Managements' codes, or "DRM". In truth, recourse to these technologies is usually made by producers on their own goods or services, in order to control and limit purchasers' usage of the digital product.

45 Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (nt 40) 222.

46 Whether technology itself, through specific software and codes – like blockchains - might replace the traditional remedies is a complex issue investigated by several representatives of civil law as well as in the common law tradition: Scott J Shackelford, 'Governing the Internet of Everything' (nt 6) 701, 724; Cristina Poncibò, *Il diritto comparato e la «Blockchain»*, ESI, 2020.

E. The Safety and Product Liability Regulatory Framework Under Test.

I. Preliminary Remarks

19 The short insight into the DCD applications to the IoB digital contents or services reveals its poor effectiveness, as the most significant items belonging to the heterogynous and futuristic magic box of the interconnected IoB world either are not covered by the DCD (as it the case for medical devices, that deserve special legislation[47]), or the non-conformity in terms of safety may generate injuries to physical or mental human integrity traditionally not covered by contract law. Besides, the problem of drawing a line between sales of goods and product liability has already been faced by Directive 85/374/EEC at art 9(b), dealing with limiting damages to items of property other than the defective products itself. Together with the sales of goods Directive 2019/771/UE, the DCD "open[s] up the process of legislative adaptation of European private law in the transition towards a digital economy",[48] but it needs to be integrated into cross-sector regulatory instruments where data and technology converge in a responsible way. "The convergence of physical and digital worlds, in turn, blurs the boundaries between traditional sectors and industries, products and services, consumption and production, online and offline, and therefore challenges standard setting processes. Interoperable solutions based on open systems and interfaces keep markets open, boost innovation and allow service portability in the Digital Single Market".[49] As argued at **D.VI.**, conformity assessment seems to be a founding element of dir. 2019/770/UE and of the European Private Law 2.0. Nonetheless, the issue in the IoB world is not only serviceability, which is whether a product or a service works or not, but also fitness for the purpose. In the IoB world, the goals to be achieved through an innovative regulatory process are safety, which is protecting life and health, as well as desirability; these can all be included in a wider meaning of "security". In this perspective, the European layout set up to guarantee the quality chain of products within the single market may serve as the institutional framework of co-regulation where the cooperation between public regulators and private entities shall enhance innovation while protecting public interests.

20 Where then can we find the proper regulatory framework for IoB? The portal to a sophisticated safety and product liability regulatory framework is represented by the PLD on liability for defective products. High technological products distributed on large scale are required to comply with technical standards. A modern construction of the PLD that can adapt to new technologies creates a link[50] between the product liability framework and the safety legislation by adopting a multilevel layout based on the dialogue involving public entities, private standardisations organisations and the relevant stakeholders. This current layout (defined as Consumer Safety Network) has been set up by safety legislation[51]. It works with expert groups (that include Member States' representatives and private stakeholders like industry and consumer associations) and is complemented by market surveillance conferred to national authorities.

21 Although the current safety legislative framework can be considered highly sophisticated[52], it has

47 Scott J Shackelford and Michael Mattioli and Steve Myers and Austin Brady and Yvette Wang and Stephanie Wong, 'Securing the Internet of Healthcare' (2018) 19 MINN JL SCI & TECH 405 f.

48 Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (nt 40) 220.

49 COM (2016) 176 final "ICT Standardisation Priorities for the Digital Single Market" 3.

50 The link between safety and liability is provided by art. 7 let (d) of PLD, the compliance defence, according to which: 'The producer shall not be liable as a result of this Directive if he proves: (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities': Cristina Amato, 'Product Liability and Product Security: Present and Future', in Sebastian Lohsse and Reiner Schulze and Dirk Staudermayer (eds.), *Liability for Artificial Intelligence and the Internet of Things. Munster Colloquia on EU Law and the Digital Economy* (vol. IV, Nomos 2019) 77-95.

51 Directive 2001/95/EC on general product safety; Directive 2006/42/EC, Machinery Directive; Directive 2014/53/EU on Radio Equipment.

52 A negative example of sophisticated co-regulation layout is represented by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation founded in California in 1999 with a mandate to govern the technical architecture of the Internet and in particular to control the lucrative ".com" domains. The reason for its failure is apparently grounded on a complicated hybrid governance structure that includes representations from stakeholders' groups and national governments: Michael A. Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution' (2000) 50 DUKE L.J. 17, 29; John Palfrey, 'The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed' (2004) 17 HARV. J.L. & TECH. 409, 429, 460; Jonathan Weinberg, ICANN and the Problem of Legitimacy (2000) 50 DUKE L.J. 187, 210; Kevin Werbach, 'The Song Remains the Same:

been structured before AI and emergent technologies; therefore, it is necessary to evaluate its persisting safety and security-by-design effectiveness.[53] "AI systems should integrate safety and security-by-design mechanisms to ensure that they are verifiably safe at every step, taking at heart the physical and mental safety of all concerned".[54] Although a lively debate around regulating the digital environment has been raised years ago, a theory of (complete) Internet governance has not yet been fully developed. Within the limits of this intervention, I will not address the crucial issues concerning the role of traditional sovereigns, on one side, and of powerful market players, on the other side, nor the related issue of whether Internet users should govern their own interoperability in the cyberspace. Suffice it to recall the discussion started around the finding that governmental regulation is rigid, it takes long times for approval, and ends into an excess of bureaucratic rules. As argued above (at **D.**), dir. 2019/770/UE represents a clear example of this assumption. Such a regulatory process may negatively affect both innovation (which advances faster than regulation[55]) and public interests (the sovereign powers being captured by private interests[56]). The 'cyber libertarianism' movement dramatically expressed the mood of the first generation of cyber spacemen against state regulatory powers when in 1996, J.P. Barlow published the *manifesto* of the independence of the cyberspace. He addressed the Governments of the Industrial World as tyrannies and he stressed their lack of moral right to rule by methods of enforcement and of consent.[57] On the other hand, it is doubtful that the sovereignty of the private sector in the Internet world would be desirable. By the same token, it would be questionable to rebut cyber libertarians or supporters of private sectors regulatory power with the opposite argument of promoting the *prevalent* sovereign power and legitimacy of governments and legal systems to efficiently regulate cyberspace as the "cyber realist movement" attempted to do.[58]

What Cyberlaw Might Teach the Next Internet Economy' (2017) 69 FLA. L. Rev. 948 f.

53 COM (2020) 64 final "Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and Robotics". While waiting for the proofs, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council (COM(2021)206). The aim of this Proposal is to put forward a legislation for a coordinated European approach on the human and ethical implications of AI and the development of an ecosystem of trust, by proposing a legal framework for trustworthy AI. The option preferred in the Proposal is a regulatory framework for high-risk AI systems.

54 COM (2019) 168 final "Building Trust in Human-Centric Artificial Intelligence" 5.

55 I refer to the so-called "Collingridge dilemma": "Potential benefits of new technology are widely accepted before enough is known about future consequences or potential risks to regulate the technology from the outset, while by the time enough is known about the consequences and possible harms to enable regulating it, vested interests in the success of technology are so entrenched that any regulatory effort will be expensive, dramatic and resisted": Morag Goodwin, 'Introduction: A Dimensions Approach to Technology Regulation', in Morag Goodwin and Bert-Jaap Koops and Ronald Leenes (eds), *Dimensions of Technology Regulation* (Wolf Legal Publishing, 2010) 1, 2; David Collingridge, *The Social Control of Technology* (Pinter 1980) 11 defined it as the "dilemma of social control".

56 Public choice theorists have demonstrated in different ways that regulators pursue economic policies that press them into regulatory captures, a phenomenon that denounces the ability of self-interested regulated entities to have a substantial influence over policymaking. The result is that despite the desire of public officials to protect public interests, regulatory capture spoils the regulatory process that turns into a failure: George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 BELL J. ECON. 3, 4; Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (Vol. I-II, Cambridge-London 1970-71); Richard Posner, 'Theories of Economic Regulation' (1974) 5 BELL J. ECON. 335, 341; Stephen Breyer, *Regulation and its Reform* (Cambridge-London 1982) 15-20; Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago-London 1991) 21-22.

57 Online self-governance was first proclaimed by John P. Barlow, *A Declaration of the Independence of the Cyberspace*, February 8th, 1996: https://www.eff.org/cyberspace-independence. For a previous elegy: Trotter Hardy, 'The Proper Legal Regime for "Cyberspace," (1994) 55 U. PIRR. L. REV. 993, 1004. Soon after the Declaration of the Independence, the 'cyberlibertarians' movement leaned over seeking for freedom in the cyberspace: David R. Johnson and David G. Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 STANF. L. Rev. 1367, 1388; David G. Post, 'Governing Cyberspace' (1996) 43 WAYNE L. Rev. 155, 166-67; Joel R. Reidenberg, 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 EMORY L.J. 911, 919.

58 In contrast to the cyberlibertarians, 'cyber realists' appeared on the scene a short period after the Declaration of Independence: Jack L. Goldsmith, 'Against Cyberanarchy' (1998) 65 U. CHI. L. Rev. 1199, 1244; Neil Weinstock Netanel, 'Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory' (2000) 88 CALIF. L. Rev. 395, 452. The Napster case (online music store created in 1999) is a clear demonstration of how legal action enforced by state power against copyright infringement may extinguish a business model (based on the sharing of digital audios), thus disproving the "cyberlibertarian" argument based on the absolute lack of state method of enforcement on the digital world. In the same perspective stands the request for network

22 As implied in my scepticism over the current discipline applicable on IoB, I believe that a desirable regulatory European policy should choose a balanced framework. Werbach captures this sentiment: "Like a pendulum gradually narrowing its arc, extreme libertarianism and regulatory revanchism gradually gave way to practical solutions in the middle. This story describes the website-dominated era of Web 1.0 as well as the social/mobile/app world of Web 2.0. There is every reason to expect the pattern to continue".[59] In my view, therefore, a more feasible approach for a European responsible innovation agenda would rather consist in "bringing together public and private institutions and organisations in a collaborative dialogue process"[60] by improving the regulation policy within the current New Legislative Framework ("NLF"), the European Standardisation System ("ESS") as set up by Regulation (EU) No. 1025/2012 and Regulation (EU) No. 1020/2019[61] [62] and the product safety legislation (nt 51). My argument is that IoB technologies should be incorporated within the regulatory process of the NLF, essentially consisting of a multilevel layout that discards *ex ante* state approval, in favor of a double control system: a pre-market product safety control limited to certification process assigned to notified bodies (that is private institutions within Member States that are approved by the Commission) based on essential requirements (contained in directives or regulations) and standards;[63] a post-market product control based on market surveillance of products. We need a Better Regulation policy within the Regulation (EU) 1020/2019[64].

II. The New Legislative Framework and the European Standardisation System

23 The European Council Resolution from the 7th of May 1985 described a New Approach to technical harmonisation and standards grounded on four principles:[65] (1) legislative harmonisation is limited to the adoption of the *essential safety requirements*; (2) the task of drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements established by the Directives, while taking into account the current stage of technology, is entrusted

neutrality rules originated by governmental intervention, advocated by start-ups and academics in order to avoid discrimination by broadband access providers.

59 Kevin Werbach, 'The Song Remains the Same: What Cyberlaw Might Teach the Next Internet Economy' (nt 52) 887, 945.

60 COM (2016) 358 3. It seems a rational approach between extremisms: John Palfrey, 'The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed' (nt 52) 409, 473; Kevin Werbach, 'The Song Remains the Same: What Cyberlaw Might Teach the Next Internet Economy' (nt 52) 954, 957.

61 The European standardisation policy also includes the planned Joint Initiative on European Standardisation, the Rolling Plan for ICT standardisation and the Annual Union Working Programme: see COM (2016) 176 final 6.

62 A different approach that may deserve further inquiry as a possible and desirable legislative technique to be combined with the NLF and ESS described in the text is represented by the so-called 'experimental legislation' that has been mainly analysed within the collaborative economy models. It "... refers to statutes or, in the majority of cases, regulations enacted for a period of time determined beforehand, on a small-scale basis, in derogation from existing law, and subject to a periodic or final evaluation": Sofia Ranchordas, 'The Whys and Woes of Experimental Legislation' (2013) 1 THEORY & PRAC LEGIS 415, 419. See more recently: Id., 'Time, Timing, and Experimental Legislation' (2015) 3 Theory & Prac Legis 135; Id., 'Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation' (2015) 55 JURIMETRICS 201; Id., 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty' (2015) 36 ST L REV 28; Id., 'Nudging Citizens through Technology in Smart Cities. Rediscovering Trust in the Datafied City' (2020) 34 Int ReOF LAW, COMPUTERS & TECH, 254; Id., 'Public Values, Private Regulators: Between Regulation and Reputation in the Sharing Economy' (2019) 13 LAW & ETHICS OF HUMAN RIGHTS 203.

63 The term 'standards' used in the text refers to 'ICT technical specifications' as "adopted by a recognised standardisation body for repeated or continuous application with which compliance is not compulsory in the fields of information and communication technology (art. 2(1)(4)(5) Regulation (EU) No. 1025/2012). In the same sense: COM (2016) final, "ICT Standardisation Priorities for the Digital Single Market" nt 1.

64 With reference to the particular issue of regulating robotics domain: "We are facing a new evolutionary step in regulation-the necessity to shift from a responsive regulation to a so-called 'smart regulation'. It means it is important to articulate a cross domain target or concern that unifies the regulatory approach to robotics": Giorgia Guerra, 'An Interdisciplinary Approach for Comparative Lawyers: Insights from the Fast-Moving Fields of Law and Technology' (2018) 19 GERMAN LJ 579, 609; see also: Ronald Leenes and Erica Palmerini and Bert-Jaap Koops and Andrea Bertolini and Pericle Salvini and Federica Lucivero, 'Regulatory Challenges of Robotics: Some Guidelines for Addressing Legal and Ethical Issues' (2017) 9 LAW, INN AND TECH 1-44.

65 Resolution 85/C 136/01, Annex II.

to organisations competent in the standardisation area; (3) *these technical specifications are not mandatory* and maintain their status as voluntary standards; and, (4) at the same time, national authorities are obliged to recognise that products manufactured in conformity with harmonised standards (or provisionally with national standards) are presumed to conform to the "essential requirements" established by the Directives. The essential feature of this layout is to limit legislative safety harmonization to the essential requirements that are of public interest, such as the health and safety of users. The New Approach Directives provide a system based on double controls: conformity assessment modules (pre-market control) and market surveillance (post-market control). The goal is to strengthen the free movement of goods system.[66]

24 Adopted in 2008 within the New Approach, the NLF'[67] consists of a complex, multilevel layout.[68] At a first stage, there is a mandatory general standard of safety (Directive 1992/59/EC of 29 June 1992 now superseded by Directive 2001/95/EC of 3 December 2001 on general product safety: 'GPSD') intended to ensure a high level of product safety throughout the EU for consumer products that are not covered by sector-specific EU harmonization legislation and mandatory specific safety standards contained into vertical directives (horizontal legislation).[69] At a second stage, technical harmonization is achieved through *general* regulatory rules concerning *specific products*, categories, market sectors and/or types of risks (vertical legislation: New Approach Directives), implemented by European[70] and national standards institutions.[71] GPSD complements the existing sector-specific (vertical) legislation and it also provides for market surveillance provisions.[72] In both horizontal and vertical legislation, the producers' duties to comply with standardized rules are still general (i.e. they provide the goal of safety to be achieved and the type of risks to be avoided). The wording of the *essential requirements*[73] contained in the sections of the acts or in their annexes[74] is intended to

66 "The New Approach (complemented by the Global Approach) is a legislative technique used in the area of the free movement of goods, widely recognised as highly efficient and successful": COM (2003) 240 Final "Enhancing the Implementation of the New Approach Directives" 2. A list of the New Approach Directives (now aligned to the NLF), and in particular to Decision 768/2008/EC can be found at: https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en.

67 The NLF (<https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en> accessed 8 August 2018) consists essentially of a package of measures aimed at setting clear rules for the accreditation of conformity assessment bodies, providing stronger and clearer rules on the requirements for the notification of conformity assessment bodies, providing a toolbox of measures for use in future legislation (including definitions of terms commonly used in product legislation, procedures to allow future sectorial legislation to become more consistent and easier to implement), and improving the market surveillance rule through the RAPEX alert system for the rapid exchange of information among EU countries and the European Commission. These regulatory measures are: Regulation (EC) 765/2008 (setting out the requirements for accreditation and the market surveillance of products); Decision 768/2008 on a common framework for the marketing of products; Regulation (EC) 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another EU country; and, Regulation (EU) 1020/2019 on market surveillance.

68 Enrico Al Mureden, 'La responsabilità del fabbricante nella prospettiva della standardizzazione delle regole sulla sicurezza dei prodotti' in Enrico Al Mureden (ed.), *La sicurezza dei prodotti e la responsabilità del produttore* (Giappichelli 2017) 2ff.

69 See the list of specific Directives and Regulations at <https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en> accessed 30 September 2018.

70 In Europe: European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC), European Telecommunication Standards institute (ETSI). See Annex I of Regulation (EU) No 1025/2012.

71 In Italy: Ente Nazionale di unificazione (UNI); Comitato Elettrotecnico Italiano (CEI).

72 See in particular: RAPEX, Rapid Alert System set up between Member States and the Commission; to certain conditions, Rapid Alert System notifications can also be exchanged with non-EU countries. The efficiency of this system has been recently demonstrated by a case detected by Rapex and occurred in Iceland, concerning a smartwatch for children: https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/?event=viewProduct&reference=A12/0157/19&lng=en. This product would not cause a direct harm to the child wearing it, but it lacked a minimum level of security: it could be easily used as a tool to have access to the child, thus jeopardizing his/her safety through localisation.

73 Essential requirements define the results to be attained, or the hazards to be dealt with, but do not specify the technical solutions for doing so. The precise technical solution may be provided by a standard or by other technical specifications or be developed in accordance with general engineering or scientific knowledge laid down in engineering and scientific literature at the discretion of the manufacturer: The 'Blue Guide' 38.

74 As an example, Regulation (EU) 2017/745 on medical devices (repealing Council Directives 90/385/EEC and 93/42/

"facilitate the setting up of standardization requests by the Commission to the European standardization organizations to produce harmonized standards. They are also formulated so to enable the assessment of conformity with those requirements, even in the absence of harmonized standards or in case the manufacturer chooses not to apply them".[75]

25 So far, it is the public regulator that provides the *general framework* for safety and quality requirements of products as positive regulation of *all* safety aspects is impractical. Harmonized technical standards are focused on a third level of intervention; they are European standards adopted by recognized standardization organizations upon requests (*standardization mandates*) made by the European Commission for the correct implementation of the harmonization legislation. Such organizations have a private nature as they operate on mutual agreement that maintains their status of voluntary application, and their technical standards never replace the legally binding essential requirements. Regulation (EU) No 1025/2012 on European standardization defines the role and responsibilities of the standardization organizations and it gives the Commission the possibility of inviting, after consultation with the Member States, the European standardization organizations to draw up harmonized standards.[76] At the end of this complex process, standards are published on the European Official Journal[77]; from publication, they shall mandatorily be applied by national standards institutions or by national notified bodies that are authorized to issue marks or certificates of conformity,[78]although compliance with harmonized technical standards remains a voluntary action for producers who will benefit in the case of the "compliance defense" (Art. 7 let d) PLD).[79] The cross-reference method illustrated above is preferred to vertical, ossified legislation. First, it encourages flexibility. Safety assessment procedures must be flexible, above all, because the hazards to be assessed vary tremendously in nature and intensity. Secondly, it provides sustainability of the imposed standards that involves transparency and the participation of relevant stakeholders, including SMEs, consumers, environmental organizations and social stakeholders (see Regulation (EU) No 1025/2012, Art 5 ch II, in particular). This dialogue between public entities, private standardization organizations and relevant stakeholders provides sufficient guarantees[80] that the standardization

EEC), art 5, §2 runs: "A device shall meet the general safety and performance requirements set out in Annex I which apply to it, taking into account its intended purpose". In Annex I (*General Safety and Performance Requirements*), general safety requirements are then listed in three different Chapters, dealing with: general requirements (Ch I); design and manufacture (Ch II); information supplied with the device (Ch III). The same pattern is used as for directives and regulations on toys, cosmetics, machinery, etc.: <https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en>

75 Commission Notice 5 April 2016 C (2016) 1958 final "The Blue Guide" 37–38.

76 See the *Vademecum* on European standardization: SWD (2015) 205 final, 27 October 2015 available at <http://ec.europa.eu/growth/single-market/european-standards/vademecum/index_en.htm>. The Commission (assisted by a committee, consisting of representatives of national states: Art 22 of Regulation (EU) No 1025/2012) issues standardisation mandates (i.e. after consulting sectoral authorities at the national level), addressing the European standardisation organisations that will formally take a position on the request and finally start up the standardisation work.

77 About the content of the harmonised standards and their relationship with the essential requirements of the harmonised legislation, see more extensively the Blue Guide (nt 75) 4.1.2.2., 39ff. 'A specification given in a harmonized standard is not an alternative to a relevant essential or other legal requirement but only a possible technical means to comply with it', 40.

78 The list of notified bodies designated by the European Commission can be found at: https://ec.europa.eu/growth/tools-databases/nando/index.cfm?fuseaction=notifiedbody.notifiedbodies&char=A

79 See for example, art. 8(1) Regulation (EU) 2017/745 on medical devices: "Devices that are in conformity with the relevant harmonised standards, or the relevant parts of those standards, the references of which have been published in the Official Journal of the European Union, shall be presumed to be in conformity with the requirements of this Regulation covered by those standards or parts thereof".

80 For a different view: Christian Joerges and Hans W Micklitz, 'Completing the New Approach Through a European Product Safety Policy (2010) 6 HANSE L. Rev. 381; Christian Joerges and Hans W Micklitz, 'The need to Supplement the New Approach to Technical Harmonization and Standards By a Coherent European Product Safety Policy' (2010) 6 HANSE L. Rev. 349 – Special issue. The Authors consider the Union product safety policy as a barrier to trade and plead for a Standing Committee on Product Safety (that includes private parties like CEN/CENELEC) before setting the special standards. On the ineffectiveness of several EU instrument to ensure and control the safety of products see: Christian Joerges, 'Product Safety, Product Safety Policy and Product Safety Law' (2010) 6 HANSE L. Rev. 115; Richard W Parker and Alberto Alemanno, 'A Comparative Overview of EU and US Legislative and Regulatory System: Implications for Domestic Governance & the Transatlantic Trade and Investment Partnership' (2015) 22 COLUM. J. EUR. L. 89 f., where the Authors argue for a more procedural approach of

requests are well understood in order to satisfy the essential requirements. On the other hand, public interests are taken into account in the process without completely delegating technical standards to industry representatives. Safety law is about social protection which no manufacturer nor single judge can determine unilaterally by laying down what "safety" is. "The alignment of corresponding decisions to technical standards specifying general safety duties is equivalent to setting a threshold value establishing the extent of permissible risks in general terms".[81]

26 The multilevel layout promoted by the NLF and the ESS has been recently confirmed and completed by Regulation (EU) No. 1020/2019/EU on market surveillance whose objective is "to improve the functioning of the internal market by strengthening the market surveillance of products covered by the Union harmonization legislation [...], with a view to ensuring that only *compliant products* that fulfil requirements providing a high level of protection of public interests, such as health and safety in general, health and safety in the workplace, the protection of consumers, the protection of the environment and public security and any other public interests protected by that legislation, are made available on the Union market" (art. 1). This Regulation sets up a complex system consisting of: (a) a combination of regulatory tools involving producers (see Ch. II) and (b) rules on controls delegated to national market surveillance authorities and a single liaison office (Ch. IV). In particular, Ch. II Reg. N. 1020/2019/EU lays down rules assigning specific tasks to economic operators concerning conformity and risks of products subject to Union harmonization legislation (listed in Annex I). Among these products there are medical devices,[82] that is technological devices that so far can be listed among the most relevant IoB assets (at **A.**). Special attention is payed to emerging technologies and the digital environment which takes into account that consumers are increasingly using connected devices in their daily lives. Therefore, the regulatory framework addresses the new risks to ensure the safety of the end users (Recital 30) and market surveillance authorities are expected to bring non-compliance to an end quickly and effectively (Recital 41). The safety framework has eventually been completed by the connection of the standardization policy to the Digital Single Market Strategy[83] on the ground that common standards ensure the interoperability of digital technologies thus fostering innovation and lowering market entry barriers.[84]

F. Final Remarks: Rethinking the European Product Safety Regulatory Scheme

27 The dialogue between public European institutions and private organizations (and stakeholders) will contribute to answer several questions together with serviceability which are implied in a wider notion of security that concerns the correct edge between promoting technology and marketing useless technological risks. The implementation of a flexible, transparent, and open safety process would also reduce, in the long run, the placing on the market of unavoidable unsafe products (especially if they belong to the category of healthy lifestyle or recreational devices). Collectively, the safety regulatory framework set out by the European New approach, the NLF, the recent Regulation on market surveillance and product liability certainly represent a smart method to achieve an optimal safety level for medical, health lifestyle, educational or workers' environment devices.[85]

28 Nevertheless, such a framework still needs rethinking in view of appropriately regulating the ICT new technologies.[86] In particular:

1. The NLF and the ESS should be coherently integrated with sales law so that *innovative* definitions of and rules on products' security and conformity shall give place to the present shattered legislative patchworks (at **D.IV.**).[87]

the EU consultation practices.

81 Christian Joerges, 'Product Safety, Product Safety Policy and Product Safety Law' (nt 80) 118.

82 Reg. (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC.

83 COM (2015) 192.

84 COM (2015) 550 final, "Upgrading the Single Market: more opportunities for people and business, para. 3; COM (2016) 176 final, ICT Standardisation Priorities for the Digital Single Market", para. 1.

85 Norbert Reich, 'Product Liability and Beyond: An Exercise in "Gap-Filling"' (2016) 3-4- ERPL 619, 626.

86 COM (2020) 64 final 16-17. For an AI regulatory model that takes into account the GDPR structure, see: Denise Amram, 'The Role of the GDPR in Designing the European Strategy on Artificial Intelligence: Law-Making Potentialities of a Recurrent Synecdoche' (2020) 1 OJC § 3.

87 In the ESS framework, the only reference to the law of sales can be found in Regulation No. 1020/2019/UE: art. 2(4)

Moreover, the current system of product liability needs adjustments at a European and national level, in the view of welcoming AI and new technologies.[88]

2. The NLF and the ESS should be significantly reformed by introducing key priority areas, stakeholders, and processes that guarantee the boost of competitiveness and innovation within the limits of desirability. At present,[89] explicit reference is made to an "ethical level playing field" and seven key requirements that AI applications in different settings should respect have been identified: human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental well-being; and, accountability. Regarding stakeholders and regulatory processes, public interests groups are represented by the ESS and they are expected to take part at all stages of developments of the European standards.[90] Nevertheless, the future of the IoB regulatory framework requires an institutional designing through: reviewing the agility of processes where dialogue between public entities and private stakeholders takes place, simplifying the current safety and liability layout to provide a well-structured regulatory process that is pluralistic and transparent,[91] and shaping the technology of the next future to be desirable. "The celebration of innovation should not obscure the principle that law exists to protect core societal values precisely because they do not change".[92]

which foresees that its provisions are without prejudice of arts 12-15 of Dir. 2000/31/EC on electronic commerce. This reference is made just to restate that no general obligation is imposed on information society service providers to monitor the information which they transmit or store, nor should a general obligation be imposed upon them to actively seek facts or circumstances indicating illegal activity. "Hosting service providers in particular shall be held liable as long as they do not have actual knowledge of illegal activity or information and are not aware of the facts or circumstances from which the illegal activity or information is apparent" (recital 16). This general principle on the ISS provider's liability is again re-stated by the Proposal for a Regulation COM (2020) 825 final 15.12.2020 on a *Single Market For Digital Services*.

