

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



The new proposal for
harmonised rules on certain
aspects concerning
contracts for the supply
of digital content

WORKSHOP FOR THE JURI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**The new proposal for harmonised rules
on certain aspects concerning contracts
for the supply of digital content**

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this paper evaluates the European Commission's proposal of 9 December 2015 for a directive harmonising certain civil law contractual rules. The directives' approach concerning scope, type of contracts covered or non covered are being analyzed as well as issues like implementation into Member States, conformity, burden of proof and remedies.

This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI Committee

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KEY FINDINGS

- The proposal's **lack of classification** of digital content contracts as sales or services contracts will lead to a different positioning of digital content rules in national laws. That is likely to result in **fragmentation** and could be confusing for addressees of the rules, such as consumers and SMEs. A solution may be to include an obligation for Member States to introduce the rules as ***sui generis* rules** in national legislation.
- The **definition of 'digital content'** is unclear and should be re-assessed.
- The **absence of a time limit for the supplier's liability for non-conformity** of digital content is not easy to justify. If consumer protection can be guaranteed by lesser means, e.g. a fixed prescription period, that might moreover be a more economic solution for both businesses and consumers.
- **Consumer protection for contracts where a consumer 'pays' by providing data** should not fall below the protection adopted for contracts in which a price in money has been paid for the supply of digital content. The **criteria for conformity** should therefore apply in the same way to both types of contract. Also, consumers would benefit from stronger protection through objective, statutory criteria for conformity.
- The **restitutionary effects** of termination can be specified in more detail. The proposal does not adequately address situations in which the supplier cannot monitor the return of goods. Where the consumer retains a benefit, payment of the value of the benefit may be required.
- The provision on **damages** is dangerous to **consumer protection** in at least two respects: (i) the limitation of its scope to damage to the consumer's digital environment only; (ii) the aim of full harmonization, which would prohibit Member States from maintaining or introducing rules of national law that would enable consumers to recover other losses.

LIST OF ABBREVIATIONS

- BGB** Bürgerliches Gesetzbuch of 1 January 1900
- BW** Nieuw Burgelijk Wetboek of 1 January 1992
- CRD** Consumer Rights Directive 2011/83/EE
- DCFR** Draft Common Framework of Reference
- IoT** Internet of Things
- UvA** Universiteit van Amsterdam

1. INTRODUCTION

This paper contains a critical evaluation of the European Commission's proposal of 9 December 2015 for a Directive on certain aspects concerning **contracts for the supply of digital content** (COM(2015) 634 final)¹. The proposal for a Directive on contracts for the online and other distance sales of goods (COM(2015) 635 final), published on the same day, is subject to a separate briefing paper. The third proposal presented by the European Commission on the same day, for a Regulation on ensuring the cross-border portability of online content services in the internal market (COM(2015) 627), will not be discussed.

The aim of this paper is to evaluate the rules laid down in the Commission's proposal on digital content contracts. The envisaged benefits of the proposed legislation will not be discussed. For these I refer to the Impact Assessment study of the proposed Directive's².

The briefing paper is structured as follows: Part 2 will discuss the definition of digital content and the type of contracts falling within the scope of the proposed Directive. Part 3 focuses on the classification of digital content contracts as sales, services, rental or *sui generis* contracts, and the consequences that the proposed Directive's approach—which is neutral on this point—has for the implementation of its rules into national laws. The Directive's choice for full, rather than minimum harmonization will also be evaluated in this part. Parts 4, 5 and 6 turn to the proposed Directive's specific rules, dealing with conformity, burden of proof, and remedies. Part 7 concludes. In the evaluation of the rules, again where relevant, comparisons will be made with national laws, in particular with specific rules for the supply of digital content in UK law.

¹ I would like to thank Corien Prins, Lokke Moerel, Colette Cujpers and Eric Tjong Tjin Tai for helpful comments on earlier draft of this paper.

² Commission Staff Working Document, Impact Assessment Accompanying the document Proposals for Directives of the European Parliament and the Council on certain aspects concerning for the supply of digital content and on certain aspects concerning for the online and other distance sales of goods, SWD(2015) 275 final/2.

2. DEFINITION AND SCOPE

The definition of 'digital content' in the proposed Directive is broad (Art. 2), indicating that the new rules are supposed to be applied to a wide range of contracts concerning digital products and services. That approach is supposed to have advantages for the future—i.e. preventing a need for amendment of the rules when technologies enable new forms of, or new ways of processing digital content. Whether the Directive succeeds in laying down a **'future-proof' definition**, and whether it is at all possible to design such a definition, is however debatable.

Choosing a broad definition for digital content, further, can make the drafting of specific rules for digital content, e.g. in relation to remedies, more complex. The problem of complexity caused by a wide definition is somewhat alleviated by **narrowing the scope of application** of the Directive. A number of contract types for which specific rules exist is excluded from the proposed Directive's scope (Art. 3). However, since digital content products take many, often complex forms, the exclusion of contract types is also not always straightforward. The proposal might be refined in this respect.

I will elaborate on both points.

Defining 'Digital Content'

The proposed Directive defines 'digital content' broadly. The term includes, as set out in Art. 2(1):

- data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,
- a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and
- a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.

The common denominator of each of these types of products or services is that they relate to digitally stored files. In other words, to data files made up out of bits, or 0s and 1s.³

Nonetheless, these three bullet points refer to diverse forms of digital content. The first concerns data that is 'produced and supplied' in digital form. That indicates that the data included under this heading is **created by a supplier and delivered to a consumer** (as confirmed in Art. 3(1) of the proposed digital content Directive; for the definitions of supplier and consumer see Artt. 2(3) and (4)). The examples of video, audio, apps, games and software are some of the most common forms of digital content. The digital content can either be delivered **on a tangible medium—such as a CD or DVD—or it can be delivered through a streaming service**. Interestingly, therefore, **the proposed Directive draws the line between digital content contracts and sale of goods contracts in a different place than Directive 2011/83/EU on consumer rights**. That Directive distinguished between goods contracts and 'digital content which is not supplied on a tangible medium' (see e.g. Art. 9(2)(c)). Digital content delivered on a tangible medium such as a CD or a DVD should for the purposes of the Consumer Rights Directive (CRD) be considered as goods. The reason put forward by the Commission to extend the definition of digital content from Directive 2011/83/EU in the new rules is that the proposed digital content Directive aims to be **'future-proof'**. It should therefore apply to services that enable new technological developments. Further, the broad, non-differentiating

³ The term 'data' is often given a broader meaning, e.g. referring to personal data that is not per se stored on a digital medium, but in the proposal appears to be connected specifically to digital files. I will therefore use the term in that sense only. Compare also T.F.E. Tjong Tjin Tai, 'Data in het vermogensrecht', *WPNR* 2015/7085.

approach to digital content aims to create a **level playing field** for all suppliers of digital content (recital 11).

The broadening of the definition of 'digital content' in comparison to the CRD is also visible