88 SWD (2018) 137 final. See Giovanni Comandé, 'Multilayered (Accountable) Liability for Artificial Intelligence' in Sebastian Lohsse and Reiner Schulze and Dirk Staudermayer (eds.), *Liability for Artificial Intelligence and the Internet of Things. Munster Colloquia on EU Law and the Digital Economy* (vol. IV, Nomos 2019), 176 f., where the A. argues that whatever liability regime is chosen; AI requires a gradual layered approach to liability grounded on accountability principles, and it also requires the use of technology itself to unfold a multi-layered accountable liability system. The A. also recognises that the interconnectedness of algorithms also restricts the means of algorithms decision-makers to give an account of the decisions they make.

89 SWD (2019) 168 final 2-3: "There is a need for ethics guidelines that build on the existing regulatory framework and that should be applied by developers, suppliers and users of AI in the internal market, establishing an *ethical level playing field* across all Member States".

90 Art. 5(1) Regulation (EU) N. 1025/2012. The Commission has engaged in partnership agreements and financial agreements with four organisations (listed in Annex III, Regulation (EU) N. 1025/2012) representing consumers, environmental and social interests as well as the interest of SMEs in standardisation at European level. The four organisations are the following: European Association for the Coordination of Consumer Representation in Standardisation (ANEC); Small Business Standards (SBS) European Environmental Citizens Organisation for Standardisation (ECOS) Confédération Européenne des Syndicats (ETUC). A summary of their activities can be found in the SWD (2018) 15 final, 56 f. the recognition that working closely with stakeholders and public authorities is essential to achieve the ICT priorities is re-stated in: COM (2018) 26 final 8. Recently, the EU Commission has appointed a high level expert group on AI and set up an open multi-stakeholder platform with more than 2.700 members: COM (2019) 168 final 2-3. A significant participation of public interests' representatives and their financing may be deemed as effective which cures against capturing the regulator. They should be reinforced by promoting effective civil service through hiring expert and professional civil servants (not hired from industry); providing for them a brilliant career in the civil service; eliminating conflict of interest: Rachel E. Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design' (2010) 89 TEX LRev 15, 43; Sidney A. Shapiro, 'The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation' (2012) 17 Roger Williams ULR 249 f.

91 The market surveillance set up in Regulation (EU) No. 1020/2019 is essentially based on checks conducted on a risk-based approach and on information required by society services providers (Ch. IV and V). A 'regulatory metric' designed for measuring agencies outputs would be much more effective: Michael E. Levine and Jennifer L. Forrence, 'Public Regulatory Capture, Interest, and the Public Agenda: Toward a Synthesis' (1990) 6 J. L. ECON. & ORG 167 offering a theory explaining public interest outcomes as the result of other-regarding behavior.

92 Werbach (2017) 948.

Smart Contracting And The New Digital Directives: Some Initial Thoughts

by **Andre Janssen***

Abstract: In this article, smart contracting meets the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, and the Directive (EU) 2019/771 regarding certain aspects of contracts for the sale of goods. Much has been written about smart contracting and the two directives. What has been missing, however, are contributions that explicitly address the question of whether the two directives mentioned are really "smart contracts ready". The present article is intended to fill this gap and to serve as an incentive to take a closer look at this topic.

Keywords: Smart contracts; digital content directive; new consumer sales directive; cryptocurrency payment

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A. Introduction

1 The article deals with smart contracting in the context of digital directives, more precisely the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter: the Digital Content Directive) and the Directive (EU) 2019/771 certain aspects concerning contracts for the sale of goods (hereinafter: the New Consumer Sales Directive).[1] This is challenging for several reasons: first, so much has been written about both smart contracts[2] and the two significant

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1 The article is based on a presentation given by the author at the online conference "Digital Consumer Contract Law and New Technologies", which took place on 26 and 27 November 2020. The conference was organised by Professor Karin Sein (University of Tartu, Estonia) and Professor Martin Ebers (University of Tartu, Estonia). The event was part of the project "PRG124 Protection of consumer rights in the Digital Single Market - contractual aspects", which is funded by the Estonian Research Council. The lecture format was largely retained.

2 See for example C. Buchleitner & T. Rabl, 'Blockchain und Smart Contracts' (2017) *ecolex*, 4-14; A.J. Casey & A. Niblett, 'Self-Driving Contracts' (2017) 43 *Journal of Corporation Law*, 1-33; M. Durovic & A. Janssen, ' Formation of Smart Contracts', in Larry A. DiMatteo, Michel Cannarsa, Cristina Poncibò (eds.), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms*, Cambridge (Cambridge University Press) 2019, pp. 61 ff.; M. Durovic & A. Janssen, 'The Formation of Blockchain-based Smart Contracts in the Light of Contract Law' (2018) *European Review of Private Law (ERPL)*, 753-772; N. Guggenberger, 'The Potential of Blockchain for the Conclusion of Contracts', in R. Schulze, D. Staudenmeyer & S. Lohse (eds.) *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps* (Nomos 2017), 83-97; A. Janssen, 'Demystifying Smart Contracts', in C.J.H. Jansen, B.A. Schuijling, I.V. Aronstein (eds.), *Digitalisering en onderneming* (Wolters Kluwer 2019),

directives[3] that one runs the risk of confirming *Karl Valentin*, who once ironically claimed "(e)verything has already been said, just not by everyone."[4] So at the outset my question was whether anything new can really be added to the whole discussion without repeating too much that is already known. As the following remarks will hopefully prove, this question can be answered in the affirmative. Second, and this was also a challenge when writing this article, there is surprisingly almost no specific explanation of how smart contracting relates to the two directives. One finds, therefore, almost a tabula rasa as to what extent the two directives are "smart contracts ready" or what problems are to be expected or solved in this regard in the future.

2 This article attempts to shed light on some aspects of this topic but is by no means meant to be comprehensive. The next chapter (B.) gives a brief introduction to the world of smart contracting, followed by the third chapter (C.), in which a fictitious smart contract scenario is presented for further illustration. The fourth chapter (D.) uses this scenario to examine two problems that can arise with smart contracts in the context of the two digital directives. The focus is to a large extent on the New Consumer Sales Directive and to a lesser extent on the Digital Content Directive. The article ends with a short conclusion (E.).

B. A short introduction to smarting contracting

3 An introduction to the world of smart contracting seems unavoidable if one wants to fully grasp the legal problems that may arise in the context with the two digital directives. This chapter will therefore briefly define the general term "smart contracts", then explain the importance of blockchain technology for the development of smart contracting and conclude with some potential areas of application of smart contracts.[5]

I. Defining smart contracts

4 Smart contracts raise interesting questions about their legal nature. It is often only said that the existing smart contracts are neither particularly smart nor they are even strictly speaking legally binding contracts at all.[6] Any discussion about smart contracts must begin with the definition of the concept.[7] There are numerous definitions of

15-29; M. Kaulartz & J. Heckmann, 'Smart Contracts – Anwendung der Blockchain-Technologie' (2016) *Computer und Recht (CR)*, 618-624; M. Kaulartz, 'Herausforderungen bei der Gestaltung von Smart Contracts' (2016) *Zeitschrift zum Innovations- und Technikrecht (InTeR)*, 201-206; E. Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 10 *Journal of Law, Innovation and Technology (JLIT)*, 269-300; M. Raskin, 'The Law and Legality of Smart Contracts', (2017) 1 *Georgetown Technology Review*, 305-341; J.M. Sklaroff, 'Smart Contracts and the Cost of Inflexibility' (2017) 166 *University Pennsylvania Law Review*, 263-303; T.F.E. Tjong Tjin Tai, 'Smart contracts en het recht' (2017) 93 *Nederlands Juristenblad*, 176-182; K. Werbach & N. Cornell, 'Contracts Ex Machina' (2017) 67 *Duke Law Journal*, 313-382.

3 See for example I. Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte (2019) *Neue Juristische Wochenschrift (NJW)*, 1705-1711; J. Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', (2019) *Journal of European Consumer and Market Law (EuCML)*, 194-201; L. K. Kumkar, 'Herausforderungen eines Gewährleistungsrechts im digitalen Zeitalter', (2020) *Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW)*, 306-333; J. Lommatzsch, R. Albrecht/P. Prüfer, 'Zwei neue EU-Richtlinien zum Vertragsrecht – „Revolution" im Verbraucherrecht?', (2000) *Gesellschafts- und Wirtschaftsrecht (GWR)*, 331-339; D. Staudenmayer, 'Die Richtlinien zu den digitalen Verträgen', (2019) *Zeitschrift für Europäisches Privatrecht (ZEuP)*, 663-694; D. Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy', (2020) *European Review of Private Law (ERPL)*, 219-249; J. Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content', (2020) *European Review of Private Law (ERPL)*, 251-273.

4 See https://www.zitate.eu/autor/karl-valentin-zitate/177935.

5 This chapter contains elements from the previous publications A. Janssen, 'Demystifying Smart Contracts', in C.J.H. Jansen, B.A. Schuijling, I.V. Aronstein (eds.), *Digitalisering en onderneming* (Wolters Kluwer 2019), 16-21 and M. Durovic & A. Janssen, ' Formation of Smart Contracts', in Larry A. DiMatteo, Michel Cannarsa, Cristina Poncibò (eds.), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms*, Cambridge (Cambridge University Press) 2019, pp. 61 ff.

6 S. Bourque & S. Fung Ling Tsui, *A Lawyer's Introduction to Smart Contracts* (Lask: Scientia Nobilitat, 2014), p. 4; R. O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21 *North Carolina Banking Institute*, 177-178.

7 For more details see M. Durovic & A. Janssen, 'The Formation of Blockchain-based Smart Contracts in the Light of Contract Law' (2018) *European Review of Private Law (ERPL)*, 754 ff.

what smart contracts are.[8] They are often defined as a special protocol intended to contribute, verify or implement the negotiation or performance of the contract in a trackable and irreversible manner without the interference of third parties.[9] One can go back to *Nick Szabo*, who in the 1990s, defined for the first time a smart contract as a:

> *"computerized transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as: payment terms, liens, confidentiality, and enforcement etc.), minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries like banks or other kind of agents."*[10]

5 Related economic goals of smart contracts include reducing loss by fraud, enforcement costs, or other transaction costs. They are presumed to be able to provide full transparency of the transaction and to grant a high degree of privacy contemporaneously.[11] *Szabo's* definition can be simplified to a computer code that is created to automatically execute contractual duties upon the occurrence of a trigger event as a "digital condition precedent",[12] or agreements wherein execution is automated, usually by a computer programme.[13] A minimum consensus definition can be distilled: a smart contract is a form of computer code which is self-executing and self-enforcing.[14] As the current smart contracts work without self-learning systems, it has to be emphasised that they neither need artificial intelligence nor deep learning.[15]

6 Needless to say, there are many debates and confusions on the legal concept of smart contracts. For blockchain-based smart contracts which will be discussed soon in this contribution, a useful dichotomy can be drawn between the "smart contract code", which is the computer code stored, verified and executed in a blockchain, and the "smart legal contract", which is a complement (or maybe even a substitute) for a legal contract to apply such technology.[16] In essence, a "smart legal contract" is a combination of the 'smart contract code' and traditional legal language.[17] A smart contract is a computer code that specifies in 'if this happens that shall happen' language, in a way understandable to a computer. Once verified, it will self-execute and self-enforce by recognizing an occurred triggering event and dispensing the assets accordingly.[18]

7 It is evident that the term smart contract is a misnomer.[19] A smart contract, as we know it right now, is independent from the applicable law, as it is not a contract in the legal meaning. The choice of such name for the concept of a self-executing and computer-coded agreement is unfortunate as it exacerbates confusion. Some theoretical similarities, however, exist between smart contracts

8 A good overview over the difference smart contracts definitions gives M. Finck, 'Grundlagen und Technologie von Smart Contracts', in M. Fries & B.P. Paal (eds.), Smart Contracts (Mohr Siebeck 2019), 1-12.

9 See e.g. T. Söbbing, 'Smart Contracts und Blockchain: Definitionen, Arbeitsweise, Rechtsfragen' (2018) *IT-Rechts-Berater (ITBR)*, 43-46.

10 N. Szabo, 'Smart Contracts', http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html

11 C. Buchleitner & T. Rabl, 'Blockchain und Smart Contracts' (2017) *ecolex*, 4, 5; N. Guggenberger, 'The Potential of Blockchain for the Conclusion of Contracts', in R. Schulze, D. Staudenmeyer & S. Lohse (eds.) *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps* (Nomos, 2017), 83, 94.

12 P. Paech, 'The Governance of Blockchain Financial Networks', (2017) 80 *Modern Law Review*, 1072, 1082.

13 M. Raskin, 'The Law and Legality of Smart Contracts', (2017) 1 *Georgetown Technology Review*, 305, 306.

14 A. Börding, T. Jülicher, C. Röttgen & M. von Schönfeld, 'Neue Herausforderungen der Digitalisierung für das deutsche Zivilrecht: Praxis und Rechtsdogmatik' (2017) *Computer und Recht (CR)*, 134, 138; E. Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 10 *Journal of Law, Innovation and Technology (JLIT)*, 269, 269; R. O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21 *North Carolina Banking Institute*, 177, 179.

15 M. Kaulartz & J. Heckmann, 'Smart Contracts – Anwendung der Blockchain-Technologie' (2016) *Computer und Recht (CR)*, 618, 618.

16 J. Stark, 'Making Sense of Blockchain Smart Contracts', *Coindesk*, Jun 4 2016, www.coindesk.com/making-sense-smart-contracts/

17 M. Kaulartz, 'Herausforderungen bei der Gestaltung von Smart Contracts' (2016) *Zeitschrift zum Innovations- und Technikrecht (InTeR)*, 205.

18 T.F.E. Tjong Tjin Tai, 'Smart contracts en het recht' (2017) 93 *Nederlands Juristenblad*, 177.

19 C. Buchleitner & T. Rabl, 'Blockchain und Smart Contracts' (2017) *ecolex*, 6.

and legal contracts insofar as both 'are frameworks for regulating the interaction between different entities.[20]

8 As for the question regarding how a smart contract works in practice and how it is concluded, *Szabo* uses his famous vending machine analogy.[21] A vending machine takes coins and dispenses change and product according to the displayed price. Once the coins are inserted, there is no further human intervention required to conclude and later execute the contract. Similar to a smart contract, a contract concluded through a vending machine is also in principle immutable and self-enforcing. Even if a person were forced to buy something from the vending machine, the machine would still give the product to the person regardless the fact that the transaction is legally invalid *ex tunc* due to duress. Furthermore, in theory, anybody with coins can participate in an exchange with the vendor regardless of the legal capacity of the contracting parties. Where smart contracts go further is "in proposing to embed contracts in all sorts of property that is valuable and controlled by digital means".[22] Essentially, once both parties agree on a smart contract, its execution is taken from their control.

II. Blockchain technology as the driver for smart contracting

9 Smart contracts do not necessarily require blockchain technology.[23] However, there is little doubt that the main reason for the increasing importance of smart contracts is the rise of blockchain technology, as it allows smart contracts to use their full automation potential. *Bitcoin*, which proliferated this technology, led ultimately to the establishment of *Ethereum*, a sophisticated and prominent blockchain platform allowing more complicated (i.e. smart contract) transactions beyond transfers of virtual currencies.[24] In the meanwhile several other blockchain-based smart contract platforms such as *Hyperledger Burrow*, *Hyperledger Fabric*, *Open Transactions,* and *Quorum* have also entered the market. The blockchain technology demonstrates how a network could be set up so that once a transaction is set in motion, the network can produce outputs autonomously without the direct intervention of any party or other intermediaries.[25] Because of this feature, it is often said that the contracting parties do not need to trust each other, they can rely on the system as a whole to carry out transactions knowing that the other party cannot frustrate the intended outcome. Blockchain not only allows verification of each transaction through the nodes (the computers in the chain), but it also, by storing the contract in a "block" and sending it to each node, makes the execution automatic and, in principle, immutable. Thus, smart contracting allows the "digitization of trust through certainty of execution" and the "creation of efficiency through removal of intermediaries and the costs they bring to the "transactions".[26] These characteristics are perhaps the greatest appeal of blockchain-based smart contracts.

10 When describing the actual process of formation of smart contracts, the concept can be best explained through Ethereum's process.[27] First, the user first types out the contract in Ethereum's coding language called "*solidity*",[28] for which the user has to download the Ethereum software and be part of its network. Then he will "propose" a specific contract by making it available in the system. The contract will have its own identification number and functions as an autonomous entity within the system. Another user may then accept the proposed contract by communicating to it. For instance, he communicates by making a payment, regularly in "Ether (ETH)", the virtual currency of Ethereum. After that communication of the other party, the smart contract will execute itself. It is important to

20 C. Lim, T.J. Saw & C. Sargeant, 'Smart Contracts: Bridging the Gap Between Expectation and Reality', 11 July 2016, *Oxford Business Law Blog*, www.law.ox.ac.uk/business-law-blog/blog/2016/07/smart-contracts-bridging-gap-between-expectation-and-reality.

21 N. Szabo, 'Formalizing and Securing Relationships on Public Networks' *First Monday,* 2 (9), https://doi.org/10.5210/fm.v2i9.548.

22 N. Szabo, 'Formalizing and Securing Relationships on Public Networks' *First Monday,* 2 (9), https://doi.org/10.5210/fm.v2i9.548.

23 *Blockchain (technology)* is sometimes also referred to as *distributed ledger (technology)* or *shared ledger (technology)*. While these three notions still remain in flux (and some authors consider them to designate different forms of technology), this contribution will for the sake of simplicity only use the term blockchain (technology).

24 See more detailed T.F.E. Tjong Tjin Tai, 'Smart contracts en het recht' (2017) 93 *Nederlands Juristenblad*, 176, 177.

25 Clifford Chance, 'Smart Contracts. Legal Agreements for the Digital Age', https://www.cliffordchance.com/briefings/2017/06/smart_contracts_-legalagreementsforth.html

26 J. I-H Hsiao, 'Smart Contract on the Blockchain-Paradigm Shift for Contract Law' (2017) 14 *US-China Law Review*, 685, 687.

27 https://ethereum.org/

28 See: https://solidity.readthedocs.io/en/develop/

note that to conduct a transaction or to execute a contract on the Ethereum blockchain platform the users need to pay "*gas*", which is a computation fee.[29] Gas is priced in small fractions of Ether called "*gwei*" and it is used to allocate resources of the Ethereum Virtual Machine (EVM) so that decentralized applications such as smart contracts can ultimately self-execute in a secured but decentralized way. The fee is paid to the miners for mining transactions, putting them into blocks.[30] The exact price of the gas is determined by supply and demand between the network's miners. They can decline to process a transaction if the gas price does not meet their threshold, and users of the network who seek processing power.

III. Some (potential) fields of application for smart contracting

11 There are many (potential) fields of application for smart contracts. Besides the well-known smart refrigerator example (the refrigerator "orders" automatically food or beverages within a previously concluded delivery smart contract) the "pay as you drive-principle" is subject to discussions in the insurance industry right now.[31] Here the policyholder concludes a (smart) car insurance contract with the insurance company. The contract contains a "pay as you drive-provision" which means the riskier the policyholder drives, the higher his premium. For data collection, the policyholder's car has a blockchain interface and the blockchain-based smart (insurance) contract automatically adjusts the amount of the payable premium according to the manner the insured car is driven. A similar idea is "drive as long as you pay" where a car can only be driven as long as the premiums are paid. If premiums have not been paid, the blockchain-based smart insurance contract uses the smart lock of the car to block the further use of the vehicle.[32] There is also the idea of combining smart contracts and smart meters in order to automatically cut off the supply of gas, water, and electricity in case of unpaid bills. [33]

C. The fictitious smart contract scenario

12 Let us now turn to the fictitious smart contract scenario, which will serve as an illustration in the further course of this article. I will refrain from presenting some of the technical intricacies, as they do not appear to be of importance for the legal solution. Let us assume that a consumer wants to buy a new car from a professional seller that has an integrated smart lock, i.e. a smart device. For this purpose, the two parties conclude an Ethereum-based smart contract. The payment by the consumer is to be made in monthly instalments, in Ether, i.e. Ethereum's currency. As long as the consumer meets the monthly instalment payments, the car's smart lock will open normally, allowing unrestricted use of the car. However, if the consumer defaults on an instalment, the smart contract automatically blocks the car's smart lock, which can no longer be used until payment. In our small example, the consumer pays his monthly instalments on time, but due to a programming error in the smart contract software of Ethereum (there is no input error on the seller's side), the smart contract blocks the smart lock of the car. As a result, the consumer can no longer use the vehicle.

D. Discussion of two smart contracts related problems in the context of the new digital directives

13 As already mentioned earlier in the introduction, two possible problems that may arise with smart contracts in the context of the two digital directives will now be presented using the example presented. The focus is primarily on two problem areas related to the application of the New Consumer Sales Directive, whereby the Digital Content Directive will also be discussed.

29 See more detailed: https://www.investopedia.com/terms/g/gas-ethereum.asp

30 The users are paying for the computation, regardless of whether the transaction succeeds or not. Even if it fails, the miners must validate and execute your transaction, which takes computational power. Hence, users must pay for that computation just like they would pay for a successful transaction.

31 C. Buchleitner & T. Rabl, 'Blockchain und Smart Contracts' (2017) *ecolex*, 4, 7; M. Kaulartz & J. Heckmann, 'Smart Contracts – Anwendung der Blockchain-Technologie' (2016) *Computer und Recht (CR)*, 618, 618.

32 F. Hofmann, 'Smart contracts und Overenforcement', in M. Fries & B. P. Paal (eds.), *Smart Contracts* (Mohr Siebeck 2019), 125, 128.

33 F. Hofmann, 'Smart contracts und Overenforcement', in M. Fries & B. P. Paal (eds.), *Smart Contracts* (Mohr Siebeck 2019), 125, 128.

I. Is a smart contract with a virtual currency payment obligation governed by the New Consumer Sales Directive?

14 The opening of the scope of application of the New Consumer Sales Directive could be problematic in the present case because no payment in a regular currency such as the Euro or US-dollar was agreed; however, a "payment" in a virtual currency (here "Ether") was provided for. This is not necessarily a sole smart contract problem, because "ordinary non-smart contracts" can provide for a "payment" in a virtual currency. Nevertheless, it is currently the case that this problem arises primarily with smart contracts, which is why it seems justified to identify this primarily as a "smart contract problem".

15 But what exactly is the problem with the New Consumer Sales Directive and "payment" in virtual currency? Let us take a closer look at the provisions of the Directive. Art. 3(1) of the New Consumer Sales Directive states that "(t)his Directive shall apply to *sales contracts* between a consumer and a seller."[34] Art. 2 no. 2 of the New Consumer Sales Directive defines the term "sales contract" as follows: "'sales contract' means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the *consumer pays or undertakes to pay the price thereof*".[35] Certainly, "payment of price" covers payments in regular currency. But are "goods for virtual currency contracts" also covered by the New Consumer Sales Directive? The Directive itself does not provide any further explanation of what is meant by a "payment of price" according to Art. 2 no. 2 of the New Consumer Sales Directive. The legislative history and the literature are also, as far as can be seen, unproductive in solving this question.

16 If this were not in itself already a significant problem for the interpretation of the New Consumer Sales Directive, the situation becomes even more confusing when one looks at the Digital Content Directive. Both directives are to be understood as twin directives, where the New Consumer Sales Directive covers the area of goods and goods with digital elements, while the Digital Content Directive regulates the supply of digital content and digital services. According to Art. 3(1)1 of the Digital Content Directive, the Directive applies "to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer *pays or undertakes to pay a price*."[36] However, unlike the New Consumer Sales Directive, the Digital Consumer Sales Directive defines the term "price" in Art. 2(7) Digital Content Directive, according to which "price" means money "*or a digital representation of value* that is due in exchange for the supply of digital content or a digital service".[37] Recital 23 of the Digital Content Directive provides further information on the background to the inclusion of "digital representations of value" in the Digital Content Directive and what exactly is meant by this. According to that recital:

> *"(...) (d)igital representations of value should also be understood to include virtual currencies (...). Differentiation depending on the methods of payment could be a cause of discrimination and provide an unjustified incentive for businesses to move towards supplying digital content or a digital service against digital representations of value. (...)".*[38]

17 The Digital Content Directive thus makes it unmistakably clear that the scope of application of the Directive is also open in the cases of "payments in virtual currency" and gives a convincing reason for this. After all, with the increasing popularity of virtual currencies as a means of payment, this is the only way to prevent companies from escaping the requirements of the Digital Content Directive by demanding "virtual currencies payments" with consumers. If our example case had been about the supply of digital content or digital service and not about goods (with digital elements), the scope of application of the Digital Content Directive would undoubtedly have been given. Why the European Union is obviously pursuing two different approaches regarding payment in virtual currencies, or at least is introducing a great deal of interpretational uncertainty into the New Consumer Sales Directive, is not apparent and also eludes a deeper logic. Of course, there is the same incentive for businesses to escape the scope of the New Consumer Sales Directive by demanding a "payment" in virtual currencies and thus to undermine its protection standard as with the Digital Content Directive. Ultimately, this is precisely why there could be an increased use of virtual currencies in the area of consumer sales in the future.

18 Overall, the result to the problem of "payment in virtual currencies" can be described as disappointing. Firstly, because the New Consumer Sales Directive seems to contain a loophole that could make it possible for businesses to systematically undermine the standard of protection.[39] And this issue might even

34 Emphasis added in quote by the author.

35 Emphasis added in quote by the author.

36 Emphasis added in quote by the author.

37 Emphasis added in quote by the author.

38 Emphasis added in quote by the author.

39 So far, many companies are still reluctant to do so because the value of many virtual currencies still fluctuates too much. However, there are already virtual currencies whose

become a potential preliminary question for the European Court of Justice to answer whether "goods for virtual currency contracts" must be considered as "sales contracts" under the New Consumer Sales Directive. On the other hand, it also seems to be a missed opportunity to further harmonise the acquis communautaire in a meaningful way, even though the EU member states are free to extend the scope of the New Consumer Sales Directive to contracts in which goods are purchased for virtual currencies. Nevertheless, a clear solution for both digital directives in this regard is preferred.

II. Should smart contracts be considered as a "digital element" of a sold item under the New Consumer Sales Directive?

19 Let us now assume that in our example the present contract is undoubtedly a "sales contract" in the sense of the New Consumer Sales Directive, because payment potentially had to be made in euros and not in a virtual currency. The starting point, that it is a sale of "goods *with digital elements*"[40] according to Art. 3(1), (2) and Art. 2 no. 5 of the New Consumer Sales Directive, is also undoubted. The car sold is a tangible movable item according to Art. 2 no. 5 of the New Consumer Sales Directive that incorporates or interconnects with digital content or a digital service (here, the smart lock with its digital functions) in such a way that the absence of that digital content respectively digital service would prevent the good (here, the car) from performing its functions. The New Consumer Sales Directive therefore applies to the car itself including its smart lock.

20 The elephant in the room is, of course, whether the New Consumer Sales Directive also covers the (defective) smart contract component of Ethereum (as a "digital element" of the car), which was ultimately responsible in the example for the consumer no longer being able to use the car. Alternatively, is the defective smart contract component rather regulated by the Digital Content Directive since this Directive is ultimately aiming at regulating the supply of digital content and digital services? The importance of deciding which directive covers the smart contract component quickly becomes apparent when considering the legal consequences of this decision. If one concludes that the New Consumer Sales Directive also covers the defective smart contract component, the consumer has direct rights arising from that non-conformity against the seller. The seller's liability risk would then increase accordingly, even though he would have a right of redress under Art. 18 of the New Consumer Sales Directive against Ethereum after the consumer has made a claim against the seller.[41] If, on the other hand, the Digital Content Directive were to apply to the smart contract component, the consumer would have to turn directly to Ethereum, as the digital content comes from the digital service provider itself; in this case, the seller could not be held liable for the defective smart contract element.

21 On the whole, the better arguments seem to speak in favour of also subjecting smart contract elements to the scope of the New Consumer Sales Directive as a "digital element" and not to the Digital Content Directive. The wording of Art. 3(3)2, Art. 2 no. 5 of the New Consumer Sales Directive is broad enough to justify such an interpretation. It could be argued that the car is interconnected in such a way with the smart contract that the absence of it prevents the car from performing. Finally, the example shows that the car cannot be used without a faultless smart contract. The fact that the smart contract element comes from a third party (in the example, Ethereum) and not from the seller is irrelevant.[42] Also, a broad interpretation of Art. 3(3)2 of the New Consumer Sales Directive could justify that the digital service running the smart contract is also provided with the car under the sales contract.

22 Nevertheless, it must be admitted that the wording of Art. 3(3)2, Art. 2 no. 5 of the New Consumer Sales Directive would also allow for another, narrower interpretation. Accordingly, the strongest reason for including the smart contract component as a "digital element" in the scope of the New Consumer Sales Directive seems to be the aim of an effective consumer protection. For if one takes the perspective of the consumer, it becomes clear that it will often be impossible, or at least very difficult, for him to see why the purchased goods do not work. In our example, how is it possible for the consumer to realise why the smart lock cannot be opened? In the end, he will not be able to recognise whether the smart lock itself is defective or whether the problem comes from the area of the smart contract. The consumer cannot be burdened with such an obligation to examine, especially since he will usually lack the necessary expertise anyway. The objective of the New Consumer Sales Directive was to establish a *one-stop-only policy* for the consumer in the marginal area of goods and digital content and digital services in order to ensure effective consumer protection. If one really wants to meet

value is proving to be relatively stable, such as "Tether".

40 Emphasis added in quote by the author.

41 See for the right of redress Art. 18 of the New Consumer Sales Directive.

42 See Art. 3(3)2 of the New Consumer Sales Directive.

this objective, the smart contracts elements should be subject to the New Consumer Sales Directive. That this leads to an extended liability of the seller for defective digital content or digital services of third parties is as previously mentioned not alien to the New Consumer Sales Directive, but is part of its concept.[43] As a final "ultima ratio argument" for the inclusion of the smart contracts component into the scope of the New Consumer Sales Directive, Art. 3(3)3 of the New Consumer Sales Directive can be cited, according to which "(i)n the event of doubt as to whether the supply of incorporated or inter-connected digital content or an incorporated or inter-connected digital service forms part of the sales contract, *the digital content or digital service shall be presumed to be covered by the sales contract.*" [44]

E. Conclusion

23 This article has shown that the relationship between smart contracts and the two digital directives is not without problems. It is regrettable that the New Consumer Sales Directive, unlike the Digital Content Directive, does not clearly accept "payment in virtual currencies" (which is currently the case especially with smart contracts) as "payment of price" in the sense of the Directive. In the long run, this could tempt businesses to insist on payment in virtual currencies to escape the scope of the New Consumer Sales Directive. Another problem discussed here was the extent to which smart contracts can be regarded as "digital elements" in the sense of the New Consumer Sales Directive if they are jointly responsible for the functioning or failure of a purchased good by means of a smart device such as a smart lock. In my opinion, there are better arguments in favour of including these smart contract elements in the scope of the New Consumer Sales Directive and not in the scope of the Digital Content Directive. Ultimately, this article is to be understood as a small *amuse-gueule* that hopefully has whetted the appetite of many readers to deal more intensively with the topic presented.

43 See Art. 3(3)2 of the New Consumer Sales Directive.

44 Emphasis added in quote by the author.

Liability For Artificial Intelligence And EU Consumer Law

by **Martin Ebers***

Abstract: The new Directives on Digital Contracts – the Digital Content and Services Directive (DCSD) 2019/770 and the Sale of Goods Directive (SGD) 2019/771 – are often seen as important steps in adapting European private law to the requirements of the digital economy. However, neither directive contains special rules for new technologies such as Artificial Intelligence (AI). In light of this issue, the following paper discusses whether existing EU consumer law is equipped to deal with situations in which AI systems are either used for internal purposes by companies or offered to consumers as the main subject matter of the contract. This analysis will reveal a number of gaps in current EU consumer law and briefly discuss upcoming legislation.

Keywords: Digital Content and Services Directive; Sale of Goods Directive; Artificial Intelligence; AI; EU Consumer Law; Liability

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A. Introduction

1 The new Directives on Digital Contracts – the Digital Content and Services Directive (DCSD) 2019/770[1] and the Sale of Goods Directive (SGD) 2019/771[2] – are widely seen as crucial first steps in adapting European private law to the requirements of the digital economy.[3] Both directives – although based on the principle of full harmonization[4] –

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1 European Parliament and Council Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (DCSD 2019/770).

2 European Parliament and Council Directive 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (SGD 2019/771).

3 Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (2020) 28 European Review of Private Law (ERPL) 217-247. For an extensive analysis of the DCSD 2019/770 see Sein and 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' (2019) 15 European Review of Contract Law (ERCL) 257, 269ff; Sein and Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 ERCL 365.

4 Cf Art 4 DCSD 2019/770; Art 4 SGD 2019/771. As to the concept of "full harmonization" or "targeted full harmonization" see Ebers, *Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht* (Tübingen, Mohr Siebeck 2016) 269ff and 742ff; Riehm, 'Die überschießende Umsetzung vollharmonisieren-

cover only certain legal aspects in the private law relationship between a business and a consumer. Moreover, in line with the principle of technology neutrality,[5] neither directive contains tailored rules for specific digital technologies.[6] Instead, both directives are generalized to "any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer"[7] or to "sales contracts between a consumer and a seller" including "goods with digital elements".[8] Therefore, new technologies such as Artificial Intelligence (AI) are not subject to any special rules.

2 These limitations raise concerns over whether existing EU consumer law (as well as other areas of EU law such as data protection and antidiscrimination law) is equipped to deal with the current challenges posed by AI systems. The following article explores this question by looking at the trader's liability for AI systems vis-à-vis the consumer. In this respect, two different constellations must be strictly delineated from each other: (i) the internal use of AI systems by a business during the "life cycle" of a contract and (ii) AI systems as the subject-matter of contracts.[9]

3 Accordingly, this paper is structured as follows: Section B gives an overview of the use of AI technologies in consumer markets, the problematic features of AI systems, and the specific risks these systems pose for consumers; section C addresses the trader's liability for AI during the life cycle of a contract, including the pre-contractual phase, the conclusion of contract and algorithmic decision making phase, and the performance phase; section D focuses on constellations in which an AI system is the subject matter of the contract, examining the trader's liability for non-conforming AI applications; and the final part of the paper looks toward the future, asking whether current reform projects (especially at the European level) can close the gaps that currently exist in European consumer law as it applies to AI.

4 That said, a disclaimer is in order: the purpose of this article is not to provide a detailed analysis of the numerous legal issues that arise in the business-consumer relationship when AI systems are used. Such an analysis would go far beyond the scope of this paper and must necessarily be left to later studies. Rather, the focus is on providing an initial overview of the numerous consumer law issues related to the use of AI, in particular highlighting the limits of the current European legal framework.

B. The Use of AI in Consumer Markets

I. The (Missing) Universal Definition of AI

5 Although the term "artificial intelligence" has been in use for nearly 70 years, no universally accepted definition of AI has emerged. *John McCarthy*, who famously coined the term in 1956, opined that since there is no "solid definition of intelligence that doesn't depend on relating it to human intelligence ... we cannot yet characterize in general what kinds of computational procedures we want to call intelligent."[10] Later, he is said to have cynically remarked: "As soon as it works, no one calls it AI anymore".[11]

6 This observation no longer holds true today. AI has become a buzzword applied to a variety of technologies available on the market. In reality, however, the term is mainly used for a specific sub-discipline of artificial intelligence, namely machine learning (ML).[12]

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der EG-Richtlinien im Privatrecht' (2006) 21 JuristenZeitung (JZ) 1035-1045.

5 The principle of technology neutrality aims to ensure equal treatment and sustainable rules; Reed, 'Taking Sides on Technology Neutrality' (2007) 4(3) SCRIPTed 263; Greenberg, 'Rethinking Technology Neutrality' (2016) 100 Minnesota Law Review 1495.

6 Cf recital (10) DCSD 2019/770: "Both the scope of this Directive and its substantive rules should be technologically neutral and future-proof".

7 Art 3(1) DCSD 2019/770.

8 Art 3(1) and 2(5)(b) SGD 2019/771.

9 Grundmann and Hacker, 'Digital Technology as a Challenge to European Contract Law. From the Existing to the Future Architecture' (2017) 13(3) ERCL 255–293, at 264.

10 <http://www-formal.stanford.edu\jmc\whatisai.pdf> accessed 31 January 2021.

11 Meyer, 'John McCarthy' (*CACM* 28 October 2011) <https://cacm.acm.org/blogs/blog-cacm/138907-john-mccarthy/fulltext> accessed 30 January 2021.

12 As to the various forms of machine learning, cf Anitha, Krithka, and Choudhry, 'Machine Learning Techniques for learning features of any kind of data: A Case Study' (2014) 3(12) International Journal of Advanced Research in Computer Engineering & Technology (IJARCET) 4324 <http://ijarcet.org/wp-content/uploads/IJARCET-VOL-3-ISSUE-12-4324-4331.pdf> accessed 30 January 2021; Buchanan and Miller, 'Machine Learning for Policymakers. What It Is and Why It Matters' (June 2017) Harvard Kennedy

7 Today's widely used ML-based systems are fundamentally different from earlier AI systems. In the past, many AI systems, especially expert systems, relied on rule-based conditional logic operations. Such systems typically break down complex human intellectual tasks into a set of computational steps or algorithms. In order to transform inputs into outputs, experts extract the knowledge from sources and convert them into a logical computational model using *symbolic rules* to represent and infer knowledge. Whereas symbolic systems have particular strengths in transparency and interpretability, one major flaw is their limited capacity to deal with complex situations. Most symbolic systems are only useful for narrow applications and cannot cope with uncertainty well enough to be useful in practical applications.[13]

8 By contrast, the current wave of successful AI applications is based on *data-learned knowledge*, which relies less on hand-coded human expertise than the knowledge learned from data. Instead of programming machines with specific instructions to accomplish particular tasks, ML algorithms enable computers to learn from "training data". Self-learning systems are not directly programmed; instead, they are trained with millions of examples so that the system develops by learning from experience.

II. The Seven Patterns of AI

9 Looking at concrete use-cases, we can distinguish seven patterns of AI, which are listed as follows in no particular order:[14]

10 *Autonomous Systems*: First, AI is the underlying technology for many autonomous systems which can accomplish a task or a goal with minimal human interaction. Such systems require the use of ML which can independently perceive the outside world, predict future behavior, and plan how to navigate changes. The most common applications are self-driving machines such as cars, trains, airplanes, etc.

11 *Patterns and Anomalies*: AI/ML also plays a role in the recognition of patterns and anomalies. ML and cognitive systems can learn patterns from data and check for anomalies by connecting data points. These techniques are most prominently used for fraud and risk detection, for example by insurance companies or tax offices.

12 *Hyperpersonalization*: Particularly in consumer markets, AI systems are used to personalize advertisements, prizes, and contracts. To this end, ML algorithms are applied to develop a profile of each individual in order to display and recommend to the consumer relevant advertisements or other content.

13 *Recognition*: To design and improve the accuracy of recognition technology, ML (especially deep learning) techniques are used for identifying and determining objects within image, audio, text, and other media formats. Examples include all manner of recognition systems, such as biometric (facial) recognition, object recognition, text recognition, audio, and video recognition.

14 *Human Interaction*: AI systems may also serve as conduits for conversation and human interaction. Here, the objective is to enable machines to interact with humans through voice, text, and image. These forms of AI systems are used for chatbots and voice assistants, as well as for the analysis of sentiment, mood, and intent.

15 *Predictive Analytics*: AI systems can also be employed to predict future outcomes based on patterns in order to help humans make better decisions. Examples include inter alia, assisted search, predicting behavior, and giving advice.

16 *Goal-driven system*: Finally, ML in the form of reinforcement learning can also be used to find the optimal solution to a problem. In practice, these goal-driven systems are used most frequently in game playing, resource optimization, and real-time auctions.

III. Use of AI Systems in the Business-Consumer Relationship

17 Many of the above-mentioned AI systems are used by companies in consumer markets. In this regard, we have to distinguish, as already mentioned, between (i) the internal use of AI systems within a company and (ii) cases in which AI is the subject of a contract.

School Cyber Security Project Paper <https://www.belfercenter.org/sites/default/files/files/publication/MachineLearningforPolicymakers.pdf> accessed 30 January 2021; Mohri, Rostamizadeh, and Talwalkar, *Foundations of Machine Learning* (Cambridge/London, MIT Press 2012).

13 Cf Kahneman and Tversky, 'Variants of uncertainty' (1982) 11(2) Cognition 143-157; Li and Du, *Artificial Intelligence with Uncertainty* (2nd edn, Boca Raton/London/New York, CRC Press 2017); Brill and Mooney, 'Empirical Natural Language Processing' (1997) 18(4) AI Magazine 13-24, at 16.

14 Cognilytica, 'The Seven Patterns of AI' (4 April 2019) <https://www.cognilytica.com/2019/04/04/the-seven-patterns-of-ai/> accessed 31 January 2021.

1. Internal Use of AI Systems

18 AI techniques are used by many companies during the "life cycle" of a contract to make contracting more efficient. At the *pre-contractual stage*, AI-driven profiling techniques provide better insights into consumers' behavior, preferences, and vulnerabilities. Companies can tailor their advertising campaigns[15] but also their products and prices specifically to the customer profile,[16] credit institutions can use the profiles for credit ratings,[17] and insurance companies can better assess the insured risk.[18] In addition to these applications, AI-driven big-data profiling techniques give companies the opportunity to gain superior knowledge about customers' personal circumstances, behavioral patterns, and personality, including future preferences. These insights enable companies to tailor their advertisements (so called "online behavioral advertising") and contracts in ways that maximize their expected utility by exploiting the behavioral vulnerabilities of their clients.

19 AI contracting tools and chatbots can also be used to govern the *contracting process* itself, especially for algorithmic (automated) decision making and formation of contracts.[19] Nowadays, such systems can be found not only in financial markets (e.g. for algorithmic trading), but also in consumer markets (e.g. for consumer sales, where an algorithmic system – and sometimes even a self-learning AI system – is contracting on behalf a company).

20 During the *performance phase*, AI systems facilitate and automatize the execution of transactions, assisting and simplifying real-time payments and managing supply chain risks. They also play a crucial role in contract management and due diligence.[20]

21 Finally, at the *post-contractual phase*, AI systems can help to litigate legal disputes by handling customer complaints, resolving online disputes, or predicting the outcome of court proceedings.[21]

2. AI Systems as the Subject-Matter of a Contract

22 Apart from their internal use by companies, AI systems may also be included in the subject-matter of a contract. Nowadays, many smart products and services offered to consumers are AI-based, e.g. self-driving cars, vacuum cleaners, surveillance equipment, health apps, voice assistants, and translation apps. For all these products and services, an unresolved question arises as to what requirements should be placed on contractual conformity when a lack of conformity exists, and under what preconditions the trader is then liable to the consumer.

15 Cf Calo, 'Digital Market Manipulation' (2014) 82(4) The George Washington Law Review 995, 1015ff; Helberger, 'Profiling and Targeting Consumers in the Internet of Things – A New Challenge for Consumer Law' in Schulze and Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Baden-Baden, Nomos 2016) 135ff.

16 Zuiderveen Borgesius and Poort, 'Online Price Discrimination and EU Data Privacy Law' (2017) 40 Journal of Consumer Policy 34.

17 Cf Citron and Pasquale (2014) 89 Washington Law Review 1; Zarsky, 'Understanding Discrimination in the Scored Society' (2014) 89 Washington Law Review 1375.

18 Cf Swedloff, 'Risk Classification's Big Data (R)evolution' (2014) 21(1) Connecticut Insurance Law Journal 339; Helveston, 'Consumer Protection in the Age of Big Data' (2016) 93(4) Washington University Law Review 859.

19 From the technical perspective, cf (in a chronological order) especially the following books: Ossowski (ed), *Agreement technologies* (Amsterdam, Springer 2013); Rovatsos, Vouros & Julian (eds), *Multi-agent systems and agreement technologies - 13th European Conference, EUMAS 2015, and Third International Conference, AT 2015, Athens, Greece, December 17-18, 2015, Revised Selected Papers* (Cham, Springer 2016); Criado Pacheco, Carrascosa, Osman, Julian (eds), *Multi-agent systems and agreement technologies - 14th European Conference, EUMAS 2016, and 4th International Conference, AT 2016, Valencia, Spain, December 15-16, 2016, Revised Selected Papers* (Cham, Springer 2017); Lujak (ed), *Agreement technologies - 6th International Conference, AT 2018, Bergen, Norway, December 6-7, 2018, Revised Selected Papers* (Cham, Springer 2019). As to the legal perspective cf below at 3.2.

20 Schuhmann, 'Quo Vadis Contract Management? Conceptual Challenges Arising from Contract Automation' (2000) 16(4) ERCL 489-510.

21 The most prominent example is eBay's ODR Resolution Center, which reportedly handles (automatically) over 60 million disputes annually; Schmitz & Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (Chicago, ABA 2017) 53; Rule & Nagarajan, 'Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution' *ACResolution Magazine* (Winter 2010).

IV. Risks for Consumers

23 The (*internal) use of AI systems* by companies vis-à-vis consumers raises a number of ethical and legal concerns.[22] These include:

- intrusion into privacy;
- growing information asymmetries;
- inability of the consumer to understand businesses' behavior;
- risks surrounding exploitation of a consumer's vulnerabilities through profiling and targeting;
- risks of algorithmic decision making due to the opaqueness of automated decisions, potentially leading to biased or discriminatory results;
- risks surrounding consumer safety and property;
- risks involved in due process and fair trial rights, considering that the consumer might be hindered in enforcing his or her rights due the opaqueness of algorithmic procedures and decisions.

24 From the perspective of consumer contract law, one of the most troubling developments is the growing *asymmetry of information* between businesses and consumers. The use of AI in consumer markets leads to a new form of power and information asymmetry. Usually, the consumer remains unaware that advertising, information, prices, or contract terms have been personalized according to his or her profile. If, for example, a business refuses to conclude a contract or makes an offer with unfavorable conditions because of a certain score, consumers are usually barred from understanding how this score was achieved in the first place. This asymmetry arises not only because the algorithms used are well-guarded trade secrets, but also because the specific characteristics of many AI technologies[23] – such as opacity ("black box effect"), complexity, unpredictability and semi-autonomous behavior – can make effective enforcement of EU Consumer legislation difficult, as the decision cannot be traced and therefore cannot be checked for legal compliance.

25 The *use of AI in products and services* also raises a number of questions, such as when an AI system is in conformity with the contract and under which conditions the business is liable if the autonomous system causes damage. The latter point is contentious, as AI applications entail new risks and liability issues due to their connectivity and high degree of automation – aspects which are at present not explicitly covered by EU legislation.[24] Finally, there is the well-known black box problem[25] and the issue that software is often updated after purchase: how can the consumer even determine that the product or application he purchased was not in conformity with the contract at the time of purchase if the underlying system is opaque and may evolve after purchase?

26 The following analysis will show that European Union law has not yet found satisfactory answers to most of these questions.

C. Liability for AI Systems During the Life Cycle of Contracts

I. Pre-Contractual Duties

27 Over the past 35 years, the European Union has enacted a vast number of directives in order to protect the consumer,[26] who is commonly defined as a natural person acting for purposes which are outside

22 Cf also Jabłonowska, Kuziemski, Nowak, Micklitz, Pałka, and Sartor, 'Consumer law and artificial intelligence. Challenges to the EU consumer law and policy stemming from the business's use of artificial intelligence. Final report of the ARTSY project' (2018) European University Institute (EUI) Working Paper LAW 2018/11; Sartor, 'New aspects and challenges in consumer protection. Digital services and artificial intelligence' (April 2020) Study requested by the IMCO committee of the European Parliament PE 648.790.

23 European Commission, 'White Paper on AI' COM(2020) 65 final, 14.

24 Cf European Commission, 'Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics' COM(2020) 64 final.

25 The term "black box" refers to the problem that automated decisions or predictions do not provide any reason or explanation for this decision or prediction; cf Burrell, "How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms" (2016 January-June) Big Data & Society 1; Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, Harvard University Press 2015).

26 On development of EU Consumer law cf Ebers, *Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht* (n 4) 737ff; Howells and Wilhelmsson, *EC Consumer Law* (Aldershot, Routledge 1997) 9ff; Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (2000) 37 Common Market Law Review (CMLR) 367-400, at 377ff; Weatherill, *EU Consumer Law and Policy* (2nd ed, Cheltenham, Elgar 2005) 1ff.

his or her business, commercial, or trade activity.[27] Many directives establish pre-contractual duties of the business – by prohibiting unfair commercial practices, such as misleading advertisements or by establishing information duties – in order to allow the consumer to make an informed decision before concluding a contract.

1. Dark Patterns and Online Behavioral Advertising as Unfair Commercial Practices?

28 A particular concerning business practice can be found in so-called "dark patterns" and online behavioral advertising techniques. The expression "dark patterns"[28] is a catch-all term for how user interface design can be used to adversely influence users and their decision-making abilities online.[29] The term has recently found its way into legal texts, for example the Californian Civil Code, as amended by the Privacy Rights Act of 2020, which defines "dark pattern" as "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation."[30] Online behavioral advertising, on the other hand, refers to the practice of targeting consumers based on their behavior and their cognitive biases, in order to influence consumers to take decisions that may go against their best interests.

29 The use of these practices poses the question of how EU law, especially the Unfair Commercial Practices Directive (UCPD) 2005/29,[31] can prevent (and remedy) situations in which the trader takes advantage of consumers' vulnerabilities.[32]

30 Many legal studies show that the UCPD 2005/29 insufficiently addresses the problem of dark patterns and other ways of online behavioral advertising,[33] highlighting two points in particular. On the one hand, the definition of "aggressive practices" seems to be too narrow, as all forms of aggressive behavior require the presence of pressure, which is normally absent in subtle forms of nudging. On the other hand, many scholars rightly argue that the benchmarks of "average" and "vulnerable" consumer are too narrow and static, as neither definition sufficiently reflects that traders in the age of AI and big data analytics have the technological capacity to exploit

27 For an overview of the various definitions of "consumer" in EU directives and the respective case-law, cf Ebers in Schulte-Nölke, Twigg-Flesner and Ebers, *EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States* (München, Sellier European Law Publishers 2008) 453ff.

28 The term was coined by Brignull in 2010; Brignull, 'Dark Patterns: Deception vs. Honesty in UI Design' A List Apart (1 November 2011) <https://alistapart.com/article/dark-patterns-deception-vs-honesty-in-ui-design/> accessed 31 January 2021.

29 In the context of data protection law, the Norwegian Consumer Council defines "dark patterns" as "techniques and features of interface design meant to manipulate [and] to nudge users towards privacy intrusive options", including "privacy intrusive default settings, misleading wording, giving users an illusion of control, hiding away privacy-friendly choices, take-it-or-leave-it choices, and choice architectures where choosing the privacy friendly option requires more effort for the users"; Forbrukerrådet, 'Deceived by Design: How tech companies use dark patterns to discourage us from exercising our rights to privacy' (27 June 2018) Norwegian Consumer Council report <https://www.dwt.com/-/media/files/blogs/privacy-and-security-blog/2020/12/deceived-by-design.pdf > accessed 31 January 2021.

30 Section 1798.140 (l) Californian Civil Code, as amended by section 14 of the California Privacy Rights Act 2020.

31 European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

32 See, for example, European Parliament, Parliamentary questions, Answer given by Ms Jourová on behalf of the European Commission, E-000774/2019, 11 April 2019.

33 Ebers, "Beeinflussung und Manipulation von Kunden durch 'Behavioral Microtargeting'" (2018) MultiMedia und Recht (MMR) 423; Galli, 'Online Behavioural Advertising and Unfair Manipulation Between the GDPR and the UCPD' in Ebers and Cantero (eds), *Algorithmic Governance and Governance of Algorithms* (Cham, Springer 2020) 109-135; Helberger, 'Profiling and targeting consumers in the Internet of Things – a new challenge for consumer law' in Schulze and Staudenmayer (eds), *Digital revolution: challenges for contract law in practice* (Baden-Baden, Nomos 2016); Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) 8(1) Law, Innovation and Technology 1 <http://ink.library.smu.edu.sg/sol_research/1736> accessed 30 January 2021. However, see also Leiser, "'Dark Patterns': The Case for Regulatory Pluralism" (12 June 2020) <https://ssrn.com/abstract=3625637> accessed 31 January 2021, who argues that, although the European Union's consumer protection regime has been underutilized, "it is ripe for shining light on malicious and manipulative dark patterns".

temporary vulnerabilities and not just those caused by age, mental infirmity or credulity, as foreseen by Art. 5(3) UCPD.[34]

31 Contract law also fails to provide satisfactory answers to dark patterns and online behavioral advertising. As I have explained elsewhere,[35] it is difficult to subsume online behavioral advertising and subtle forms of nudging under any of the traditional protective doctrines – such as duress, mistake, undue influence, misrepresentation, or *culpa in contrahendo* – as there is a very fine line between informing, nudging, and outright manipulation.

32 Accordingly, the possibilities to protect consumers from dark patterns, nudging and subtle forms of manipulation are currently – *de lege lata* – rather limited.

2. Pre-contractual Information Duties

33 Pre-contractual information duties primarily serve the purpose of rectifying existing information asymmetries between the trader and the consumer. Accordingly, they could also serve to correct new power imbalances in the B2C relationship stemming from companies' use of opaque algorithmic systems. One way to realize this level of accountability could be to require that traders inform consumers before the conclusion of contract about the use of algorithmic systems, their main characteristics, and their underlying logic.

34 The EU Consumer Rights Directive 2011/83/EU, as amended by the "New Deal for Consumers", includes such an obligation, however, only to a very limited extent; according to Art. 6(1) (ea) Consumer Rights Directive (CRD) 2011/83/EU[36] as amended by Directive 2019/2161/EU,[37] the trader may be obliged to inform the consumer "that the price has been personalised on the basis of an automated decision making process". Moreover, the so-called P2B (platform-to-business) Regulation 2019/1150 requires providers of online search engines to "set out the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters, by providing an easily and publicly available description".[38]

35 Additionally, many consumer law directives require traders to disclose a list of information – for example, about the main characteristics and total price of the goods or services and the functionality of digital content – before the conclusion of a contract.[39] However, the relevant disclosure requirements are formulated too generally to determine how they can be concretized with regard to AI systems.

36 Therefore, considering the current legal situation, only limited pre-contractual information obligations can be leveraged to regulate the use of AI systems.

II. Formation of Contract and Algorithmic Decision Making

1. Formation of Contract under EU Private Law

37 Traditionally, formation of contract is not a subject of EU (Private) Law Directives.[40] Hence, the question of whether a contract has been concluded must be determined under the applicable national law. Accordingly, the heated debate[41] over whether

34 Critically, Duivenvoorde, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive' (2013) 2 Journal of European Consumer and Market Law 69-79. See also Leczykiewicz and Weatherhill (eds), *The Images of the Consumer in EU Law* (Oxford/Portland, Hart Publishing 2018).

35 Ebers, "Beeinflussung und Manipulation von Kunden durch 'Behavioral Microtargeting'" (n 33).

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

37 European Parliament and Council Directive 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules [2019] OJ L328/7.

38 Art 5(2) Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 (P2B Regulation).

39 Art 5(1)(a) CRD 2011/83; Art 6 of the Directive 2011/83/EU on consumer rights, etc.

40 Cf Art 3(5) CRD 2011/83; Art 3(10) DCSD 2019/770; Art 3(6) SGD 2019/771. For more details on this harmonization technique see the papers in Schulze/Ebers/Grigoleit (eds), *Information Requirements and Formation of Contract in the Acquis Communautaire – Informationspflichten und Vertragsschluss im Acquis Communautaire* (Tübingen, Mohr Siebeck 2003).

41 Cf Allen and Widdison, 'Can Computers Make Contracts?'

automatically generated declarations of an AI system can be attributed (e.g. as an offer or acceptance) to a natural or legal person depends on the applicable national law.[42]

2. Art. 22(1) GDPR and EU Private Law

38 Whether Art. 22 of the General Data Protection Regulation (GDPR) changes the national rules of formation of contract remains unclear. According to Art. 22(1) GDPR, "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her." Since this provision can be interpreted as a prohibition,[43] a breach of Art. 22(1) GDPR could result in the nullity of a contract, or, if interpreted as a right not to be subject to automated decision-making,[44] as a right to avoidance.

39 However, both views cannot be adopted. The GDPR does not intend to harmonize the national laws of obligations. In general, violations of the regulation do not affect the general contract law of Member States such as the rules on the validity, formation, or effect of a contract.[45] By the same token, EU secondary law clarifies that consumer contract law directives are without prejudice to the GDPR.[46] Hence, the GDPR and (partially harmonized) national laws of obligations are applicable alongside each other.[47]

40 Apart from this, Art. 22(1) GDPR has little significance in practice, as Art. 22(2) GDPR establishes numerous exceptions and only covers decisions "based solely on automated processing" of data (Art 22(1) GDPR). Since most algorithmically prepared decisions still involve a human being, the majority of algorithmic decision-making procedures are therefore not covered by the prohibition of Art 22(1) GDPR.[48]

(1996) 9 Harvard Journal of Law & Technology 26; Sartor, 'Agents in Cyber Law' in Cevenini, *Proceedings of the Workshop on the Law of Electronic Agents (LEA02)* (Bologna, CIRSFID 2002) 7; Turner, *Robot Rules. Regulating Artificial Intelligence* (Cham, Palgrave Macmillan 2019) 106ff; for German law cf Wendehorst/Grinzinger, '§ 4 Vertragsrechtliche Fragestellungen beim Einsatz intelligenter Agenten' in Ebers et al (eds), *Künstliche Intelligenz und Robotik – Rechtshandbuch* (München, CH Beck 2020) 139ff, at 149ff.

42 There have already been some attempts to create special laws to account for the role of computers in concluding contracts. Cf eg Art 12 of the UN Convention on the Use of Electronic Communications in International Contracts 2005 ("A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract"); section 14 of the Uniform Electronic Transactions Act ("A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.").

43 Sancho, 'Automated Decision-Making under Article 22 GDPR: Towards a More Substantial Regime for Solely Automated Decision-Making' in Ebers and Navas (eds), *Algorithms and Law* (Cambridge/New York, Cambridge University Press 2020) 147; see also Wachter, Mittelstadt, and Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 International Data Privacy Law (IDPL) 94ff; Mendoza and Bygrave, 'The Right Not to Be Subject to Automated Decisions Based on Profiling' (2017) University of Oslo Faculty of Law Legal Studies Research Paper Series, 7ff, 9ff.

44 Sancho (n 43) 148.

45 This is expressly clarified for child consent in Art 8(3) GDPR, but it applies in principle to all breaches of the Regulation.

46 See Art 3(8) DCSD 2019/770.

47 For attempts to harmonize data protection law with the law of obligations in order to create a "Datenschuldrecht" or "data-related law of obligations", cf Langhanke/Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 1 Journal of European Consumer and Market Law (EuCML) 218; Schmidt-Kessel, 'Unentgeltlich oder entgeltlich? – Der vertragliche Austausch von digitalen Inhalten gegen personenbezogene Daten' (2017) Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW) 84; Lohsse/Schulze/Staudenmayer (eds), *Data as Counter-Performance - Contract Law 2.0?* (Baden-Baden, Nomos 2019); Wendland, 'Sonderprivatrecht für Digitale Güter' (2019) 118 Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss) 191.

48 Wachter, Mittelstadt and Floridi (n 43) 92. Bygrave, on the other hand, is of the opinion that decisions formally attributed to humans but originating "from an automated data-processing operation the result of which is not actively assessed by either that person or other persons before being formalised as a decision" would fall under the category of "automated decision-making": Bygrave, 'Automated Profiling: Minding the Machine: Article 15 of the EC Data Protection Directive and Automated Profiling' (2001) 17 Computer Law & Security Review 17.

3. Algorithmic Discrimination and EU Private Law

41 Another problem in the context of algorithmic decision making is the risk of discriminatory decisions. In fact, many examples show that algorithmic decisionmaking procedures are by no means neutral, but can perpetuate and even exacerbate human bias in various ways. For example, data mining and machine learning techniques which are used to select job applicants might discriminate against minorities, simply because the training data reflect existing social biases against a minority.[49] Despite these findings, a number of legal studies draw the conclusion that neither EU anti-discrimination law[50] nor EU data protection law[51] can tackle this problem.[52]

III. Contractual Liability for a Breach of Contract Caused by AI Systems

42 If, in using an AI system, the trader breaches the contract,[53] the question arises as to whether he is responsible for non-performance or other damages caused by the "misconduct" of such a system.

43 Currently, EU private law contains few provisions in this regard. When it comes to *non-conforming goods* or *non-conforming digital content/services*, the consumer's claim for repair/replacement (or other measures to bring the good/digital content into conformity), price reduction, or termination of contract does not require the seller to be at fault.[54] According to both the DCSD 2019/770 and the SGD 2019/771, the business's liability is, as a matter of principle, strict. Therefore, the consumer is not required to establish that the trader was aware or should have been aware that the AI system was likely to act in a way that led to a breach of contract and a damage.

44 However, this form of strict contractual liability applies only to the above listed remedies. The regulation of damages is, on the other hand, left to Member States.[55] As a consequence, Member States[56] remain free to maintain or introduce systems in which liability in damages is based on fault[57] or on

49 Lowry and MacPherson, 'A Blot on the Profession' 296 British Medical Journal 657–658 (1988).

50 Cf especially Race Equality Directive 2000/43/EC; Gender Equality Directive 2004/113.

51 Some scholars suggest that the GDPR should be used to mitigate risks of unfair and illegal discrimination; cf Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law' (2018) 55 CMLR 1143. Cf also Mantelero, 'Regulating Big Data' (2017) 33(5) The Computer Law and Security Review 584; Wachter, 'Normative Challenges of Identification in the Internet of Things: Privacy, Profiling, Discrimination, and the GDPR' (2018) 34(3) The Computer Law and Security Review 436; Wachter and Mittelstadt, 'A Right to Reasonable Inferences: Rethinking Data Protection Law in the Age of Big Data and AI' (2019) Columbia Business Law Review 494 <https://ssrn.com/abstract=3248829> accessed 31 January 2021.

52 Ebers, 'Regulating AI and Robotics: Ethical and Legal Challenges' in Ebers and Navas (eds), *Algorithms and Law* (Cambridge/New York, Cambridge University Press 2020) 78ff. For the problems of applying EU anti-discrimination law, see also Hacker (n 51); for the limits of EU Data protection law to deal with algorithmic discrimination cf Zuiderveen Borgesius, 'Discrimination, artificial intelligence, and algorithmic decision-making' (2018) Study for the Council of Europe, 24ff <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73> accessed 31 January 2021.

53 Example: The trader does not deliver the ordered good or does not provide the promised service because of a malfunction of the AI system.

54 Riehm/Abold, 'Mängelgewährleistungspflichten des Anbieters digitaler Inhalte' (2018) 2 Zeitschrift für Urheber- und Medienrecht (ZUM) 82–91, at 88; Rosenkranz, 'Article 10 - Third-party rights' in Schulze and Staudenmayer (eds), *EU Digital Law – Article-by-Article Commentary* (Baden-Baden/Oxford, CH Beck/Nomos/Hart 2020) 196, para 55.

55 Art 3(10) DCSD 2019/770; Art 3(6) SGD 2019/771. Additionally, recital (73) DCSD 2019/770 and recital (61) SGD 2019/771 state as a principle that the consumer should be entitled to claim compensation for detriment caused by a lack of conformity with the contract. At the same time, the recitals also stress that such a right already is ensured in all Member States and therefore the directives are without prejudice to national damages rules.

56 For a comparison between different legal systems, see Ebers, Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht (n 4) 941ff; Schwartze, *Europäische Sachmängelgewährleistung beim Warenkauf* (Tübingen, Mohr Siebeck 2000) 249ff, 331ff; von Bar, Clive and Schulte-Nölke et al (eds), 'Draft Common Frame of Reference (DCFR), Principles, Definitions and Model Rules of European Private Law, Full Edition' (2009), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) vol 1, 774ff.

57 This is, for example, the case in Germany; cf § 280(1) BGB. By contrast, under English and Irish law, contract liability is strict liability, and will occur in most cases of non-performance unless the failure to perform is excused; Treitel, *Remedies for Breach of Contract* (Oxford, Clarendon Press 1989).

force majeure as a defense.[58]

45 If the consumer's right to damages for breach of contract is subject to these conditions, it is doubtful whether the trader can be held liable in cases where the specific error and thus the behavior of the AI system was unforeseeable and in the specific situation unavoidable.

46 National contract law might come up with different answers.[59] According to a predominant view, computer programs – including AI systems – are seen as mere tools which are used by human agents.[60] Therefore, in order to hold a human accountable, what matters is not the damaging "behavior" of the software, but the behavior of the human actor involved. However, such an approach is problematic when it comes to autonomous systems. The higher the degree of automation, the less the human can be blamed for the specific behavior of the AI system that led to a breach of contract and damages. If the trader can prove that the occurrence of damage was neither predictable nor avoidable in accordance with the state of the art, he cannot be held liable.

47 In light of these considerations, a growing number of scholars want to treat AI systems as "agents" for which the human operator is liable according to the rules on vicarious liability.[61] Indeed, such an analogy leads in most cases to strict contractual liability of the human operator for breaches of contractual obligations caused by machines, regardless of whether such conduct was planned or envisaged. Others even call for autonomous AI systems to be granted limited legal capacity in order to close possible liability gaps in contract and tort law.[62]

48 In any case, contractual clauses might limit or exclude a business's liability for damages caused by AI systems. The question then becomes a matter of whether such clauses are valid. Since neither the DCSD 2019/770 nor the SGD 2019/771 regulate the right to damages, the validity of such disclaimers must be determined first and foremost by national (consumer) contract law. Additional requirements could result from the Unfair Contract Terms Directive (UCTD) 93/13.[63] While the Court of Justice of the European Union (CJEU) emphasized in earlier rulings that the list contained in the Annex to the directive is only of "indicative and illustrative value",[64] the Court has underlined since the Invitel case[65] that the Annex is "an essential element on which the competent court may base its assessment". At the same time, the CJEU gradually specified, in a number of cases, the abstract criteria listed in the Annex for reviewing whether a term is unfair.[66] Accordingly, the CJEU

58 Eg French law, see Beale, Fauvarque-Cosson, Rutgers and Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law* (3rd edn, Oxford, Hart 2019) ch 28.3.

59 For an overview on the different theories cf Koops, Hildebrandt, and Jaquet-Chiffelle, 'Bridging the Accountability Gap: Rights for New Entities in the Information Society?' (2010) 11(2) Minnesota Journal of Law, Science & Technology 497.

60 Cerka, Grigiene, Sirbikyte, 'Liability for damages caused by artificial Intelligence' (2015) 31 Computer Law & Security Review 376-389, at 384ff. For Germany, cf Horner/Kaulartz, 'Haftung 4.0: Rechtliche Herausforderungen im Kontext der Industrie 4.0' (2016) Innovations- und Technikrecht (InTeR) 22-27, at 23; Hanisch, 'Zivilrechtliche Haftungskonzepte für Robotik' in Hilgendorf (ed), *Robotik im Kontext von Recht und Moral* (Baden-Baden, Nomos 2014) 27-61, at 32.

61 For the international debate cf fn 41 and 62. For Germany, cf Hacker, 'Verhaltens- und Wissenszurechnung beim Einsatz von Künstlicher Intelligenz' (2018) 9 Rechtswissenschaft (RW) 243–288, at 284ff; Schirmer, 'Rechtsfähige Roboter?' (2016) 71 JZ 660–816, at 665; Teubner, 'Digitale Rechtssubjekte' (2018) 218 Archiv für die civilistische Praxis (AcP) 155-205, at 186; Wendehorst/Grinzinger, 'Vertragsrechtliche Fragestellungen beim Einsatz intelligenter Agenten' (n 41) 168ff, para 82ff.

62 Solum, 'Legal Personhood for Artificial Intelligence' (1992) 70 North Carolina Law Rev 1231; Karnow, 'Liability for Distributed Artificial Intelligence' (1996) 11 Berkeley Technol Law Journal 147; Allen and Widdison, 'Can Computers Make Contracts?' (1996) 9 Harvard Journal of Law & Technology 26; Sartor, 'Agents in Cyber Law' in Santor and Cevenini (eds), *Proceedings of the Workshop on the Law of Electronic Agents (LEA02)* (Bologna, CIRSFID 2002) 7; Teubner, 'Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33 Journal of Law & Society 497, 502; Matthias, 'Automaten als Träger von Rechten. Plädoyer für eine Gesetzesänderung' (PhD Thesis, University of Berlin 2007); Chopra and White, *A Legal Theory for Autonomous Artificial Agents* (Ann Arbor, University of Michigan Press 2011).

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

64 Case C478/99 *Commission v Sweden* ECLI:EU:C:2002:281, [2002] ECR I-4147 [22].

65 Case C472/10 *Invitel Távközlési* ECLI:EU:C:2012:242 [26]; confirmed by case C488/11 *Asbeek Brusse and de Man Garabito* ECLI:EU:C:2013:341 [55]; case C342/13 *Sebestyén* ECLI:EU:C:2014:1857 [32]. In Case C143/13 *Matei* ECLI:EU:C:2015:127 [60] the Court refers to the Annex even as a "grey list".

66 For more detail cf Ebers, *Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht* (n 4) 887ff; Micklitz and Reich, 'The Court and the Sleeping Beauty: The Rival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 CMLR 771-808,

could develop Europe-wide fairness requirements for clauses that limit the traders' liability for AI systems.

IV. Non-Contractual Liability for Defective AI Systems

49 Consumers who are harmed by an AI system may also have an extra-contractual claim against the producer or the operator of the AI system. So far, there is currently no specific legislation on civil liability for damage caused by AI either at European level or in any national jurisdictions.[67]

1. Product Liability Directive 85/374

50 In the European Union, product liability has been fully harmonized in all Member States through the Product Liability Directive (PLD) 85/374/EEC,[68] which establishes a system of strict liability – that is, liability without fault for producers when a defective product causes physical or material damage to the injured person.[69]

51 Whether the PLD can adjust effectively to the challenges posed by AI systems is currently unclear. Both the "Expert Group on Liability and New Technologies[70] and the European Commission in its report on "liability implications of Artificial Intelligence"[71] as well as other reports[72] point out various shortcomings of the PLD in this regard:[73]

52 First, it is unclear whether software is a product and thus covered by the PLD.

53 Second, the directive only applies to products and not to services.[74] Companies providing services such as (real-time) data services, data access, data-analytics tools, and machine-learning libraries are therefore not liable under the PLD,[75] so that national (non-harmonized) law decides whether the (strict) liability rules developed for product liability can be applied accordingly to services.

54 Third, the concept of defect remains unclear, because in the PLD, the determination of defect is linked to the level of safety that consumers are entitled to expect. However, with AI systems it becomes increasingly difficult for consumers and courts to establish the expected level of safety.

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at 789 (judge-made "grey list").

67 According to a comparative report, Estonia and France are expected to develop and potentially propose either revision of the existing national legislation or adoption of the new legislation with a specific focus on liability issues; Evers, 'European Parliamentary Research Service, Civil liability regime for artificial intelligence. European added value assessment' (2020) EPRS Study PE 654.178, 46. However, the Estonian Ministry recently decided to refrain from reform projects in this regard, until the European Commission publishes its proposals on the regulation of AI; Liisi Jürgen, Tea Kookmaa, Tanel Kerikmäe, 'Jürgen, Kookmaa, Kerikmäe: kratiseadus pandi ootele' *ERR* (1 December 2020) <https://www.err.ee/1192069/jurgen-kookmaa-kerikmae-kratiseadus-pandi-ootele> accessed 2 February 2021.

68 European Parliament and Council Directive 1999/34/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products 1999 OJ L 141/20.

69 Art 9(b) PLD 1985/374 states that this claim does not relate to the defective product itself, but only to "damage to, or destruction of, any item of property other than the defective product itself". In other words, the PLD only provides compensation for "consequential loss", ie, economic loss that is connected to damage to a person or property of the claimant; For the term "consequential loss" as distinguished from "pure economic loss" cf Bussani/Palmer, 'The notion of pure economic loss and its settings' in Bussani/Palmer (eds), *Pure Economic Loss in Europe* (Cambridge, Cambridge University Press 2003) 3, 5ff.

70 European Commission, 'Liability for Artificial Intelligence and other emerging technologies' (2019) Report from the Expert Group on Liability and New Technologies - New Technologies Formation doi:10.2838/573689.

71 European Commission, 'Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics' COM (2020) 64 final.

72 See especially Evers (n 67) 9.

73 See also Luzak, 'A Broken Notion: Impact of Modern Technologies on Product Liability' (2000) 11(3) European Journal of Risk Regulation 1; de Meeus, 'The Product Liability Directive at the Age of the Digital Industrial Revolution: Fit for Innovation?' (2019) 8 EuCML 149; Rott, 'Produkthaftung im Zeitalter der Digitalisierung' in Hentschel, Hornung and Jandt (eds), *Mensch – Technik – Umwelt: Verantwortung für eine sozialverträgliche Zukunft, Festschrift für Alexander Roßnagel* (Baden-Baden, Nomos 2020) 639; von Westphalen, 'Produkthaftungsrechtliche Erwägungen beim Versagen Künstlicher Intelligenz (KI) unter Beachtung der Mitteilung der Kommission COM(2020) 64 final' (2000) Verbraucher und Recht (VuR) 248-254.

74 Cf Case C-495/10 *Centre hospitalier universitaire de Besançon v Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura* ECLI:EU:C:2011:869.

75 Service providers could only be liable if they manufacture the product as part of their service.

55 Moreover, there is the problem that, under Art 4 PLD, the injured party must prove the damage, the defect, and the causal relationship between defect and damage. This is precisely what is difficult with AI systems. The specific characteristics of many AI technologies – including opacity ('black box-effect'), complexity, unpredictability, and partially autonomous behavior,[76] as well as the (global) interconnectivity ("many hands problem")[77] – may make it hard for the victim to show that the AI system was defective when it was put into circulation and caused a damage.

56 Finally, the PLD provides for a number of exceptions in which producers can limit their liability, as for example the "development risks defence" admitted by Art 7(e) PLD.[78]

57 For all these reasons, the European Commission is currently examining possible amendments to the PLD.

2. National Tort Law

58 Liability for AI systems can arise not only from harmonized product liability law, but also from national liability systems, especially tort law. National tort law plays a crucial role especially when it comes to a claim of the injured party (consumer) against the operator of the AI system (e.g. against the trader).[79]

59 A recently published comparative legal analysis[80] of the national liability regimes of 19 Member States provides an interesting overview of the complexity and diversity of approaches and their degree of flexibility to adjust to the new challenges related to AI. By and large, all legal systems contain a regulatory mix between fault-based liability (as a rule) and strict liability systems (as a narrow set of exceptions).

60 Fault based systems usually do not provide satisfactory results when it comes to AI systems, because the high degree of automation/autonomy makes it increasingly difficult to trace damages back to negligent human behavior. If the operator can show that he/she has always taken all necessary safety precautions, it will be impossible to hold him/her liable for non-predictable actions of the AI systems.[81]

61 As a result, operators can only be held accountable if there is strict liability. However, in most member states, provisions on strict liability only apply in pre-determined cases – as, for example, with damages caused by things, dangerous activities, animals, and vicarious liability – and it is in all legal systems currently unclear whether these provisions can be applied to AI directly or by analogy.[82]

D. Liability for Non-Conforming AI Applications

62 In practice, AI systems are not only used by companies for internal purposes, but also offered to consumers as an essential part of smart goods or services, as for example in the form of automated translation services, surveillance technology, intelligent health apps, intelligent vacuum cleaners, or self-driving cars.

63 In these cases, the question arises as to what kind of quality consumers can expect from AI-driven goods, digital contents, or digital services. In other words: when is such a good, content, or service not in conformity with the contract? And what remedies are consumers then entitled to?

76 Cf European Commission, 'White Paper On Artificial Intelligence - A European approach to excellence and trust' COM(2020) 65 final, 12.

77 Yeung, 'A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework' (2019) Council of Europe- Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), 11.

78 Cf thereto Cemre Polat, 'Defectiveness of Autonomous Systems and Development Risk Defence' (*RAILS-Blog*, 5 January 2021) <https://blog.ai-laws.org/defectiveness-of-autonomous-systems-and-development-risk-defence/> accessed 4 February 2021).

79 National tort law also plays a role in producers' liability insofar as it deals with situations that are not covered by the national laws transposing the PLD 85/374. For Germany, cf Ebers, 'Autonomes Fahren: Produkt- und Produzentenhaftung' in Oppermann/Stender-Vorwachs (eds), *Autonomes Fahren. Rechtsfolgen, Rechtsprobleme, technische Grundlagen* (München, CH Beck 2017) 93-125, at 102, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192911> accessed 4 February 2021.

80 Evers (n 67).

81 This does not exclude in general the liability of operators. A person using AI systems should still be required to abide by duties to properly select, operate, monitor, and maintain the technology in use and – failing that – should be liable for breach of such duties if at fault.

82 Cf again Evers (n 67) 32.

I. Scope of the Directives on Digital Contracts

1. DCSD 2019/770 vs. SGD 2019/771: Which Directive Applies?

64 Since the DCSD 2019/770 and the SGD 2019/771 are mutually exclusive in their scope of application,[83] the first question is under which conditions each directive applies to AI-driven applications.

65 For the consumer, the demarcation of the scopes of application for both directives is of great importance. Although the two directives follow the same structure with almost identical rules on conformity and remedies, there are still some differences between them. The most notable point in this regard is the addressee of potential remedies.[84] The SGD 2019/771 establishes a one-stop mechanism: if the provision of digital content or service forms part of the contract, the seller is responsible for their functioning, even if this content or service is not supplied by the seller itself but by a third party. In other words, the consumer does not need to deal with different suppliers.[85] This situation changes if the consumer acquires a smart good separately from digital content or services. In that case, the SGD 2019/771 applies to the good only, whereas the DCSD 2019/770 applies to additional digital content and services with the consequence that the consumer has different contract partners to turn to, i.e. the seller and also the digital content/services provider.

66 The decisive factor in determining which of the directives applies is, at the end of the day, the content of the contract.[86] The SGD 2019/771 applies to goods with digital elements only if two cumulative conditions are met: a) first, the digital content or service must be incorporated or inter-connected with the good in such a way that "the absence of that digital content or digital service would prevent the goods from performing their functions" (Article 2(5)(b) SGD 2019/771); and b) second, the digital content or service must be "provided with the goods under the sales contract" (Article 3(3) SGD 2019/771).

2. Liability of Platform Providers?

67 Another issue is whether the new directives on digital contracts also apply to platforms. If a consumer and a business conclude the contract via an online platform, the platform is usually not a party to this contract. Rather, in such a "triangular" situation, there are normally three different contractual relationships, i.e. between the consumer and the business, the platform and the consumer, and the platform and the business.[87]

68 Accordingly, both the DCSD 2019/770 and the SGD 2019/771 clarify that platform providers are to be considered as sellers or traders only if they act "as the direct contractual partner of the consumer".[88] This could be the case, for example, when apps based on AI systems are offered by an operator of a platform which certifies and controls the apps,[89] or when a platform offers consumers directly "AI as a Service" (AIaaS).[90]

69 If, on the other hand, a platform acts as a mere intermediary, there is no obligation under EU law to apply the (nationally transposed) provisions of the directives to them. However, according to the

83 Cf Art 3(4) DCSD 2019/770; Art 3(3) SGD 2019/771.

84 Cf thereto Rott, 'The Digitalisation of Cars and the New Digital Consumer Contract Law' jipitec, in this issue. See also Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) 10 VuR 363, 369.

85 See also Staudenmayer, 'Kauf von Waren mit digitalen Elementen – Die Richtlinie zum Warenkauf' (2019) Neue Juristische Wochenschrift (NJW) 2889; Staudenmayer, 'Die Richtlinie zu den digitalen Verträgen' (2019) 4 Zeitschrift für Europäisches Privatrecht (ZEuP) 663, 672ff.

86 Cf Sein and Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Part 1' (n 3) 269ff.

87 See Wendehorst, 'Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive' (2016) 5 EuCML 30-33; Busch et al, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3-4.

88 Recital (18) DCSD 2019/770 and recital (23) SGD 2019/770.

89 Cf Sein and Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Part 1' (n 3) 277ff.

90 Typically, AIaaS providers offer their customers access to pre-built AI models and services via APIs (application programming interfaces). Usually, however, AIaaS is offered only to commercial organizations and public sector bodies, and not to consumers. Cf Parsaeefard, Tabrizian, Leon-Garcia, 'Artificial Intelligence as a Services (AI-aaS) on Software-Defined Infrastructure' (AIES 2020, New York, 11 July 2019) arXiv:1907.05505v1 [cs.LG]; Javadi, Cloete, Cobbe, Lee and Singh, 'Monitoring Misuse for Accountable 'Artificial Intelligence as a Service'" (AIES 2020, New York, 7-8 February 2020); Berberich/Conrad, '§ 30 Plattformen und KI' in Ebers et al (eds), *Künstliche Intelligenz und Robotik – Rechtshandbuch* (München, CH Beck 2020) 930ff, at 938ff.

recitals of the directives,[91] even in this case Member States remain free to extend the directives' rules to these platform providers.

II. The Conformity Criteria

1. Overview

70 The new directives oblige the business to comply both with subjective as well as objective conformity criteria.[92] However, a closer look reveals that – in contrast to earlier proposals[93] – both Directives follow an approach under which goods, digital contents, and digital services have to respect mainly objective conformity criteria, i.e. statutory criteria.

71 As a matter of principle, subjective and objective conformity criteria apply cumulatively; in other words, both categories need to be respected.[94]

72 Whereas the parties to a contract can always agree to subjective conformity criteria that go beyond the objective conformity criteria (thereby establishing higher conformity standards), they cannot simply establish a lower standard than the objective conformity criteria in Art. 8 DCSD 2019/770, Art. 7 SGD 2019/771. According to both Directives, this is only possible if the consumer (i) was specifically informed that a particular characteristic of the good, digital content, or digital service was deviating from the objective requirements for conformity, and the consumer (ii) expressly and separately accepted that deviation when concluding the contract.[95]

73 As a result, consumers can rely on the objective criteria to establish non-conformity. Since compliance with objective conformity is mandatory for the business[96] and deviation is only possible by express and separate agreement,[97] (pre-formulated) standard contract terms cannot deviate from the objective conformity. Accordingly, it is not permissible for the business to attempt to exclude or limit its liability for AI systems through contract clauses defining the contractual performance in a way which is below the objective conformity, for example by pointing out that the AI system is "beta software" or a completely unpredictable system whose behavior cannot be predicted.

2. Objective Conformity, Art. 8(1) DCSD 2019/770 and Art. 7(1) SGD 2019/771

74 When digital goods, content, or services are based on AI-systems, the question arises as to which features, qualities, and performance these systems must comply with in order to meet the objective criteria for conformity. In this regard, Art. 8(1) DCSD 2019/770 and Art. 7(1) SGD 2019/771 contain a list of different objective conformity criteria, starting with the well-known "fit-for-purpose test", followed in Art. 8(1)(b) DCSD 2019/770 by a list of other objective conformity elements such as functionality, compatibility, accessibility, and security the consumer can reasonably expect.

75 Arguably, identifying objective criteria for AI systems is a complicated endeavor. How can we determine whether AI systems are fit for the purposes for which systems of the same type would "normally" be used? How do we measure whether AI systems possess the quality and performance features which are "normal" for systems of the same type and which the consumer may "reasonably" expect?

76 Obviously, such standards should not be defined by the courts on the basis of mere empirical findings. What is necessary, instead, is a normative standard that is not based on arbitrary subjective expectations, but on objective criteria. In this vein, Art. 8(1)(a) DCSD 2019/770 and Art. 7(1)(a) SGD 2019/771, in particular, refer to existing Union and national law

91 Cf again recital (18) DCSD 2019/770 and recital (23) SGD 2019/770.

92 Art 6 DCSD 2019/770; Art 5 SGD 2019/771.

93 The original proposal of a Digital Content Directive had taken a subjective approach; cf Art 6(1) of the European Commission, 'Proposal for a Directive on the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM(2015) 634 final. This approach encountered a lot of criticism; cf Loos, 'Not Good but Certainly Content' in Claeys and Terryn (eds), *Digital Content and Distance Sales* (Mortsel, Intersentia 2017) 18ff; Mak, 'The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content' (2016) Policy Department C in-depth analysis PE 536.494, 15ff; Twigg-Flesner, 'Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law' in Franceschi (ed), *European Contract Law and the Digital Single Market* (Cambridge/Antwerp/Portland, Intersentia 2016) 45.

94 Staudenmayer, 'Article 6 – Conformity of the digital content or digital service' in Schulze and Staudenmayer, *EU Digital Law: Article-by-Article Commentary* (Baden-Baden/Oxford, CH Beck/Nomos/Hart 2020) 107ff, at 115, para 29.

95 Art 8(5) DCSD 2019/770; Art 7(5) SGD 2019/771.

96 Art 22 DCSD 2019/770, Art 21 SGD 2019/771.

97 Art 8(5) DCSD 2019/770; Art 7(5) SGD 2019/771.

as well as technical standards.[98]

77 However, these criteria do not contribute significantly to concretizing the concept of objective conformity. Currently, there are neither legal rules specifically designed for AI systems nor international or national technical standards in that field. While it is true that both international[99] and national standardization organizations[100] are in the process of developing such technical standards, it will take a long time before they have emerged.

78 Even if technical standards for AI were available, two more related issues must be considered. First, standards in the field of AI can quickly become obsolete due to technical progress, updates, and upgrades. And second, there is a fundamental problem with learning AI systems in that the performance of such a system is not static, but constantly changing during operation. A characteristic feature of these systems is that they are not based on "locked" algorithms[101] that provide the same results each time the same input is applied to it. Instead, these algorithms rely on machine learning, so that they can change and adapt over time due to their real-world experience. As a consequence, the performance and quality of learning AI systems cannot be determined at a single point in time.

79 Considering these circumstances, one might indeed wonder whether it would be better if the DCSD had used a subjective notion of conformity "to promote innovation in the Digital Single Market and cater for technological developments reflected in the fast changing characteristics of digital content".[102]

3. Proof of Non-Conformity

80 Another important issue is the burden of proving a lack of conformity. In principle, both Directives reverse the burden of proof. According to Art. 12(2) DCSD 2019/770 and Art. 11(1) SGD 2019/770, if the lack of conformity becomes apparent within the period of one year, it is to be presumed that the lack of conformity existed at the time of delivery or supply.

81 However, this presumption only applies to an existing lack of conformity. The crucial question is therefore who must prove the lack of conformity itself. As both Directives are silent in this regard, this question is left to national law.[103] Usually, the

98 Additionally, both articles refer, in the absence of such technical standards, to applicable sector-specific industry "codes of conduct". However, it remains unclear from which guidelines objective conformity standards can be derived. At the end of day, codes of conducts primarily set out organizational structures. Usually, they do not state how a specific product must be manufactured but rather which organizational requirements as well as methods and procedures must be observed with regard to design and production processes, and how these prerequisites are put into practice. It is therefore doubtful whether conformity criteria can be derived from codes of conduct at all.

99 In 2017, the International Electrotechnical Commission (IEC) and the International Organization for Standardization (ISO) became the first international standards development organizations to set up a joint committee (ISO/IEC JTC 1/SC 42) which carries out standardization activities for AI; <https://www.iso.org/committee/6794475.html> accessed 4 February 2021.

100 In Germany, the Deutsches Intitut für Normung (DIN) published recently a roadmap for standards and specifications in the field of artificial intelligence; DIN/DKE, 'German Standardization Roadmap on Artificial Intelligence' (November 2020) <https://www.din.de/resource/blob/772610/e96c34dd6b12900ea75b460538805349/normungsroadmap-en-data.pdf> accessed 4 February 2021. See also DIN/DKE, 'Whitepaper: Ethik und Künstliche Intelligenz: Was können technische Normen und Standards leisten?' (October 2020), <https://www.din.de/resource/blob/754724/00dcbccc21399e13872b2b6120369e74/whitepaper-ki-ethikaspekte-data.pdf> accessed 4 February 2021.

101 The term "locked algorithms" is used in particular by the US Food and Drug Administration (FDA) for medical devices based on AI. To date, the FDA has cleared or approved only medical devices using "locked" algorithms; cf FDA, 'Artificial Intelligence and Machine Learning in Software as a Medical Device' (12 January 2021) <https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device> accessed 4 February 2021; Benjamens, Dhunnoo, Meskó, 'The state of artificial intelligence-based FDA-approved medical devices and algorithms: an online database' (11 September 2020) NPJ Digit Medicine <https://doi.org/10.1038/s41746-020-00324-0> accessed 4 February 2021.

102 Thus, recital (24) of the original proposal for a Digital Content Directive (n 41) in order to justify the dominance of the subjective conformity criteria.

103 Zoll, 'Article 12 - Burden of proof' in Schulze and Staudenmayer (eds), *EU Digital Law– Article-by-Article Commentary* (Baden-Baden/Oxford, CH Beck/Nomos/Hart 2020) 217, para 17. In my opinion, nothing else follows from the CJEU judgment in Faber; Case C478/99 *Froukje Faber v Autobedrijf Hazet Ochten BV* ECLI:EU:C:2015:357. It is true that in the underlying case the car was completely destroyed, so that it could no longer be determined whether this fire was caused by a defect. Also, the CJEU ruled that according to Art 5(3) Consumer Sales Directive 1999/44, the consumer "does not

burden of proof concerning the appearance of the lack of conformity will be on the consumer, since he derives beneficial consequences from this fact.[104]

82 This raises the difficult question of how the consumer can prove a lack of conformity. First, AI systems are often embedded in an intelligent environment (Internet of Things) with contributions from multiple people and machine components, making it extremely difficult to determine why something is not working (the so called "many hands problem"). Second, proving a lack of conformity might be difficult if a system is constantly changing its features and performance due to its learning capabilities. And third, the lack of transparency (opaqueness) of many AI system might also make it difficult to attribute liability (the black box problem).

83 For all of these reasons, it can be assumed that consumers will have significant problems in practice enforcing their rights with AI systems.

4. Remedies

84 Regarding remedies, reference can be made to what has been said before.[105] For specific performance, price reduction, and termination, the liability of the business is strict. By contrast, contractual (and non-contractual) claims for damages caused to the consumer by a defective AI system are not governed by the Directives, so that Member State law decides, for example, whether compensation is linked to

fault, how the fault requirement should be applied to AI systems, and who bears the burden of proof.

85 Clearly, the absence of any harmonization vis-à-vis damages is hardly compatible with the directives' objectives to provide a high level of consumer protection and to create a proper functioning of the internal market. Therefore, scholars correctly point out that there is still need for future European legislation to harmonize the law of damages in relation to the supply of digital content.[106]

E. Outlook

86 The *tour de horizon* through the lifecycle of contracts – in which AI is either used for internal purposes by companies or offered as an essential part of the main subject matter to consumers – reveals, as a result, a number of gaps in current EU consumer law. This concerns in particular (i) dark patterns and online behavioral advertising, (ii) growing information asymmetries, (iii) risks of algorithmic decision making, (iv) liability for defective AI systems, (v) missing standards for assessing whether AI systems comply with the objective conformity criteria, (vi) difficulties for the consumer to prove non-conformity of AI systems, and (vii) the lack of harmonization of the law of damages in relation to the supply of digital content.

87 An important question is, therefore, whether the current EU reform projects have the potential to close these gaps. In this respect, two main reform efforts are worth highlighting.[107]

88 First, the EU Commission's White Paper on AI,[108] in which the Commission considers possible adjustments to existing EU legislative frameworks,[109]

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have to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller". At the same time, however, the CJEU underlined that Art 5(3) only applies if "the consumer furnishes evidence that the goods sold are not in conformity with the contract". Therefore, it does not suffice to show that the item or a specific feature does not work; the consumer must still prove the lack of conformity itself.

104 Zoll (n 103). For Germany, Koch, 'Anmerkung zum Urteil des EuGH vom 4. Juni 2015 - C-497/13' (2015) JZ 834-837, at 834.

105 Cf above, 3.3. and 3.4.

106 Schulze, 'Article 5 - Supply of the digital content or digital service' in Schulze and Staudenmayer (eds), *EU Digital Law–Article-by-Article Commentary* (Baden-Baden/Oxford, CH Beck/Nomos/Hart 2020) para 35.

107 Additionally, the European Commission presented in December 2020 two proposals. First, the proposal for a Digital Services Act, which aims to introduce mechanisms for removing illegal content, possibilities for users to challenge platforms' content moderation decisions, and transparency measures for online platforms; European Commission, 'Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM(2020) 825 final. And second, the proposal for a Digital Markets Act, which aims to ensure that large online platforms (so called "gatekeepers") behave in a fair way vis-à-vis business users who depend on them; European Commission, 'Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)' COM(2020) 842 final.

108 Cf thereto Ebers/Cantero, 'Algorithmic Governance and Governance of Algorithms: An Introduction' in Ebers/Cantero (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* (Cham, Springer 2020) 1-22, at 12ff.

109 European Commission, 'White Paper - On Artificial Intelligence – A European approach to excellence and trust'

and additionally, a new legal instrument for "high-risk AI applications". And second, the current efforts to modernize the civil liability regime for AI – discussed inter alia[110] in the report of the Expert Group on Liability and New Technology,[111] the European Commission's Report on the safety and liability implications of AI,[112] and the European Parliament's resolution with recommendations to the Commission on a civil liability regime for AI.[113]

89 Both initiatives as well as forthcoming guidance documents by the European Commission on the application of current consumer law[114] could make an important contribution to consumer protection. Nevertheless, it seems too early to evaluate these initiatives. In the AI White Paper, the Commission does not elaborate on possible consumer protection instruments with regard to AI applications.[115] And in the Liability Report, the Commission only states in general terms that "certain adjustments to the Product Liability Directive and national liability regimes through appropriate EU initiatives could be considered on a targeted, risk-based approach, i.e. taking into account that different AI applications pose different risks."[116]

90 In addition, some Member States have already voiced strong opposition to the plans of the European Commission. In a position paper published in October 2020, 14 EU countries called on the Commission to incentivize the development of next-generation AI technologies, rather than put up barriers, urging the Commission to adopt a "soft law approach".[117]

91 European consumers seem to disagree with this opinion. According to an AI consumer survey conducted by consumer groups in nine EU countries,[118] consumers have confidence in AI's potential; however, many of them doubt that they are sufficiently protected under current consumer law from the negative consequences of AI. Indeed, the foregoing analysis has shown that there is still much to be done.

COM(2020) 65 final, 14.

110 For a short overview cf de Bruyne, Dheu, 'An EU Perspective on Liability and Artificial Intelligence' (*RAILS-Blog*, 14 May 2020) <https://blog.ai-laws.org/an-eu-perspective-on-liability-and-artificial-intelligence/> accessed 2 February 2021.

111 European Commission, 'Liability for Artificial Intelligence and other emerging technologies' (2019) Report of the Expert Group on Liability and New Technologies- New Technologies Formation doi:10.2838/573689.

112 European Commission, 'Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics' COM(2020) 64 final.

113 European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). Cf moreover, European Parliament, Committee on Legal Affairs, Rapporteur: Axel Voss, 'Report with recommendations to the Commission on a civil liability regime for artificial intelligence' A9-0178/2020. For a critical discussion of this resolution see Sousa Antunes, 'Civil Liability Applicable to Artificial Intelligence: A Preliminary Critique of the European Parliament Resolution of 2020' (5 December 2020) <https://ssrn.com/abstract=3743242> accessed 4 February 2021; Etzkorn, 'Die Initiative des EU-Parlaments für eine EU-Verordnung zur zivilrechtlichen Haftung beim Einsatz von KI' (2020) 36 Computer und Recht (CR) 764-768.

114 The European Commission is planning to publish guidance documents on the application of the UCPD 2005/29 and the CRD 2011/83 to problematic practices observed in e-commerce that prevent consumers from obtaining important information and abuse their behavioural biases. This refers especially to the use of 'dark patterns' (user-interface designs aimed at manipulating consumers), profiling, hidden advertising, fraud, misleading information and manipulated consumer reviews; cf European Commission, 'New Consumer Agenda. Strengthening consumer resilience for sustainable recovery' COM(2020) 696 final, 10.

115 Cf Ebers, 'Künstliche Intelligenz und Verbraucherschutz: Das KI-Weißbuch der Europäischen Kommission' (2020) VuR 121-122; Ebers/Navas, 'Artificial Intelligence and Consumer Protection' (*fifteeneightyfour*, 10 September 2020) <http://www.cambridgeblog.org/2020/09/artificial-intelligence-and-consumer-protection/>.

116 European Commission, 'Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics' COM(2020) 64 final, 17.

117 Stolton, 'EU nations call for 'soft law solutions' in future Artificial Intelligence regulation' *Euractiv* (8 October 2020) <https://www.euractiv.com/section/digital/news/eu-nations-call-for-soft-law-solutions-in-future-artificial-intelligence-regulation/> accessed 4 February 2021. The position paper was signed by Denmark (initiator), Belgium, the Czech Republic, Estonia, Finland, France, Ireland, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Spain and Sweden.

118 BEUC, 'Artificial Intelligence: What consumers say. Findings and policy recommendations of a multi-country survey on AI' (2020) <http://www.beuc.eu/publications/beuc-x-2020-078_artificial_intelligence_what_consumers_say_report.pdf> accessed 4 February 2021.

Digital Consumer Contract Law And New Technologies

Implementation Of The Digital Content Directive In Austria

by **Brigitta Zöchling-Jud***

Abstract: This report deals with the implementation of the Digital Content Directive and the Sale of Goods Directive in Austria. It aims to give an overview of the current legislative progress regarding the transposition and the national status quo of warranty regulations as well as consumer protection regulations. Finally, selected contents of the Austrian draft for the implementation of the directives are introduced and discussed.

Keywords: Digital Content Directive; Sale of Goods Directive; implementation; consumer protection law; warranty law; Austrian law

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A. Status of the legislative process

1 The implementation of the Digital Content Directive (DCD)[1] and the simultaneous implementation of the Sale of Goods Directive (SGD)[2] also pose certain challenges for the Austrian legislator. It has to be taken into account that the status of the implementation has – partly due to the COVID-19 pandemic – not yet progressed as far as originally planned by the Ministry of Justice[3].

2 There is an inter-ministerial draft for the implementation of both directives, which was discussed by a working group and adapted accordingly during the spring and summer of 2020, before it was adopted in September 2020. In addition to several university professors, the working group included different stakeholders, such as the Austrian Chamber of Commerce, the Association of Consumer Information, the Bar Association, and the Judiciary. The draft is neither published nor politically agreed upon yet. Therefore, the following report has to be limited to the main features of its content, with the *caveat*, of course, that in the end everything might be different.

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1 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.

2 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

3 This report is based on the status of the legislative progress in November 2020.

B. Status quo in Austria

3 In order to understand the implementation plans of the Ministry of Justice, one must first of all consider the current legal situation in Austria.

4 Consumer protection law in Austria is mainly regulated in the general codification of civil law, namely the Austrian Civil Code (ABGB) or in the Consumer Protection Act (KSchG)[4], which entered into force in 1980 and has been reformed several times since then. This was, of course, particularly due to the implementation of the EU consumer protection directives[5]. It should be noted that the Consumer Protection Act (KSchG) does not provide a comprehensive codification of consumer protection regulations, but only specifies, amends or stipulates the mandatory position of the general provisions of civil law in favour of consumers. This means that the Austrian Civil Code (ABGB) is also relevant for consumers. In addition, there are specific consumer acts like the Timesharing Act[6], the Package Travel Act[7] or the "FAGG"[8], which applies on distance and off-premise contracts. Fully harmonizing consumer protection directives have, particularly in recent years, primarily been implemented in such specific consumer protection acts.

5 Warranty has always been regulated in Sections 922 ff Austrian Civil Code (ABGB), namely as a part of the general law of obligations[9]. Warranty is therefore not regulated for the individual types of contract, but applies in principle regardless of the respective contract's type[10]. The only requirement is that there must be payment or another form of counter-performance, as there is no warranty for donations[11].

6 The individual types of contract contain – if any – only supplementary or modifying provisions of general warranty law; regulations concerning the service contract, for instance, only make reference to Sections 922 ff Austrian Civil Code (ABGB)[12]. This system has the advantage that the qualification of contracts is widely irrelevant for the application of warranty provisions and therefore mixed contracts or completely new types of contracts can be included without any problems.

7 In addition, it is well known that Section 285 Austrian Civil Code (ABGB) is based on a very broad definition of goods[13], which in particular does not refer to physicality and also covers rights. In light of this, the acquisition of digital contents against payment

4 Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden (Konsumentenschutzgesetz – KSchG), BGBl I 140/1979 idF 58/2018.

5 Brigitta Zöchling-Jud, 'Die Richtlinienvorschläge der Kommission über digitale Inhalte und Fernabsatzkaufverträge aus österreichischer Sicht' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?* (Manz 2016) 10; Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 103.

6 Bundesgesetz über den Verbraucherschutz bei Teilzeitnutzungs- und Nutzungsvergünstigungsverträgen (Teilzeitnutzungsgesetz 2011 – TNG 2011), BGBl I 8/2011 idF 50/2016.

7 Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Pauschalreisegesetz – PRG), BGBl I 50/2017.

8 Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Fern- und Auswärtsgeschäfte-Gesetz – FAGG) BGBl I 33/2014 idF 83/2015.

9 Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht*, vol 2 (14th edn, Manz 2015) 68.

10 Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht*, vol 2 (14th edn, Manz 2015) 68; Brigitta Zöchling-Jud, '§§ 922-933b ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (2nd edn, Manz 2016) para 6.

11 Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht*, vol 2 (14th edn, Manz 2015) 68; Brigitta Zöchling-Jud, '§§ 922-933b ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (2nd edn, Manz 2016) para 6; Brigitta Zöchling-Jud, 'Internet der Dinge' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 275.

12 Rudolf Reischauer, '§ 1167 ABGB' in Peter Rummel (ed), *ABGB-Kommentar* (3rd edn, Manz 2000) para 1; Robert Rebhahn and Christoph Kietaibl, '§ 1167 ABGB' in Michael Schwimann and Georg Kodek (eds), *ABGB: Praxiskommentar* (4th edn, Lexis Nexis 2014) para 1; Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht*, vol 2 (14th edn, Manz 2015) 299; Brigitta Zöchling-Jud, '§§ 922-933b ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (2nd edn, Manz 2016) para 30; Michael Bydlinski, '§ 1167 ABGB' in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *Kurzkommentar zum ABGB* (6th edn, Verlag Österreich 2020) para 1; Andreas Kletečka, '§ 1167 ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (4th edn, Manz 2020) para 1.

13 Johannes Stabentheiner, '§ 285 ABGB' in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds), *Klang Kommentar* (3rd edn, Verlag Österreich 2011) para 1; Rudolf Welser and Andreas Kletečka, *Bürgerliches Recht*, vol 1 (15th edn, Manz 2018) 264; Elisabeth Helmich, '§ 285 ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (4th edn, Manz 2018) para 1; Moritz Zoppel, '§ 285 ABGB' in Michael Schwimann and Georg Kodek (eds), *ABGB: Praxiskommentar* (5th edn, Lexis Nexis 2019) para 1.

has always triggered the warranty obligation of the provider, irrespective of the contract qualification in the individual case (sales contract, service contract, rental contract, etc)[14]. Case law on warranty for digital contents goes back to the 1980s[15].

8 Finally, the implementation of the Consumer Sales Directive (CSD) 1994/44/EC[16] in 2002 has to be taken into account. At the time, the Austrian legislator decided to implement the directive in principle into the Austrian Civil Code (ABGB), namely by reforming the general warranty provisions[17]. The definition of lack of conformity, the reversal of the burden of proof, legal remedies, the limitation period, and trader's redress are regulated in the Austrian Civil Code (ABGB). Only the mandatory nature of general warranty obligations in favour of the consumer as well as some specifics, such as the incorrect installation of goods or the requirements for contractual guarantees, were implemented in the Consumer Protection Act (KSchG)[18].

9 The CSD has therefore been over-implemented; the provisions apply irrespective of the existence of a consumer contract, irrespective of the type of contract, irrespective of whether the contract relates to a mobile or immobile object and irrespective of the physical nature of the object[19]. This means that the acquisition of dysfunctional digital content is already subject to the general warranty provisions under current Austrian law.

C. Preliminary considerations for the implementation of the DCD and the SGD

10 When the development and content of the DCD and the SGD became apparent at the European level, preliminary considerations were already made in Austria on how the two directives should be implemented. Naturally, it was considered to implement the directives into the Austrian Civil Code (ABGB) just like the CSD at the time and thus to over-implement them[20]. Once again, the idea of a uniform warranty law for everyone and everything seemed tempting. In this sense, the current government programme also sets as a goal the avoidance of legal fragmentation through the implementation of EU legislative acts in existing laws and mentions in particular the SGD and the DCD[21].

D. The plans of the Ministry of Justice

11 However, the plans of the Ministry of Justice point in a completely different direction. It is planned to create an independent Consumer Warranty Act (VGG), to implement both the SGD and the DCD. The provisions in the Austrian Civil Code (ABGB) are to be adapted only slightly in order to avoid inconsistencies with the planned Consumer Warranty Act (VGG). In contrast, the regulations of the DCD concerning the supply of digital content and the legal consequences in the event of delayed supply are to be implemented in the Consumer Protection Act (KSchG). The idea is to merge these provisions with the corresponding implementing provisions of the Consumer Rights Directive[22], because they are dogmatically assigned

14 C.f. Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 71; Brigitta Zöchling-Jud, 'Internet der Dinge' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 276; Cf Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 71.

15 Rudolf Reischauer, '§ 923 ABGB' in Peter Rummel and Meinhard Lukas (eds), *ABGB-Kommentar* (4th edn, Manz 2018) para 17; 1 Ob 531/77; 8 Ob 625/87; 5 Ob 504/96.

16 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 L171/12.

17 Rudolf Welser, 'Das neue Gewährleistungsrecht' [2001] ecolex 420; Brigitta Zöchling-Jud, ‚Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115; Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4.

18 Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht II* (14th edn, Manz 2015) 96.

19 Brigitta Zöchling-Jud, 'Die Richtlinienvorschläge der Kommission über digitale Inhalte und Fernabsatzkaufverträge aus österreichischer Sicht' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?* (Manz 2016) 10-11; Brigitta Zöchling-Jud, '§§ 922-933b ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (2nd edn, Manz 2016) para 5.

20 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105.

21 Austrian Government Programme 2020 – 2024 „Aus Verantwortung für Österreich" 31.

22 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 1999/44EC of

to the law of delay and not warranty law. The same applies to provisions on contractual guarantees, which are already regulated in the Consumer Protection Act (KSchG) and are only to be adapted to the requirements of the new directive.

12 Despite the resulting legal fragmentation, I believe that the plans of the Ministry of Justice are, in principle, to be welcomed. The following aspects speak in favour of creating an independent Consumer Warranty Act (VGG)[23]:

13 First of all, it should be taken into consideration that both directives are fully harmonising and therefore the Member States are generally not allowed to deviate from the provisions of the directives. This considerably limits the Member States' scope for implementation, not only in terms of content, but also with regard to the wording used in the directives[24]. Any divergence of the national legislator from the wording of the directive triggers at least an enormous need for explanation to the European Commission, in the extreme case one risks an infringement proceeding. This applies in particular, if extensive and detailed directive requirements are only implemented through general clauses. It is therefore not surprising that in recent years the Austrian legislator has - quite pragmatically - begun to transpose directives with practically identical wording in special acts, as it was done for timesharing, package travel, as well as distance and off-premise contracts[25].

14 If we now take a closer look at the wording of the directives, they are characterized by numerous definitions and detailed regulations, which contradicts an implementation in the Austrian Civil Code (ABGB). The general warranty law is composed of scarcely ten sections (and some additional warranty provisions for animals). And even though the importance of warranty and digitalisation should by no means be underestimated, it would seem strange if the Austrian Civil Code (ABGB) suddenly had to insert fifty or more provisions. A break in style would be inevitable[26].

15 In addition, both at the level of the European Commission as well as in Austria, a certain political resistance to so-called "gold plating", i.e., over-implementation of directives, is becoming apparent[27].

16 Finally, it must be taken into account that many provisions of the directives do not appear suitable for implementation beyond the consumer sector. This applies, for example, to the definition of non-conformity and, in particular, to the requirements for deviation from the objective requirements of contract conformity[28].

the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council [2011] L304/64.

23 See also Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105-107.

24 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105; Brigitta Zöchling-Jud, 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht' in Johannes Stabentheiner, Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019) 213.

25 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 103-104.

26 On the reasons that contradict an implementation in the Consumer Protection Act (KSchG) cf Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 106; Explanatory notes to the Consumer Warranty Act Draft 4.

27 Frank Burmeister and Erik Staebe, 'Grenzen des sog Gold Plating bei der Umsetzung europäischer Richtlinien in nationales Recht' [2009] EuR, 444, 456; Doris Liebwald, 'Europäische Rechtsbegriffe und österreichische Rechtssprache: Die Transformation von EU-Richtlinien in nationales Recht' [2013] JRP 294, 306; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2015) 215 final 8; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2016) 855 final 11; Barbara Postl, 'Deregulierung von Gold Plating ' [2020] ecolex 150, 151-153.

28 See also Brigitta Zöchling-Jud, 'Verträge über digitale Inhalte' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 212; Brigitta Zöchling-Jud, 'Vertragsmäßigkeit von Waren und digitalen Inhalten – (rechtzeitige) Bereitstellung digitaler Inhalte' in Markus Artz and Beate Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018) 123-128; Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 121; cf Herbert Weißensteiner, 'Der Mangelbegriff der WarenkaufRL' [2019] ZfRV 202-203.

17 In summary, the plans of the Ministry of Justice to create an independent Consumer Warranty Act (VGG) to implement the two directives are, in principle, to be welcomed.

E. Consumer Warranty Act (Draft)

I. Merging and systematization of the DCD and the SGD

18 If we take a closer look at the Consumer Warranty Act Draft, it should be noted that it implements both directives, i.e., the DCD and the SGD, in one act.

19 This makes it possible to make up for a shortcoming at the European level; namely, to merge parallel provisions contained in both directives and thus not only to reduce the text considerably, but also to systematize the regulatory material[29].

20 The Consumer Warranty Act (VGG) is divided into four chapters[30]. Chapter 1 ("General Provisions") contains not only the provisions on the scope, definitions and their mandatory nature, but it also merges the provisions from both directives on all questions of contract conformity. In this area, the contents of the two directives are very similar and are therefore suitable for a merger.

21 Chapter 2 and Chapter 3 are then devoted to the specific requirements of the SGD and the DCD ("Warranty for the sale of goods" and "Warranty and modifications for digital performances"). These chapters contain the respective regulations on the general principles of warranty – thus time limits as well as the reversal of the burden of proof – and the various remedies; in these aspects the divergences between the two directives were considered too great to be unified.

22 In addition, each directive contains requirements in this area that have no equivalent in the other, for example the provisions on reimbursement in the DCD and its provisions on the modification of digital content and digital services. With regard to the SGD, the numerous special regulations for goods with digital elements should be mentioned.

23 Finally, Chapter 4 ("Limitation period and final provisions") is devoted to the final provisions on entry into force, transitional law and enforcement as well as the limitation period.

29 Explanatory notes to the Consumer Warranty Act Draft 4 f.

30 Explanatory notes to the Consumer Warranty Act Draft 5.

These provisions will then be merged and unified again for the Sale of Goods and Digital Contents.

24 Through this systematization, the Consumer Warranty Act (VGG) created 30 sections from 54 articles in the two directives, whereby an attempt was also made to shorten them linguistically. For example, the draft does not always mention "digital content" and "digital services" separately, but combines both under the uniform term "digital performance" (*"digitale Leistungen"*)[31].

II. Scope of application of the Consumer Warranty Act (VGG) and other warranty provisions not contained in the VGG

25 Both the personal and the material scope of application of the Consumer Warranty Act (VGG) are corresponding to the requirements of the two directives (Section 1 para 1 Consumer Warranty Act Draft)[32]. The Consumer Warranty Act (VGG) therefore only covers consumer contracts for the purchase of goods, including those yet to be manufactured, and contracts for the supply of digital performance. Regarding the remuneration, the supply of digital performance is based alternatively on payment or the provision of personal data in accordance with the requirements of the DCD[33] (Section 1 para 1 no 2 Consumer Warranty Act Draft).

31 Explanatory notes to the Consumer Warranty Act Draft 8.

32 In contrast, Section 1 Consumer Protection Act (KSchG) is based on a broader definition of the term "consumer". It also includes contracts which a natural person concludes in preparation for taking up on a business and legal entities, if they do not operate a business. Heinz Krecji, '§ 1 KSchG' in Peter Rummel and Meinhard Lukas (eds), *ABGB-Kommentar* (3rd edn, Manz 2002) para 7; Peter Apathy, '§ 1 KSchG' in Michael Schwimann and Georg Kodek (eds), *ABGB: Praxiskommentar* (4th edn, Lexis Nexis 2015) paras 8, 15; Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches* Recht, vol 2 (14th edn, Manz 2015) 317; Georg Kathrein and Thomas Schoditsch, '§§ 1-42 KSchG' in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *Kurzkommentar zum ABGB* (6th edn, Verlag Österreich 2020) paras 7-8.

33 See Brigitta Zöchling-Jud, 'Daten als Leistung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 243; Brigitta Zöchling-Jud, 'Vertragsmäßigkeit von Waren und digitalen Inhalten – (rechtzeitige) Bereitstellung digitaler Inhalte' in Markus Artz and Beate Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018) 139.

26 Of course, this narrow scope of application means that there will be numerous other warranty provisions outside the Consumer Warranty Act (VGG). On the one hand, these are the general warranty provisions in the Austrian Civil Code (ABGB), which apply to all B2B and C2C contracts as well as to all contracts (including B2C) that do not fall within the material scope of application of the Consumer Warranty Act (VGG). This concerns mainly real estate sale contracts or genuine service contracts. It is planned that the provisions of the Austrian Civil Code (ABGB), which are at the "same level" of the SGD, will be slightly adapted. For instance, the term *"Wandlung"* (actio redhibitoria) is to be replaced by "termination of the contract" and the limitation period will be revised. Also, the provision on dealer's redress (Section 933b ABGB) remains in the Austrian Civil Code (ABGB) and will be adapted content-wise.

27 On the other hand, there will continue to be special norms in the Consumer Protection Act (KSchG), a legal fragmentation that could, in my opinion, be avoided. Section 9 Consumer Protection Act (KschG), which regulates the mandatory nature of general warranty provisions in favour of consumers, will be preserved. This provision is relevant for contracts that do not fall within the material scope of the Consumer Warranty Act (VGG). The same applies to Section 9b Consumer Protection Act (KSchG), which provides a special norm for guarantees and is to be adapted to the requirements of the SGD. At least the last point should, in my opinion, be reconsidered.

III. Selected Issues of the Consumer Protection Act (VGG)

28 This report will not give a detailed presentation of the content of the planned Consumer Warranty Act (VGG), because it essentially corresponds to the requirements of the two directives. This applies, for example, to the definition of contract conformity, including the combination of subjective and objective requirements, provisions on the burden of proof, or the consumer's remedies. Instead, three points, which to a certain extent represent an Austrian particularity, should be highlighted:

1. Digital performance and provision of personal data

29 As is commonly known, according to the DCD, the trader's warranty obligation for defective digital services does not only come into effect when the consumer pays a price, but also when personal data is provided in exchange (Art 3 para 1 and 2 DCD)[34].

30 In such cases, in addition to the requirements of the DCD, the protection of personal data in accordance with the General Data Protection Regulation[35] (GDPR), which remains unaffected by the DCD and which therefore has priority, must be taken into account. The DCD therefore does not affect, for example, the consumer's right to withdraw the consent for the processing of personal data at any time, the requirements for the voluntary nature of the consent, or the right to erasure. This of course raises the question of the legal consequences if a consumer withdraws the consent, in particular whether in such a case the trader should be given the opportunity to likewise terminate his obligation to perform. The directive seems to give the Member States discretion for the implementation.

31 In this sense, recital (40) states that:

> *"This Directive should not regulate the consequences for the contracts covered by this Directive in the event that the consumer withdraws the consent for the processing of the consumer's personal data. Such consequences should remain a matter of national law."*

32 The Ministry of Justice now wants to pass this task on to the judiciary. Reference is made to the requirement of voluntariness in Art 7 para 4 GDPR, which states that agreements are invalid if they provide for negative legal consequences for the consumer in the event of withdrawal of consent to data processing. Accordingly, the recitals state that an agreement with the content that the trader could, for instance not be held liable in the event of withdrawal of consent to data processing, would probably be invalid. Which legal consequences the withdrawal of consent by the consumer has for a contract, however, must be examined by the judiciary on a case-by-case basis, according to the respective circumstances. An explicit provision, such as a special right of termination for the trader, is not

34 Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 168-179 Brigitta Zöchling-Jud, 'Daten als Leistung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 241.

35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

provided for[36], because it would hardly be feasible to cover the various possible cases even to a certain extent and to find an appropriate and balanced solution for all these cases at a general level[37]. Legal uncertainty on such an important issue is therefore bound to occur.

2. Durability[38]

33 Article 7 para (1)(d) SGD includes among the objective requirements for the conformity of goods the durability which is usual for goods of the same type and which the consumer may reasonably expect. According to recital (32), the trader's liability for the durability of goods is not so much a matter of individual consumer protection as a general objective of promoting more sustainable consumer habits[39]. The trader's warranty obligation for the durability will complement EU product-specific legislation, which is yet to be developed[40].

34 In this sense, the Austrian Federal Government has also set the goal of promoting the sustainability of products as well as avoiding planned obsolescence in its government program and has explicitly mentioned the implementation of the SGD and the DCD as a means of achieving this goal[41]. It is therefore not surprising that the Consumer Warranty Act (VGG) places special emphasis on durability. First of all, Section 2 para 11 Consumer Warranty Act Draft adopts the definition of Art 2 para 13 SGD: "Durability" means the ability of the goods to maintain their required functions and performance through normal use. Durability is one of the objective quality requirements according to Section 6 para 2 no 5 Consumer Warranty Act Draft.

35 However, for certain product groups, for which the issue of obsolescence appears to be particularly widespread in practice, the Consumer Protection Act (KSchG) and the Distance and Off-Premise Contracts Act (FAGG), i.e. the special acts by which the CSD was implemented, stipulate a specific pre-contractual duty of information:

36 According to Section 5a para 1 no 5 Consumer Protection Act (KSchG) and Section 4 para 1 no 1 FAGG, the trader must inform the consumer before conclusion of a contract regarding goods with digital elements or textile clothing about the minimum durability in normal use. In accordance with the requirements of the SGD, this pre-contractual information now specifies legitimate consumer expectations and – to put it simply – becomes the subject matter of the contract[42].

37 Finally, the warranty period is extended for goods (including goods with digital elements) in Section 10 para 5 Consumer Warranty Act Draft. While the trader generally has to provide warranty for defects that become apparent within two years of delivery (Section 10 para 1 Consumer Warranty Act Draft), a warranty period of five years applies to goods that in normal use can be expected to have a durability that considerably exceeds two years. The trader is therefore liable if the defect becomes apparent within five years. The role model for this regulation is Section 27 of the Norwegian Consumer Sales Act.

38 Without commenting further on this proposal, it can be said that the draft does at any rate appear to be technically improvable, as it currently raises more questions than it answers[43]. There is also cause for

36 In contrast, the German draft for the implementation of the DCD (Entwurf eines Gesetzes zur Änderung des Bürgerlichen Gesetzbuches und des Einführungsgesetzes zum Bürgerlichen Gesetzbuche in Umsetzung der EU-Richtlinie zur besseren Durchsetzung und Modernisierung der Verbraucherschutzvorschriften der Union [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_BereitstellungdigitalerInhalte_2.pdf;jsessionid=FA444FDBB2F7E0AEB08E4D5544F01EA1.2_cid324?__blob=publicationFile&v=2] 3 November 2020) states in Section 327q BGB that the trader has the right to terminate the contract in the event that the consumer withdraws the consent to data processing. The trader is not bound by a termination period, if he cannot reasonably be expected to continue the contractual relationship until the agreed end of the contract or until the expiry of a contractual or statutory termination period.

37 Explanatory notes to the Consumer Warranty Act Draft 9.

38 See in detail Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4, Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57.

39 Elize Rudloff, 'Der Vorschlag einer Warenhandels-Richtlinie der EU - Fortschritt auf dem Weg zu mehr Nachhaltigkeit?' [2018] VuR 323; Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 122-123; Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4.

40 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR, 115, 122; Wolfang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57, 59.

41 Austrian Government Programme 2020 – 2024 „Aus Verantwortung für Österreich" 31.

42 Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4, 5.

43 C.f. Wolfgang Faber, 'Neues Gewährleistungsrecht und

doubt with regard to legal policy, because Austrian trade is threatened with severe discrimination. Similarly, the obligation to indicate a minimum durability date for all goods with digital elements does not seem appropriate in the light of the fact that the manufacturer will often be based abroad[44]. However, the political decision has not yet been made.

3. Warranty and limitation period

39 The last point to be addressed concerns the warranty period and the limitation period. The Consumer Warranty Act (VGG) first of all follows the provisions of the directive and distinguishes between the period in which a lack of conformity must become apparent in order to establish the liability of the trader and the period in which the consumer can enforce his rights in court. The first period is called warranty period, whilst the second is called limitation period[45]. With the exception of the already mentioned durability defects, the Consumer Warranty Act Draft adopts for the warranty period the specifications of the two directives, namely for goods in Section 10 of Chapter 2 and for digital services in Section 17 of Chapter 3[46].

40 Regarding the limitation period, Section 27 in Chapter 4, concerning goods and digital services, stipulates uniformly that the consumer's warranty rights expire six months after the end of the respective warranty period.

41 For goods and digital services to be provided once or separately, this effectively extends the period during which the trader can be held liable up to 2.5 years after delivery or provision. For digital performances which are to be provided on a permanent basis, the trader is liable for six months after the end of the obligation to supply.

42 The extension of the limitation period to a total of 2.5 years is based on the following idea: If a defect appears just before the warranty period expires, thus in extreme cases after almost two years, the consumer should still have enough time to enforce his rights in court. Here, the legislative materials apply the principle of *effet utile*. In my opinion, the directives do not require such an extension[47], they are, however, permitted despite full harmonisation and are likely to be the subject of political discussions.

F. Resume

43 In summary and conclusion:

1. The plans of the Ministry of Justice for the implementation of the SGD and the DCD are, in principle, to be welcomed. This definitely applies to the planned system, and in particular to the creation of an independent Consumer Warranty Act.

2. The parallel preservation of special warranty provisions in the Consumer Protection Act (KSchG) should be reconsidered. This applies particularly to the provision on contractual guarantees

3. The proposals of the Ministry of Justice also contain controversial considerations of legal policy, which will certainly be the subject of political discussions in Austria.

Nachhaltigkeit (Teil II)' [2020] VbR 57, 60.

44 Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57, 59.

45 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 131; Brigitta Zöchling-Jud, 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht' in Johannes Stabentheiner, Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019) 207.

46 Defects of title are regulated separately.

47 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 132.

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 important 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]

4 That state of affairs was explicitly acknowledged by the legislator in 2013 when a bill transposing the Consumer Rights Directive[7] 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*

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 (Beeldbrigade).

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 2014[16] 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 Directive[20])[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 Directive[28] 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.internetconsultatie.nl/verkoop_goederen_levering_digitale_inhoud/reacties (last visited on 30 March 20212020). 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 *Aanwijzingingen* 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

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

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.

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 Germany[53] and Belgium[54] 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 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,

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 kooopregelingen in kaart gebracht (gemeenrechtelijke 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, *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 rights[64] 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 expressing her decision to terminate the contract[79] be interpreted as to *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

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/zelf-doen/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.

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).

Implementation Of The Digital Content Directive In Poland: A Fast Ride On A Tandem Bike Against The Traffic

by **Monika Namysłowska, Agnieszka Jabłonowska, Filip Wiaderek***

Abstract: Just like two cyclists on a tandem, Directive 2019/770 (DCD) and Directive 2019/771 (SGD) ride together in the same direction. Their ultimate goal is to increase the level of consumer protection and improve the functioning of the internal market by laying down conformity standards and remedies in contracts for the sale of goods and supply of digital content and digital services. The purpose of this article is to present the way, in which the Directives concerned are scheduled to be implemented into the Polish legal system. In order to provide the necessary background, initial Polish experiences with the implementation of the EU consumer aquis are discussed. These early developments are then contrasted with the recently unveiled plans for the DCD and SGD implementation, which met severe criticism in Polish academia. Instead of an integrated approach, a "copy-paste" implementation outside of the Civil Code is proposed. This may result in a systemic disruption affecting not only consumer law, but also contract law as a whole.

Keywords: Directive 2019/770; Directive 2019/771; SGD; digital content; digital services; sale of goods; implementation; Polish law; consumer protection

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A. Introduction: the next leg of the EU consumer law journey

1 On 20 May 2019, the EU legislature adopted two legal acts harmonising certain aspects of consumer contract law: Directive 2019/770 on the supply of digital content and digital services[1] (hereinafter: "DCD") and Directive 2019/771 on the sale of goods[2] (hereinafter: "SGD"). The purpose of both acts was to increase the level of consumer protection by laying down the conformity standards with contracts of goods, digital content and digital services and by providing consumers with reliable remedies in case of non-conformity. Since the adoption of Directive 1999/44/EC on the sale of consumer goods[3], the Directives concerned are the most significant developments in the field of consumer contract

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1 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 L 136/1.*

2 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

3 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 L 171/12.

law.[4] The transposition period for both acts elapses on 1 July 2021. Implementing provisions, adopted at the national level, shall become applicable as of 1 January 2022.

2 In a systemic perspective, the SGD supersedes the currently applicable Directive 1999/44/EC, which is to be repealed with effect from 1 January 2022. Similarly to its predecessor, the scope of the new act covers contracts for the sale of goods, including contracts for the supply of goods to be manufactured or produced.[5] In response to more recent market developments, the SGD clarifies that the notion of goods also covers "goods with digital elements", namely tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions.[6]

3 By contrast, the DCD applies to contracts for the supply of digital content and digital services.[7] "Digital content" is to be construed as data that are produced and supplied in digital form, while the notion of "digital service" refers to a service that allows the consumer to create, process, store or access data in digital form or to share or otherwise interact with data in digital form uploaded or created by the consumer or other users of that service.[8] As was already mentioned, digital content incorporated in or inter-connected with goods with digital elements is explicitly excluded from the Directive's scope and in case of doubts the SGD applies.[9] Accordingly, both Directives do not overlap with regard to the material scope of application. Nonetheless, they are certainly part of a common harmonization effort and in many respects need to be seen together.

4 What is especially relevant for national lawmakers, who are now in the process of implementing the SGD and the DCD into domestic law, is that both acts in principle provide for a full level of harmonisation.[10] From the Commission's perspective, which proposed this approach, minimum harmonisation established by Directive 1999/44/EC did not guarantee a desired improvement in the functioning of the internal market.[11] Although the personal scope of both Directives is limited to business-to-consumer relations (B2C), Member States remain free to extend the protection afforded to consumers to other entities, such as non-governmental organisations, start-ups or small and medium-sized enterprises.[12] Moreover, even in respect of B2C relationships, the Directives do not affect national law concerning matters not covered by their scope, such as formation, validity, nullity or effects of contracts and non-contractual remedies.[13] In the specific context of the DCD, Member States also remain free to determine the legal nature of relevant contracts and categorize them, e.g. as a sale, service, rental or *sui generis* contract.[14]

5 Against this background, the paper discusses the envisaged implementation of the DCD into Polish law and its possible implications. Firstly, it briefly recounts prior approaches to the implementation of the consumer *acquis* in the analysed jurisdiction and indicates their relevance for the prospective implementation of the SGD and the DCD. Following this general overview, the draft implementing act published in December 2020 will be outlined, with a particular focus on the DCD and the reasons behind the envisaged national approach. The paper concludes with the assessment of the draft act concerned.

B. Initial Polish experience with the implementation of the EU consumer aquis: blazing the trail

6 The experience concerning the implementation of previous consumer law directives into the Polish legal order provides an essential background for studying

4 J. M. Carvalho 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771 (2019)' 5 Journal of European Consumer and Market Law 194.

5 SGD, Article 3(1) and (2).

6 SGD, Article 2(5)(b) and Article 3(3).

7 DCD, Article 3(1).

8 DCD, Articles 2(1) and (2).

9 DCD, Article 3(4).

10 SGD, Article 4; DCD, Article 4.

11 Commission 'Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods' COM(2015) 635 final 7; Commission 'Staff Working Document on the impacts of fully harmonised rules on contracts for the sales of goods supplementing the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods' SWD(2017) 354 final.

12 SGD, Recital 21; DCD, Recital 16.

13 SGD, Recital 18; DCD, Recital 12.

14 DCD, Recital 12.

the approach proposed by the domestic legislature in case of the SGD and the DCD. The story dates back to the early days of the Polish membership in the EU. Transposing pre-existing consumer protection measures, including harmonised provisions on consumer sales, constituted one of the requirements for the Polish accession to the EU, which took place on 1 May 2004. Given the pressure of time, the Polish legislator decided to transpose Directive 1999/44/EC outside the Civil Code – in a dedicated Act on specific conditions of consumer sale.[15] This solution has been openly criticised in the academia and was viewed as a disruption to the existing terminology of national contract law and the central role of the Civil Code.[16] The legislature was well aware of that and accepted the criticism.[17] However, the approaching time of accession served as a reasonable excuse.

7 The decision to refrain from developing a uniform solution for consumer and non-consumer sales, without drawing clear boundaries between the two regimes, led to severe interpretative difficulties in borderline cases, e.g. regarding goods used in both private and professional capacity.[18] These problems were further exacerbated by a different level of protection envisaged by the implemented EU rules and the pre-existing domestic ones. Ultimately, the standard of protection afforded to consumers in the Act on specific conditions of consumer sale (e.g. in respect to the burden of proof and available remedies) was lower compared to the provisions of the Polish Civil Code.

8 A significant shift towards a more integrated approach took place in 2014 when the Polish legislature was compelled to transpose Directive 2011/83/EU on consumer rights (CRD).[19] Although the new rules were implemented mostly in the new Act on consumer rights[20] (e.g. those pertaining to information duties[21] and withdrawal rights[22]), a decision was made to incorporate some of them (e.g. on delivery[23]) into the Civil Code. At the same time, the opportunity was taken to revisit the implementation of Directive 1999/44/EC by repealing the Act on specific conditions of consumer sale and bringing more coherence to the rules on sales.[24]

9 The explanatory memorandum to the draft Act on consumer rights stressed that the original transposition of Directive 1999/44/EC outside the Polish Civil Code was a temporary solution, chosen due to shortage of time before Polish accession to the EU and complexity of the subject-matter.[25] When proceeding the Act on specific conditions of consumer sale, an assumption was made that provisions in question should be ultimately transposed to the Civil Code. These plans were interrupted in 2008, however, when the Commission published the initial proposal for the CRD. In the first draft version, the CRD was to repeal Directive 1999/44/EC and introduce a more comprehensive set of rules for consumer contracts.[26] This circumstance led the Polish legislature to await the development of the EU legislative proceedings.[27]

15 Act of 27 July 2002 on specific conditions of consumer sale and amendments to the Civil Code (Ustawa o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego), Dz.U. 2002 nr 141 poz. 1176.

16 Cf M. Pecyna 'Ustawa o sprzedaży konsumenckiej. Komentarz' (Kraków 2004) 14–23; J. Szczotka 'Sprzedaż konsumencka. Komentarz' (2 ed., Lublin 2007) 9.

17 Explanatory Memorandum to the draft act on specific conditions of consumer sale (Uzasadnienie projektu ustawy o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego) (Sejm of the IV term, document no. 465) 12 – 13 (accessed: 29 January 2021) < http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/465/$file/465.pdf>.

18 A. Kurowska 'Implementacja dyrektywy o sprzedaży konsumenckiej do porzadków prawnych wybranych państw członkowskich' (2008) 6 Problemy Współczesnego Prawa Miedzynarodowego, Europejskiego i Porównawczego 93, 96.

19 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 L 304/64.

20 Act of 30 May 2014 on consumer rights (Ustawa o prawach konsumenta), Dz.U. 2014 poz. 827.

21 CRD, Articles 5 and 6.

22 CRD, Articles 9–16.

23 CRD, Article 18; Act of 23 April 1964 – Civil Code (Kodeks cywilny), Dz.U. 2020 poz. 1740, Article 543[1], hereafter: Polish Civil Code.

24 Explanatory Memorandum to the draft Act on consumer rights (Uzasadnienie projektu ustawy o prawach konsumenta) (Sejm of the VII term, document nr 2076) 2 (accessed: 29 January 2021) <https://orka.sejm.gov.pl/Druki7ka.nsf/0/BE57572B371BB245C1257C690038EFE9/%24File/2076.pdf>.

25 ibid.

26 Proposal for a Directive of the European Parliament and of the Council on consumer rights (COM(2008) 614 final).

27 Explanatory Memorandum to the draft Act on consumer rights (n 25) 2.

Eventually, the provisions on consumer sales were largely withdrawn from the CRD during negotiations with the Council.[28]

10 As previously indicated, most provisions of Directive 2011/83/EU were implemented to the Polish legal order in the Act on consumer rights. The chosen way of proceeding appears to have been linked to the full level of harmonisation provided for by the Directive.[29] Conversely, re-implementation of Directive 1999/44/EC into the Polish Civil Code was justified by the fact that the underlying principle of minimum harmonisation[30] made it possible to depart from the original text of the Directive and incorporate its provisions in the existing regime of seller's liability.[31] A coherent approach in respect of consumer sales received overwhelming support from scholars, while the chosen venue of implementation for Directive 2011/83/EU met mixed reactions. Considering the peripheral nature of the matters covered by the Act on consumer rights, the adoption of a separate act in this regard has been reconciled with over time.

11 Thus, the legal framework applicable to date is the following. Most provisions of the CRD are implemented in the Act on consumer rights, which directly reflects the Directive in question. By contrast, provisions implementing Directive 1999/44/EC have been adjusted to the domestic legal categories, known from the Polish regime of seller's liability, and form part of the Polish Civil Code.

28 See generally: E. Hall, G. Howells, J. Watson 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 2 ERCL 139; S. Weatherill 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed' (2012) 4 CMLR 1279.

29 Explanatory Memorandum to the draft act on consumer rights (n 25) 3; CRD, Article 4.

30 Directive 1999/44/EC, Article 8(2).

31 Explanatory Memorandum to the draft Act on consumer rights (n 25) 3–4.

C. Sales of goods and supply of digital content and services: on a rocky road to Europeanisation

I. Substantive norms on liability prior to the SGD and the DCD: a solid ground for adaptation

12 From the above, one may infer that Directives providing for full harmonisation are more likely to be implemented by the Polish legislator via separate acts, even though a decision of this kind is certainly not automatic.[32] Systemic importance of the subject matter from the perspective of the Civil Code is also a consideration. Both of these factors need to be examined when assessing the envisaged implementation of the SGD and the DCD into Polish law.

13 As was already mentioned, unlike Directive 1999/44/EC but in line with the broader tendency in the EU consumer *acquis* epitomized by the CRD,[33] the EU legislator decided that both new Directives on consumer contracts should aim for full harmonisation. The sale of consumer goods addressed by the SGD, without doubt, belongs to the core of domestic civil law. However, well-established national doctrines in this respect have already been largely harmonised with the emerging corpus of the EU private law during the re-implementation of 2014. By contrast, the supply of digital content and digital services has not been explicitly addressed in Polish civil law so far. An attempt to do so was made in 2014, during a discussion about the implementation of the CRD. Initially, a proposal was made to apply provisions pertaining to the sale of goods *mutatis mutandis* to contracts for the supply of digital content.[34] Ultimately however, following criticism from the scholarship, this initiative was

32 Separate acts were adopted to transpose Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market, Directive 2008/48/EC on consumer credit and Directive 2015/2302 on package travel. By contrast, certain provisions of the CRD and the Council Directive 85/374/EEC on the liability for defective products have been implemented into the Civil Code.

33 K. Tonner 'From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect' in: K. Purnhagen, P. Rott (eds) 'Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz' (Springer, 2014) 693, 702–704.

34 T. Targosz, M. Wyrwiński 'Dostarczanie treści cyfrowych a umowa sprzedaży. Uwagi na tle projektu nowelizacji art. 555 kodeksu cywilnego' (2015) 1 Forum Prawnicze 18, 20.

abandoned. The non-material and, at least in certain business models, continuous nature of consideration in contracts for the supply of digital content was deemed contrary to the characteristics of the sale of goods, whereby the seller transfers ownership of a particular good in exchange of a price paid by the buyer.[35] As a result, legal qualification of contracts for the supply of digital content has remained an unregulated matter.

14 Since, contracts for the supply of digital content or digital services currently constitute innominate agreements, their legal qualification is contingent on a case-by-case analysis of a given contractual relationship.[36] Depending on the way consideration has been defined, provisions pertaining to different types of nominate agreements may apply. Among possible qualifications (e.g. sale of goods, donation, lease, loan for use, or provision of service) one may find contracts that differ significantly regarding the regime of the liability they provide for. Agreements of result tend to underlie a stricter liability regime. In the case of sales, for example, liability is linked to "defects" within an object of transaction.[37] By contrast, agreements of due diligence, such as contracts for the provision of services, underlie general rules of the liability based on the principle of fault. With respect to the supply of digital content, reliance on the service model is typically observed in the contracting practice.[38]

II. The Polish legislature implementing new contract law Directives, or There and Back Again

15 In late December 2020, the Government Legislation Centre published a draft act implementing the SGD and the DCD.[39] The proposed act, dated 16 September 2020, envisages a transposition of both Directives into the Act on consumer rights and a repeal of the provisions of the Polish Civil Code which implemented Directive 1999/44/EC. The Polish legislature did not substantiate the decision to implement the Directives in question in the same legal act. It is noteworthy, however, that both Directives share a substantial number of legal definitions and envisage similar regimes of liability for the sale of goods and for the supply of digital content or digital services. Moreover, the SGD is, under certain circumstances, applicable to digital content incorporated in or inter-connected with a good with digital elements. Diffusing the provisions pertaining to the supply of digital content among various legal acts could reduce the clarity of the national legislation and result in practical difficulties. Therefore, the decision to implement the two Directives in the same legal act appears to be reasonable.

16 Nonetheless, a generally positive assessment of the idea to implement the SGD and the DCD in the same act does not imply a similar approval of the chosen venue of implementation and the substantive proposals made. Instead of implementing the provisions envisaged in the two Directives into the Polish Civil Code, a de-codification of the subject-matter belonging to the core of the civil law is again proposed. The justification of the proposed solution[40] leaves much to be desired.

17 According to the memorandum accompanying the proposed act, an implementation of the SGD and the DCD in the Polish Civil Code would risk destabilising the latter's systematics, considering the fundamental nature of the changes to be introduced. Such a solution, it is argued, should be preceded by gathering experiences about how the provisions in question would function in the economic reality.[41] The authors purport that liability of the seller in the Polish Civil Code is traditionally linked to the legal category of "defect", whereas the notion of "non-conformity with the contract" set forth in the new Directives constitutes a *novum* to the Polish legal order.[42] This argument, however, is deeply flawed, considering that liability based on the category of

35 ibid 22.

36 'D. Lubasz 'Komentarz do art. 2' in: D. Lubasz, M. Namysłowska 'Ustawa o prawach konsumenta. Komentarz' (Wolters Kluwer, 2015); T. Czech 'Komentarz do art. 2' in: T. Czech 'Prawa konsumenta. Komentarz' (ed. II, Wolters Kluwer, 2020).

37 See generally: W. Czachórski 'Zobowiązania – Zarys wykładu' (ed. 11, LexisNexis 2009) 398.

38 T. Targosz (n 35) 20, 31.

39 Draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny) <https://legislacja.rcl.gov.pl/projekt/12341810/katalog/12752756#12752756> accessed: 29 January 2021.

40 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny), 2 <https://legislacja.rcl.gov.pl/docs//2/12341810/12752756/12752757/dokument482603.pdf> accessed: 29 January 2021.

41 ibid.

42 ibid 4, 6.

"non-conformity with the contract" has already been harmonized with the notion of defect during the re-implementation of Directive 1999/44/EC. Moreover, the fact that full harmonisation does not preclude the possibility of further successful adjustments is best illustrated by the approach of lawmakers in Germany. Despite the fact that the seller's liability in German law is also based on the notion of "defect", implementation of the SGD outside of *Bürgerliches Gesetzbuch* (BGB) has remained out of the question. Instead, the legislator correctly observed that the SGD does not introduce fundamental changes to the seller's liability regime. Concluding that adjusting the domestic framework to the rules envisaged in the SGD is feasible, the German legislature has seen no reason in abandoning the solutions introduced to its Civil Code following the implementation of Directive 1999/44/EC.[43] The venue of implementation for the DCD has been discussed more extensively in the German law-making process; however, the question of whether the adoption of a separate act would be desirable received less attention as the focus was instead on how to best place the novel set of rules within the BGB.[44]

18 As seen from above, the principle of full harmonisation is not universally regarded as a circumstance precluding the integration of EU contract law into a domestic civil code. The Polish legislature invoked the opposite argument when preparing the draft act implementing the Directives at hand.[45] As stressed previously, the Polish approach to the transposition of directives following the principle of full harmonisation usually boils down to enacting specific acts that precisely reflect relevant EU norms. This method is not entirely unfounded, especially in view of an approaching deadline for implementation. Interference in acts of a systemic significance, such as national civil codes, requires thoughtful actions. Inappropriate adjustment of domestic norms may lead to a disturbance in the internal legal order and draw the Commission's attention in the process of implementation monitoring. From this perspective, transposition which faithfully reflects the wording of a given directive constitutes a safe solution that minimises the risk of the Commission's intervention. The explanatory memorandum, however, does not invoke the arguments presented above. Instead, it contains a number of erroneous and contradictory statements. As mentioned prior, the extent of a conceptual dissonance between the Civil Code and the SGD is overstated. Moreover, reference to the gathering of experience is followed by a suggestion that re-implementation into the Polish Civil Code remains a possibility,[46] yet the legislator has not been seeking any academic expertise in this regard. It is doubtful whether swiftly introduced legislation, not well-embedded in the legal order, is going to result in the development of good practice.

19 The vision of a temporary de-codification also remains at variance with the arguments invoked in favour of implementation in the Act on consumer rights. Firstly, the proposed solution is presented as a one that would ensure consistency concerning the structure and wording of the provisions implementing the EU consumer *acquis* and reduce further interference in the Civil Code.[47] Secondly, the explanatory memorandum asserts that the chosen solution would result in the creation of a single, coherent and essentially self-contained set of norms, governing the relations between traders and consumers, thereby limiting the need of referring to various legal acts.[48] In reality, the chosen solution would lead to opposite outcomes, as it would create two different regimes of seller's liability, thwarting the previously created ground for a systemic reform. Moreover, the assumption that the chosen method of implementation would result in a comprehensive framework of consumer transactions seems unsubstantiated. Numerous rules pertaining to consumer relations are spread among various legal acts including the Civil Code and the ones contained in the Act on consumer rights are not fundamentally interrelated. Therefore, the proposed method of implementation will not create an act of a systemic significance, moving towards the emergence a "Consumer Code".

43 Explanatory Memorandum to the referee draft act on the implementation of the SGD (Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags) 12 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Warenkaufrichtlinie.html> accessed: 8 February 2021.

44 Explanatory Memorandum to the draft act on the implementation of the DCD (Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Umsetzung der Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen) 28–29 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bereitsstellung_digitaler_Inhalte.html> accessed: 8 February 2021.

45 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (n 41) 2-3.

46 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (n 41) 2–3.

47 ibid 3–4.

48 ibid 3.

III. Implementation of the DCD: a missed highway exit to a systemic solution

20 The spurious reasoning set out above determined the approach of the Polish legislature for the implementation of the SGD and the DCD, which as mentioned, are to be implemented together outside the Civil Code. The present section provides a more detailed account of the proposals made in respect of digital content and digital services.

21 According to the draft act, provisions implementing the DCD will be introduced to the Act on consumer rights in wording that essentially reflects the Directive's text. The proposal begins with a list of legal definitions. A contract for the supply of digital content or a digital service will be construed as a contract pursuant to which the trader is obliged to supply the digital content or digital service to the consumer (according to the consumer's directions) while the consumer is obliged to pay the price or provide personal data to the trader, except where personal data provided by the consumer are exclusively processed by the trader for one of indicated purposes.[49] The definition at hand reflects the wording of Article 3(1) of the DCD, specified by the exception from Article 3(5)(f). The personal scope of the rules in question is limited to B2C relations.

22 Following the DCD, the definition of the price transposed to the Act on consumer rights includes not only official currencies, but also a digital representation of values.[50] Possible legal consequences of the envisaged norm for virtual currencies remain uncertain, considering the unclear status of cryptocurrencies in Polish law so far and the open-ended wording of the DCD in this regard.[51] Furthermore, in line with the Directive, the proposed provisions acknowledge that the consumer's consideration may take the form of consent to processing personal data. Consequences of a possible withdrawal of consumer's consent are nonetheless not specified.

23 As was already mentioned, the DCD does not determine the legal qualification of the contracts for supply of digital content or digital services. Member States are therefore free to stipulate whether the agreements in question shall be qualified as sales, service, rental or *sui generis* contracts. The Polish legislator decided to introduce a definition of the contract for supply of digital content or digital services,[52] which could suggest that the contract in question is to join the catalogue of nominate contracts. On the one hand, the definition indicates the parties' main obligations thus determining *essentialia negotii* of the contracts concerned. On the other hand, it is enshrined in Article 2 of the Act on consumer rights, which merely explains the statutory terms. Accordingly, the character of the described definition remains an open question.

24 A key part of the DCD is to be included in the Act on consumer rights as a separate chapter (5b) governing the contract for the provision of digital content or a digital service. Draft provisions reflect the DCD with limited adjustments resulting from the specificity of the Polish legislation. Concerning the performance standard, the Polish legislature decided to refer to the articles implementing the SGD since they lay down similar objective and subjective requirements of conformity. The provisions in question are to be followed by several supplementary norms focused on matters specific to the digital content and digital services, such as continuous consideration and software updates. Subsequent provisions address consumer remedies in the event of the non-conformity of digital content or service with the contract and determine instances, in which the service or content provider is entitled to introduce modifications to the service or content in question.

25 In general, the explanatory memorandum provides little explanation with regard to the implementation of the DCD. It does not contain many arguments which substantiate the chosen type of contract, nor does it testify to any additional reflection concerning the personal scope of the new rules. The choices made in relation to both these aspects appear to flow from a decision not to interfere in the text of the Polish Civil Code and instead amend the Act on consumer rights. Nonetheless, this is not the only path the Polish legislature could have taken. Firstly, an alternative solution could be to transpose the provisions of the DCD to the general provisions on contracts in the Polish Civil Code, following the approach of German lawmakers.[53] Secondly, a proposal could introduce a new type of nominate

49 The purposes include: 1) supplying the digital content or digital service; 2) improving security, compatibility or interoperability of the software offered by the trader on a free and open-source licence; 3) complying with legal requirements. See: Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(a).

50 Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(c).

51 DCD, Recital 23.

52 Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(a).

53 Draft act on the implementation of the DCD, Title 2a of BGB [German Civil Code].

agreement to the Polish Civil Code. Last but not least, provisions regulating the supply of digital content or digital services could be dispersed among provisions regulating existing types of contracts, in which the consideration could take the form of supply of digital content or digital services. With regard to the personal scope of application, the Polish legislature decided not to extend it, although a possibility of doing so is explicitly mentioned in the DCD.[54] As a result, the type of contracts for the supply of digital content or digital services, introduced outside of the Civil Code, pertains to B2C relations only. If such a contract is concluded between businesses or peers, it will be governed by provisions of the Civil Code corresponding with the legal relationship in question. Accordingly, contracts of the same content could be governed by substantially different regimes of liability, depending on the legal qualification of the contracting parties.

D. Conclusions: a finish with no applause?

26 The interconnection between the SGD and the DCD speaks in favour of implementing them together in the same act. As such, reflection upon the transposition of the DCD, which constitutes the main subject of this paper, could not be carried out without addressing the transposition of the SGD.

27 A substantial part of the SGD pertains to the seller's liability in contracts for the sale of consumer goods. In Poland, this matter is currently regulated in the Civil Code in a manner which is not completely identical to the new EU rules. As a result, doubts about the appropriate method of transposition have arisen. The Polish legislature seems to conclude that an interference in the Civil Code is undesirable. Consequently, the SGD and the DCD are set to become incorporated in the Act on consumer rights, which initially implemented Directive 2011/83/EU on consumer rights into the Polish legal order.

28 The chosen method of transposition is highly controversial. Introduction of provisions governing the sale of consumer goods to the Act on consumer rights would entail a repeal of certain provisions of the Polish Civil Code, implementing Directive 1999/44/EC. De-codification would result in the emergence of separate liability regimes in sale contracts based on similar legal categories and using different legal terms. Their applicability would be contingent on the B2B, B2C or peer-to-peer nature of the legal relation between the parties. For example, the hierarchy of remedies would only apply to consumer contracts.

29 This dissonance will not emerge with contracts for the supply of digital content or digital services, for which no well-established rules and doctrines are currently in place. In reality, the discrepancy would become even more significant. Directly following the DCD approach, the Polish legislature decided to limit personal scope of the new rules on digital content and digital services to B2C relations. However, agreements of the same nature may also be concluded between traders and peers; as such, their legal assessment will need to be performed case-by-case. Should such contracts be qualified as agreements for the provision of services, their performance will underlie a fundamentally different regime of liability from the one envisaged in the DCD. In conclusion, contracts of the same content would be governed by substantially different sets of norms depending on their parties' legal qualification.

30 The aforementioned negative implications result from the Polish legislature's decision to step away from the path of an integrated approach in implementing the EU consumer *acquis* in favour of a simpler solution. Instead of riding on a firm route paved with existing legal institutions, a decision was made to take a shortcut that may not lead towards the same destination. A ride on a tandem bike may be an extraordinary experience as long as one bears in mind that every move has to be synchronised. Indeed, it is better to ride on firm ground, even if extra effort is necessary.

54 DCD, Recital 16.

Transposition Of The Digital Content Directive (EU) 2019/770 Into Estonian Legal System

by **Irene Kull***

Abstract: Digital Content Directive (EU) 2018/770 (DCD) is an innovative directive insofar as contracts for the supply of digital content and digital services were not regulated by EU law and like in most European countries, this area was not regulated in Estonia either. Member States extend the scope of the material regimes concerned. That includes the case of dual-purpose contracts and of platform providers who are not direct contractual partners of the consumer. Member States are also free to provide for longer time limits for the liability of the trader than those laid down in the Directives. The qualification and the categorisation of digital content and service contract also remain unsolved. The draft law for the transposition of the Digital Content Directive has not yet been submitted to the Estonian Parliament. The Ministry of Justice of Estonia has prepared a draft law concerning transposition of the DCD, Sale of Goods Directive and recently adopted the Modernization Directive which is not publicly available. The article briefly describes the process of transposition of the DCD and the place of digital content and digital service as concepts in the Estonian private law system, as well as legislative choices made during preparation of the draft. The most reasonable option is to transpose relevant provisions of DCD into general part of LOA which is consistent with current transposition practices. The author also discusses the possibility of extending the scope of application of the DCD. Contracts where consumers provide or undertake to provide personal data to the trader are contracts for payment under Estonian law. Despite the possibility that general rules on termination of contract apply, the need to regulate consequences for withdrawal of consent by specific rules is examined in the article. Currently, Estonian draft law provides a time limit for trader's liability and limitation periods. The author analyses the existing system of traders' liability and possible consequences if only the limitation period will be kept. Finally, the author provides some concluding remarks.

Keywords: Directive (EU) 2019/770; Digital Content and Service; Transposition; System of Estonian Private Law; Personal Data as Consideration; Traders Liability

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A. Introduction

1 The Digital Content Directive (EU) 2019/770 (hereafter also: DCD)[1] has been published on May 22, 2019, entered into force on June 11, 2019 and must be transposed into national law on July 1, 2021 at the latest. The objective of the DCD is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection and lay down common rules on certain requirements concerning contracts between traders

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1 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 L 136/1.

and consumers for the supply of digital content or digital services.[2]

2 Transposition of the Digital Content Directive into Estonian law touches upon the parallel transposition of the Sale of Goods Directive[3] and Modernization Directive[4]. The DCD and Sale of Goods Directive should complement each other by establishing certain requirements concerning contracts for the supply of digital content or digital services, and certain requirements concerning contracts for the sale of goods. However, the directives do not overlap in their objective scope of application. The DCD should also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content.[5] The Sale of Goods Directive governs the sale of goods (online or offline), including goods embedded with digital components (e.g., smart watches, smart TVs, etc.). Both directives provide for conformity requirements (e.g., quality, interoperability, updates, accessories, fit for purposes, etc.), remedies for lack of conformity (e.g., repair, replacement, price reduction, termination, etc.), a 2-year time limit of traders' liability for defects, rules regarding the burden of proof, and redress. The DCD is an innovative directive insofar as contracts for the supply of digital content and digital services were not regulated by EU law and like in most European countries, this area was not regulated in Estonia either. The Directive is of maximum harmonisation, unless otherwise provided for[6] which means that Member States may not restrict the scope of the directives. They may, however, freely[7] extend the scope of the material regimes concerned which includes the case of dual-purpose contracts[8] and of platform providers who are not direct contractual partners of the consumer[9]. Member States are also free to provide for longer time limits for the liability of the trader than those laid down in the Directives[10]. The qualification and the categorisation of digital content and service contract also remain unsolved.

3 This article focuses on some main decisions and choices made in the course of discussions concerning the transposition of the DCD. The article contains a short introduction to the process for transposition of the DCD and the place of digital content and digital services as concepts in Estonian private law system and in the system of legislation. Furthermore, it discusses some choices made in the course of preparation of the transposition such as an extension of the scope of application, personal data as consideration, and a period for liability. It closes with concluding remarks. Main source is draft of the Law amending the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives) which was published on 9.04.2021.[11]

B. Process of the transposition of the Digital Content Directive

4 The Ministry of Justice of Estonia has prepared a draft law concerning transposition of the DCD, Sale of Goods Directive and recently adopted Modernization Directive. During the preparation of the draft law, interest groups were invited to comment on a selection of key issues related to the transposition of the directives that the Ministry considered important. Responses were received from the Ministry of Economic Affairs and Communications, the University of Tartu, the Estonian Bar Association,

2 See Art. 1 of the DCD.

3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

4 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.

5 Recital 20 of the DCD.

6 Art. 4 of the DCD.

7 Recital 16 of the DCD.

8 Recital 17 of the DCD.

9 Recital 18 of the DCD.

10 Art. 11(2) and (3) and Recitals 56 and 58 of the DCD.

11 Võlaõigusseaduse ja tarbijakaitseseaduse muutmise seadus (digitaalse sisu, tarbijalemüügi ning muudetud tarbija õiguste direktiivide ülevõtmine) [Law amending the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives)], no 21-0443. Available in Estonian at:<https://eelnoud.valitsus.ee/main/mount/docList/f4fd9c56-c713-4200-a85a-0e024a6fc9b2#I02DIqIf> Hereby I would like to thank K. Koll from Ministry of Justice who kindly equipped me with the non-published pre-draft and other materials used in the process of preparation.

the Estonian Chamber of Commerce and Industry, the Estonian Association of Information Technology and Telecommunications and the Consumer Protection and Technical Regulatory Authority.[12] The issues from the questionnaire were the personal scope of both directives, the need to regulate dual purpose consumer contracts, exclusions in the scope of application, right to use personal data as counter-performance, regulation of consequences of withdrawal of consent to use of personal data, consequences of termination of package contracts, non-compliance, the seller's liability and limitation period, the regulation of the burden of proof and the obligation to provide information, the regulation of returns and refunds, and finally, the sales guarantees and harmonization of provisions of the sales contract with provisions of the contract for work. To date, there has been no public discussions concerning transposition of the directives. However, analyses of the most important problems related to the transposition of the Directives into Estonian law have been published.[13] At the moment when this article was written, the draft law from 23.03.2021 on the transposition of the directives was sent to ministries and interest groups for an opinion and will be submitted to the Estonian Parliament in the near future.[14]

12 The author also used the questionnaire with answers from interest groups provided by the Ministry of Justice when writing this article.

13 For example, an overview of the Directive's regulation of conformity and liability of the seller and legal remedies and an analysis of what extent the transposition of the Directive means new principles for Estonian contract law by K. Sein in 'Tarbija õiguskaitsevahendid uues digisisu ja digiteenuste lepingute direktiivis' (Legal Remedies of the Consumer in the New Directive concerning Contracts for Digital Content and Digital Services) (2019) 8 Juridica 568-577 (in Estonian); K. Urgas, K. Koll, 'Nõuetele vastavus ning ettevõtja vastutus uues digitaalse sisu ja teenuste lepingute direktiivis' (Conformity and Liability of Businesses in the new Directive concerning Digital Content and Digital Services) (2019) 8 Juridica 551-567 (in Estonian). About personal data as counter performance by I. Kull, 'Digisisu üleandmine ja digiteenuste osutamine isikuandmete esitamise vastu. Euroopa Parlamendi ja nõukogu direktiiv (EL) 2019/770' (Supply of Digital Content and Digital Services in Return for Providing Personal Data. Directive (EU) 2019/770 of the European Parliament and of the Council), (2019) 8 Juridica 578-588; I. Kull, 'Withdrawal from the consent to process personal data provided as counter-performance: contractual consequences', (2020) 13 Juridiskā zinātne/Law 33-49.

14 Passing the Act requires three readings in Riigikogu (Estonian Parliament). See Riigikogu kodu- ja töökorra seadus (Riigikogu Rules of Procedure and Internal Rules Act), entry into force 17.03.2003, available at:< https://www.riigiteataja.ee/en/eli/518112014003/consolide>.

C. Digital content and digital services in the system of Estonian private law

5 One of the main challenges when transposing the Digital Content Directive and also the Sale of Goods Directive is to ensure the coherence of the existing private law system. Estonian legislative practice has followed, so far, the principle of coherency quite successfully. The Estonian legal system was fully revised in the 1990s and in many cases, Germanic family of law was chosen as model for the new laws.[15] In private law this entailed drafting the 'imaginary' civil code based on the pandect system consisting of the General Part of Civil Law Act (hereinafter: GPCCA)[16], Property Law Act, Family Law Act, Law of Succession Act, and Law of Obligations Act[17] (hereinafter: LOA).[18] It was decided from the beginning of legal reforms started in 1991 that there is no urgent need to codify the above private law acts that already function *de facto* as a single code.[19] Notably, the Estonian legal system developed under the influences of other legal systems and

15 In private law the Germanic family was chosen as main source of guiding principles on the bases of decision made in 1992 by the Supreme Council of the Republic of Estonia. Eesti Vabariigi Ülemnõukogu otsus 6. juulil 1992 Eesti Vabariigi pankrotiseaduse rakendamise kohta (Decision of the Supreme Council of the Republic of Estonia of 6 July 1992 concerning the Implementation of the Republic of Estonia Bankruptcy Act) § 7 (7) – Riigi Teataja (the State Gazette) 1992, 31, 404. See P. Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' (2000) Juridica International 5, 107; The draft of the LOA was largely modelled on the German Civil Code (BGB) and particularly the draft proposing modification to the BGB (BGB-KE). See Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts. Herausg vom Bundesminister der Justiz. (1992) Köln, Bundesanzeiger. See also I. Kull, 'Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law' (2008) Juridica International 14, 122-129.

16 General Part of the Civil Code Act (tsiviilseadustiku üldosa seadus), in force from 1.07.2002, available at: <https://www.riigiteataja.ee/en/eli/509012018002/consolide>.

17 Law of Obligations Act (võlaõigusseadus), in force from 1.07.2002, available at:<https://www. riigiteataja.ee/en/eli/508082018001/consolide>.

18 Varul (n 15), 108.

19 Varul (n 15), 118. See also M. Ristikivi, A. Kangur, I. Kull, K. Luhamaa, M. Sedman, H. Siimets-Gross and A. Värv 'An Introduction to Estonian Legal Culture' in S. Koch and J. Øyrehagen Sunde (eds), Comparing Legal Cultures (Bergen, Fagbokforlaget, 2nd ed), 191–220.

harmonised soft law instruments.[20] Therefore, it is understandable that Estonia has reason to monitor the transposition of directives in the model countries, taking into account its own established legal system and case law.

6 The DCD, Sale of Goods Directive and Modernization Directive to be transposed fall within the scope of regulation of LOA and partly also of the GPCCA. The LOA consists of two parts – general (§§ 1-207) and special (§§ 208–1068) – of which the latter is in turn divided into two parts, the first governing specific types of contract (§§ 208-1004) and the second non-contractual obligations such as tort liability for damage, unfair enrichment, administration without mandate and public permission of remuneration (§§ 1005-1068). In this context, it should be noted that when drafting the LOA, it was considered important to consolidate all the rules on consumer contracts into LOA in order to ensure regulatory uniformity. Thus, all EU consumer rights directives governing contractual relations are placed in the structure of the LOA, taking into account whether these are general rules applicable to all types of contract or rules applicable only to a specific type of contract.[21] The preparation of the transposition is based on an already established principle that contract law provisions of the directives will be transposed into the LOA, taking into account whether these are general or special rules. In addition, general provisions of the GPCCA, especially rules on prescription periods, have to be considered. Indeed, Estonia has also adapted the Consumer Protection Act[22], however it consists mainly in public law rules.

7 One of the biggest challenges of the DCD is that the Directive does not regulate the legal nature of contracts for the supply of digital content or digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental or *sui generis* contract, are be left to national law.[23] Regulation, regardless of different types of contractual agreements (e.g. sales or service contracts), is reasonable as it prevents Directive from being outpaced by technological development, innovation and evolution of new business models.[24] However, this also causes difficulties for Member States in choosing the best legislative technique.[25] At the time of writing this article, the draft law governing amendments to the sales contract and other special types of contracts was not yet ready, therefore, I will not go into more detail on the links between the transposition of the DCD and the transposition of the Sale of Goods Directive. Still, it is important to note that the rules of current law are also applicable to digital content and digital services, although digital content or services are not explicitly mentioned in law or regulated by specific rules. For example, according to the § 48 of the GPCCA objects of the right can be things, rights, and other benefits, which means among other objects also digital content or digital services. Also, the definition of sales contracts leaves the list of objects of the contract open, providing that the provisions concerning the sale of things applies to the sale of rights and other objects, unless otherwise provided for in the law (§ 208(3) LOA). However, this does mean that provisions concerning consumer sale apply to contracts for digital supply and in some cases digital services. The definition for such

20 For example, in drafting the LOA, the countries whose examples were used were the Netherlands, Denmark, France, Italy, the state of Louisiana, the province of Quebec, and other countries of the Romanistic and Germanic family, as well as Nordic countries. The LOA has also been greatly influenced by the model laws like Unidroit PICC and PECL. The Civil Chamber of the Estonian Supreme Court has stated in several judgments that foreign legal acts, court practice, and legal doctrines can be taken into account when interpreting Estonian law. This requires, however, that there is no Estonian case law and that the rules or legal system of the model country are similar to those in Estonia. See judgments of the Supreme Court of Estonia from 21.12.2004 no. 3-2-1-145-04 and from 13.09.2005 no. 3-2-1-72-05, from 09.12.2008 no. 3-2-1-103-08 and from 12.10.2011 no. 3-2-1-90-11. The Criminal Chamber of the Estonian Supreme Court, on the other hand, warned judges against uncritical referencing of foreign law. Whereas the similarity of Estonian law to German law does not legitimize abstaining from the principle that, in Estonia, the state power including judicial power is exercised solely on the bases of the Constitution and the laws of Estonia. See order of the Criminal Chamber of the Supreme Court of Estonia from 13.06.2018 no. 1-17-11509.

21 For example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 was implemented into the general part of LOA; provisions implementing the Consumer Rights Directive 2011/83/EU into special part under contract of sale rules.

22 Consumer Protection Act (tarbijakaitseseadus), in force from 01.03.2016, available at:<https://www.riigiteataja.ee/en/eli/ee/504122020003/consolide/current>.

23 Recital 12 of the DCD.

24 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' (2019) European Review of Contract Law 15(3), 260.

25 See for example discussion by G. Spindler, 'Contracts for the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content' (2016) ERCL 12(3), 183–217.

provisions is a contract where a consumer is sold a moveable by a seller who enters the contract in the course of their economic or professional activities.[26]

8 Taking into account the existing system of Estonian private law, it is evident, that general rules concerning digital content and services cannot be smoothly integrated into the special part of the LOA, which is structured according to type of contract. There were a number of options for transposition of the DCD under discussion: for example, whether to make changes in the rules of all types of contracts or only amendments in the regulation of sales contracts and add references to the relevant provisions concerning digital content and services to other types of contracts; amend sales, lease and agency contracts and, in the case of other types of agreements; add references to general rules only within the framework of a specific part; create completely separate new type of contract: adapt separate law or make changes in the general part of the LOA. The most reasonable and consistent with transposition traditions already established in previous practice was the option to transpose relevant provisions of the DCD into general part of the LOA.

9 Draft law prepared by the Ministry of Justice proposes to amend Chapter 2 of Part 1 of the General Part of the LOA[27] with the Division 6 named as 'Digital Content and Digital Service Contract'. According to the draft, the new division will consist of following provisions: definition of the digital content and digital service contract (§ 62^4), application of provisions of general part of LOA (§ 62^5), supply of digital content or digital service ((§ 62^6), conformity of the digital content or digital service (§ 62^7), obligation to update the digital content or digital service (§ 62^8), incorrect integration of the digital content or digital service (§ 62^9), deviating agreements (§ 62^{10}), liability of the trader for non-conformity (§ 62^{11}), burden of proof (§ 62^{12}), consumer's right to terminate the contract for failure to supply (§ 62^{13}), consumers remedies for lack of conformity (§ 62^{14}), obligations of the trader in the event of termination (§ 62^{15}), obligations of the consumer in the event of termination (§ 62^{16}), time limits and means of reimbursement by the trader (§ 62^{17}), the contractual consequences of the withdrawal of the consumer's consent to the processing of personal data (§ 62^{18}), modification of the digital content or digital service (§ 62^{19}), right of redress (§ 62^{20}), prohibition on violation of provisions (§ 62^{21}) and mandatory nature of provisions (§ 62^{22}).[28] In order to clarify the relationship between the provisions of general and special parts, § 62^5(7) of the LOA will provide that the provisions of the general part of the LOA and provisions of the respective type of contract to which the contract of supply of digital content or digital services conforms shall apply, unless otherwise regulated in Division 6. Digital content, digital service, digital element thing and related concepts are defined in the new § 14^2 of the LOA.

D. Some choices concerning transposition of the DCD

I. Scope of application of the rules transposed from the DCD

10 According to recital 16 of the DCD, Member States are free to extend the application of the rules of the Directive to contracts that are excluded from the scope of the Directive, for example to natural or legal persons that are not consumers within the meaning of the Directive. According to the Art. 3(1) of the DCD, the Digital Content Directive applies only if a trader provides or undertakes to provide digital content to a consumer. A consumer is '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' (Art. 2(6) of the DCD). A similar definition can be found in the § 1(5) of the LOA which provides that for the purposes of the LOA, a consumer is a natural person who concludes a transaction not related to independent

26 In the Commentary to the § 48 of the GPCCA from 2010 digital content or digital services are not mentioned as objects of rights. See P. Varul, I. Kull, V. Kõve and M. Käerdi, 'Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne' (Juura 2010), 190-191. In the commentary to the § 208(3) of the LOA from 2019 the reference to the possibility that provisions of sales contract will apply also to the digital content and services also on the bases of § 48 of the GPCCA is made. In the commentaries to the § 208(4) of the LOA it is explained, that in addition, sales contracts entered into in respect of digital products, such as computer software, electronic databases, digitized music, video and text, etc., shall also be deemed to be contracts for the sale of movables within the meaning of § 208(4). It does not matter whether the product in question is delivered to the consumer in physical form, eg on a durable medium (CD, DVD, etc.) or whether it allows the user to download it from a certain account or to a certain device. See M. Käerdi, '§ 48' in: P. Varul, I. Kull, V. Kõve, M. Käerdi and K. Sein (eds), *Võlaõigusseadus II. Kommenteeritud väljaanne* (Juura, 2019), 41-42.

27 Structure of the Part 1 of the LOA is following: Chapter 1 General Provisions. Chapter 2 Contract. Division 1 General Provisions; Division 2 Standard Terms; Division 3 Off-premises Contract; Division 4 Distance Contracts; Division 5 Contracts Entered into through Computer Network.

28 The provisions contained in the draft law may change during the preparatory discussions.

economic or professional activities. Until now, the Estonian legislature applied the rules concerning consumer contracts only to contracts between a trader and a consumer. The concept of consumer has not been extended in Estonian case law either. It is questionable, if there is any need to extend the personal scope of either directive to companies or the non-profit sector. So far, in practice, there has been no need to restrict the freedom of contract to such an extent. Furthermore, the provisions on the unfair standard terms of the LOA (§§ 35-45) apply to contracts concluded between businesses which should exclude the risk of abuse of rights. On the other hand, the extension of the application to other subjects than consumers and businesses would increase the administrative burden and obligations of businesses and legal uncertainty[29].

11 Member States should also remain free to determine, in the case of dual-purpose contracts, where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered a consumer. It has to be mentioned that already according to recital 17 of the Consumer Rights Directive[30] such dual-purpose contracts are always contracts concluded with the consumer. This principle has been used as a basis for transposing the Consumer Rights Directive into Estonian law. Providing for differences in the transposition of the DCD could mean that consumer protection rules have to be applied only in part to the same contractual relationship. It is sensible to extend the scope of application to dual purpose contracts while in the case of digital content and digital service, there are often situations where the digital content or service is also used to some extent for economic and professional activities. Although the draft law does not contain any corresponding provision, according to the explanatory memorandum of the draft law, the definition of consumer will cover also persons who conclude dual purpose contracts, e.g., where the contract is concluded for purposes that are partly within and partly outside the person's trade.

II. Personal data of the consumer as form of payment

12 It is novel that the scope of the DCD is not only contracts for which the consumer pays with money, but also contracts in which the consumer provides his or her personal data to the trader. According to the Art. 3(1), the Directive "shall also apply where 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, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose." Recital 25 of the DCD provides that the Directive does not apply to situations where the trader only collects metadata, such as information concerning the consumer's device or browsing history, except where this situation is considered to be a contract under national law. Member States should remain free to extend the application of this Directive to such situations, or to otherwise regulate such situations, which are excluded from the scope of this Directive. At the moment, it is decided that Estonia will not use this possibility. However, the inclusion of so-called cookies should be seriously considered, especially taking into account judgment of the European Court of Justice C-673/17 according to which if cookies are used, the active consent of the consumer is needed for the storage of information or access to information already stored in a website user's terminal equipment.[31] This raises the question of why personal data obtained through cookies and processed with consent should be excluded from the scope, while other personal data processed with consent would lead to the application of the Directive.[32]

13 Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader.[33] Application of rules concerning digital content and digital service on contracts where the trader supplies, or undertakes to supply, digital content or a digital

29 According to the opinion of interest groups which is not publicly available.

30 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.

31 Judgment of the Court (Grand Chamber) of 1 October 2019 no. C-673/17 (Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH) 65.

32 The question is raised by K. Sein and P. Kalamees in their opinion concerning the transposition of the DCD. Opinion is not publicly available.

33 Recital 24 of the DCD.

service to the consumer, and the consumer provides, or undertakes to provide, personal data can be found in the § 62[4](2) of the draft law. According to the Art. 3(8) of the DCD, European Union law on the protection of personal data shall apply to any personal data processed in connection with contracts for supply of digital content or digital service without prejudice to Regulation (EU) 2016/679 (hereinafter: GDPR)[34] and Directive 2002/58/EC[35]. In the event of conflict between the provisions of the DCD and Union law on the protection of personal data, the latter prevails.[36] The use of personal data for commercial purposes under the contract for supply of digital content or digital service in the vast majority of cases based on the consumer's consent (Art. 6(1)(a) GDPR). If personal data is needed only for the performance of the contract (e.g., e-mail address, password, etc.), the legal basis for processing the data follows from the Art. 6(1)(b) of the GDPR.

14 The transposition of the Directive must therefore take into account the law in force, i.e., whether to regard contracts for the supply of digital content or digital service as contracts for payment subject to the use of personal data, or whether it is necessary to lay down a specific rule. Contracts where digital content or digital services are supplied for personal data as counter-performance can be qualified under Estonian law as contracts for payment. However, it does not mean that the obligations of the parties to the contract are reciprocal,[37] e.g., a trader has no right to claim consent or require the transfer of personal data.

15 Under Art. 7(3) of the GDPR, the consumer has the right to withdraw his or her consent to the processing of their personal data at any time. Member States are free to regulate consequences of the withdrawal of the consent for the processing of the consumer's personal data.[38] Estonia did not use this possibility in the draft as existing rules provide a fair solution of the situation and ensure the rights and protection of the consumer provided by the GDPR.[39] However, this choice is still open to discussion: do we need special provisions concerning the consequences of the withdrawal of the consent to process personal data? A situation where a consumer withdraws his or her consent to the processing of personal data may in certain cases be considered a good reason to terminate the contract (*ex nunc*) within the meaning of § 196 (2) of the LOA.[40] Under § 196(2) of the LOA, a good reason is a situation where the terminating party cannot, taking into account all the circumstances and the mutual interest, reasonably be required to continue the contract until the agreed date or the expiry of the notice period. Since the withdrawal of consent must be free according to the GDPR, i.e., without any sanctions, the withdrawal of consent cannot constitute a breach of contract (§ 196(3) LOA). Also, a trader may for the same reason and under § 196(2) of the LOA terminate the contract, for example restrict the access to social media services or to the app. Paragraph 196 of the LOA applies in cases, where the digital content has already been transferred and also if the digital service continues to be provided.

16 Under Art. 17(1)(b) GDPR, the consumer is entitled to require the erasure of the personal data when he or she has withdrawn the consent or objects to the processing of personal data. It is not clear, if special rules concerning the right to require the erasure of the personal data are needed. According to the § 195(2) of the LOA termination (*ex nunc*) the contract shall release both parties from the performance of their contractual obligations. Upon termination (*ex nunc*) of a contract, the parties are only required to return that which has been delivered in advance with respect to the time of cancellation of the contract and rules on termination *ex tunc* apply *mutatis mutandis* (§ 195(5) LOA). This leads to the conclusion that withdrawal of the consent to process personal data is to be understood as termination of the contract and general rules concerning the obligations of

34 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

35 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L *201.*

36 Art. 3(8) of the DCD.

37 I. Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) NJW 72, 1706.

38 Recital 40 of the DCD. See more on discussion concerning the right to withdraw the consent in C. Langhanke, M. Schmidt-Kessel, 'Consumer Data as Consideration' (2015) EuCML 6, 218-23.

39 About the consequences of the withdrawal of the consent under Estonian law see more in cf Kull (n 13).

40 According to the § 62[5] of the draft law, general part of the LOA applies if otherwise is not provided. Rules on right to terminate contract *ex nunc* are provided for in the general part of the LOA.

the trader under GDPR apply (§ 62[15] draft law).[41] There were no special regulation concerning the consequences of the withdrawal of the consent to process personal data in the pre-draft law. The draft law provides for the contractual consequences of the withdrawal of the consumer's consent to the processing of personal data, which ensures clarity for the consumer and excludes the possibility that the withdrawal could be considered as a breach of contract. According to the § 62[18](1) of the draft law, if a consumer exercises the right to withdraw his or her consent to the processing of personal data, trader may rely on the provisions of § 196(1) of the LOA in the case of a contract which provides for the continuous or multiple supply of digital content or digital services. In addition, withdrawal of the consumer's consent to the processing of personal data shall not be considered a breach of contract and the trader shall not be able to seek redress against the consumer as a result (§ 62[18](2) draft law).

17 A consumer can withdraw his or her consent to the processing of personal data by declaration of intention in any form unless otherwise prescribed by law according to the § 68 of the GPCCA. This also must be the general rule in contracts for supply of digital content or service. However, the general rule concerning the time limit for termination of the contract provided for in the § 118 and § 196(3) of the LOA shall not apply on contracts for the supply of digital content or digital service[42] and will be provided as special rule in the draft law.

III. Period of liability for lack of conformity

18 Recital 56 of the DCD clarifies that to "ensure legal certainty" traders and consumers must always be able to rely on a time limit, which may be either a time limit for the trader's liability or a time limit for the consumer to exercise his or her rights. It is also possible to set both deadlines.[43] At the moment, Estonian draft law provides both the time limit for trader's liability and limitation period. A trader shall be liable for any lack of conformity which exists at the time of supply (Art. 10(2) DCD)[44] and becomes apparent within a period of time after supply which shall not be less than two years (Art. 11(2) DCD). Also, the Sale of Goods Directive provides that the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time (Art. 10(1) Sale of Goods Directive).[45] Member States may maintain or introduce longer time limits than those in DCD (Art. 11(3) and Sale of Goods Directive (Art. 10(3)) on the condition that limitation period allows to the consumer exercise the remedies for any lack of conformity, which occurs or becomes apparent during at least 2 years period after supply or delivery. Since one-off digital content supply can be qualified primarily as either a sales or contract for work within the meaning of Estonian law, it would be reasonable to reconcile the limitation periods with limitation period applicable to the supply of digital content or digital service.

19 Therefore, the following solutions were under discussion: 1) maintain the time limit of the trader's liability for 2 years as it is in the current law and, in addition, apply the limitation period; 2) waive the 2-years' time limit of the trader's liability and apply only the limitation rules.

20 The first solution would not significantly change the existing law and at the same time is in line with the DCD. In particular, under Estonian law the seller is liable for any lack of conformity of a thing which becomes apparent within two years as of the date of delivery of the thing (§ 218(2) LOA) only in consumer sale.[46] There is no time limit on trader's liability in other sales contracts. In essence, this creates the possibility that the rights of consumers are less protected in terms of the trader's liability than the rights of other buyers. This rule was transposed into Estonian law from the Art. 5(1) of the Consumer Sales Directive[47] under which seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods. The second sentence of the same article provides the possibility that if, under national legislation, the right to use remedies are subject to a limitation period, that period shall not expire within two years from the time of delivery.

41 See also Kull (n 39) 49.

42 It would be against the principle provided for in the Art. 15 of the DCD.

43 See also G. Spindler and K. Sein, 'Die Richtlinie über Verträge über digitale Inhalte. Gewährleistungen, Haftung und Änderungen' (2019) MultiMedia und Recht, 492.

44 The same rule applies to both B2C and B2B sales contracts under § 218(1) of the LOA and contract for work under § 642(1) of the LOA.

45 The same rule applies to sales contract under § 218(2) of the LOA and contract for work under § 642(2) of the LOA.

46 About the seller's liability under Estonian law, see **there's no reference here**

47 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. *OJ L 171.*

Estonia did not use the possibility to establish more favourable rules for consumers. At the same time, the general three-year rules on limitation periods according to the § 146(1) of the GPCCA apply also to consumer sales. Under the DCD, Member States should remain free to regulate national limitation periods including the starting point of limitation period.[48] In any case the regulation of starting points should allow consumers to exercise their remedies for any lack of conformity that becomes apparent at least during the period during which the trader is liable for a lack of conformity. As general rule, the limitation period of a claim begins when the claim falls due unless otherwise provided by law (§ 147(1) GPCCA). Beginning of expiry of claims arising from lack of conformity of purchased thing is governed by a special provision, namely § 227 of the LOA. Under § 227 of the LOA, the limitation period of a claim arising from the lack of conformity of a thing begins as of the delivery of the thing to the buyer. The same applies to the delivery of a substitute thing by the seller. Upon repair of a thing by the seller, the limitation period of claims against the eliminated deficiency begins anew as of the repair of the thing. The length and starting point of the limitation period laid down for contracts for work do not differ from the limitation periods for claims arising from the contract of sale.[49]

21 Under existing rules, consumers can claim damages or use other remedies during 3-years' time limit from the delivery of digital content if non-conformity becomes apparent within 2 years as of the date of supply which mean that parties have to pay separate attention to both the time limit and limitation period (which might be the downside of the solution). Despite this, draft law offers a solution which is based on both the limit of liability of the trader and limitation period.[50]

22 The second solution means that the time limit for the trader's liability will be repealed and limitation period of 3-years will be the only time limit for trader's liability. As a result, the consumer might be in a better position as the time limit for seeking remedies will be in essence extended (no additional 2-year time limit)[51] while general limitation period of 3-years would apply to all one-off contracts for supply of digital content or digital service regardless of the qualification of the contract under applicable law.[52] However, a number of stakeholders also expressed the view that replacing the current 2-year limitation of trader's liability with a general 3-year limitation period would lead traders into a more difficult position, as already a period of 2-years is too long to prove non-conformity of certain types of goods at the time of delivery. For example, in cases of video games, improvements are made on an ongoing basis which makes it difficult to identify the cause of the problem if time limit is too long. This might be a downside of the solution for traders.

23 In case of a continuous supply of digital services (e.g. Dropbox, Netflix), the trader shall be liable for a lack of conformity (Art.-s 7, 8 and 9 DCD), that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.[53] If, under national law, the rights concerning the use of remedies are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies for any lack of conformity that occurs or becomes apparent during the period of time referred to in the first subparagraph.[54] A contract for continuous supply of digital content or digital service might be also qualified as contract for work. In that case, for example if the cloud service or use of software is provided, the delivery of the respective partial performance will take place in the form of continuous transfer. According to the §

48 Recital 58 of the DCD; recital 42 of the Sale of Goods Directive.

49 According to the § 651(1) of the LOA regulating start of the limitation periood in contracts for work, the limitation period of a claim arising from the lack of conformity of work shall start as of the completion of the work. If the customer is required to accept the work, the limitation period of a claim shall start as of the acceptance of the work or as of the work being deemed to have been accepted. § 651(2) of the LOA: Upon the performance of substitute work, the limitation period shall commence as of the completion of the substitute work. Upon remedying a lack of conformity, the limitation period shall recommence with respect to the remedied lack of conformity as of the remedying of the lack of conformity

50 LOA § 62^{10} Liability of the trader for non-conformity of the digital content or digital service. (1) Where the contract provides for the supply of digital content or service in one or more separate operations, the trader shall be liable for non-conformity of the digital content or service which exists at the time of supply of digital content or service and which becomes appearant within two years as of the date of delivery [...].

51 In the case of a waiver of the time limit on trader's liability, the Estonian legislature would follow the example of BGB, where there is no time limit on the seller's liability. See BGB § 438.

52 In most cases, one-off contracts for supply of digital content or digital services will be qualified as sales contracts (§ 208 LOA) or contracts for work (§ 635 LOA).

53 Art. 11(3) of the DCD.

54 Art. 11(3) of the DCD.

651 of the LOA, the limitation period starts from the completion of the work, or if the customer is required to accept the work, the limitation period of a claim shall start as of the acceptance of the work or as of the work being deemed to have been accepted. It does mean that if supply of digital content or service is continuous; the limitation period starts from the moment the defect occurs (work was completed, accepted or deemed to be accepted), and consumer shall be able to use remedies concerning the defects occurred during whole period of the contract. In that case the requirement of the DCD Art. 11(3) is met, and the limitation period allows the consumer to exercise the remedies for any lack of conformity that occurs or becomes apparent during the contractual relations (and even after the end of the contract).

24 The situation where a contract is qualified as lease contract (for example, use of CD with digital content) seems problematic. Under the lease contract, a lessor is required to deliver a thing, together with its accessories, to a lessee by the agreed time and in a suitable condition for contractual use and to ensure that the thing is maintained in such condition during the validity of the contract (§ 276(1) LOA). The limitation period of the claims of a lessee shall start as of the end of the contract under the § 338 of the LOA. According to the § 338 of the LOA, the limitation period of a claim by a lessor for compensation for alteration or deterioration of a leased thing and a claim by a lessee for compensation for expenses incurred in relation to a thing or for removal of alterations is six months of the return of the thing. The limitation period of the claims of a lessee shall start as of the termination of the contract and of a claim of a lessor for compensation for alteration or deterioration of a leased thing shall expire together with a claim for the return of the thing. This means that the 6-month limitation period has to be changed. The start of the limitation period from the termination of the contract seems to be in accordance with the requirements of the DCD. If the contract is qualified as a contract of mandate (§ 619 LOA), general rules on the limitation period and start of that period from GPCCA (§ 147) shall apply. In conclusion, finding the proper moment when the limitation period shall start is the main challenge. If the starting point were the time of the occurrence of the defect (§ 147(2) GPCCA), the liability of the trader for all defects occurring during the contract would be guaranteed, as required by the Directive. A 3-year limitation period would preclude a disproportionately long time for the trader to pursue claims against him,[55] while ensuring that the consumer still has a reasonable opportunity to enforce his or her claims.[56] In any case, the relationship between general and specific limitation rules has to be analysed thoroughly.

E. Concluding remarks

25 At the time of writing, Estonia does have the final publicly available draft law of the transposition of the DCD and Sale of Goods Directive. A number of important decisions concerning the transposition of directives have been taken. Following the Estonian legislative tradition, the Digital Content Directive will be implemented into the Law of Obligation Act, in the Part 1 as new Division 6 in Chapter 2 (Contracts). This seems to be the most reasonable choice, consistent with transposition traditions already established in previous practice. The DCD, Sale of Goods Directive and Modernization Directive to be transposed fall within the scope of regulation of the LOA and partly also of the GPCCA which means that changes will also be made in other parts of the respective legal acts. Estonia did not use the opportunity to extend the application of the rules of the DCD to contracts that are excluded from the scope of the Directive, such as such as non-governmental organisations, start-ups or SMEs. The draft does not provide any rules concerning the dual-purpose contracts. However, it can be argued that unless the application to dual-use contracts is not expressly provided for in the law, memorandum should include an explanation to that effect.

26 In the draft, Estonia did not use the freedom to determine the legal nature of contracts for the supply of digital content or a digital service, e.g., whether such contracts constitute a sale, service, rental or sui generis contract. The Special Division in the general part of the LOA will apply to all types of contracts if they meet the characteristics of a contract for the supply of digital content or a digital service provided by law.

27 The DCD does not apply to situations where the trader only collects metadata, such as information concerning the consumer's device or browsing history, except where this situation is considered to be a contract under national law. Estonia did not use the freedom to extend the application of rules concerning the supply of digital content or service to such situations. Draft law regulates contractual consequences of the withdrawal of the consent for the processing of the consumer's personal data in order to ensure compliance with the requirement of the GDPR. This is an important provision, the aim of

55 See critical opinion concerning the Directive's liberal approach towards the proposed freedom of the Member States to choose the time limit for liability and limitation period in Spindler (n 25) 213.

56 About the time limits of the trader's liability and limitation period in the DCD and Estonian law see Urgas, Koll (n 13) 563.

which is not so much to regulate the consequences but to explain law simply and clearly. As Member States are free to apply either a time limit for the trader's liability or a time limit for the consumer to exercise his or her rights, Estonian draft law provides both a time limit for trader's liability and a limitation period. This means that the time limit of the trader's liability for 2 years, as it is in the current law, is maintained and in addition, the limitation period of 3 years will apply. In conclusion, for Estonia, the transposition of the DCD does not lead to very significant changes in the current private law system and only some discretionary possibilities left to the Member States have been used. Finally, in general the choices made in the draft have so far been justified.

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[1]. 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[2] (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.

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,[3] 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")[4] 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

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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.

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.[5] 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.[6]

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[7], into the separate chapter XVIII[1] 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[8] and Mortgage Credit Directive 2014/17/EU.[9] Both those directives have been implemented in separate statutes.

11 According to State officials and the pre-draft of the DCD (hereinafter "Pre-draft"),[10] the DCD should be implemented in the LCC's chapter XVIII[1] 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"[11] and "an authentic legal micro-system".[12] 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.[13] 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.[14] 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.[15]

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.[16] 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,[17] Law on Patents,[18] 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.[19] 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.[20] 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.[21] 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.

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.[22] 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.

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 re-sale 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.

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[12] 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.[23] 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.[24]

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[1] 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[2]). 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.[25] 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[22], 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[14], based on Consumer Sales Directive 1999/44/EC[26]. However, those rules, according to LCC Art. 6.228[1], 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 sund 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[18] 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[24] 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.[27] 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[1]). 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,[28] 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.

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.

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.

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.

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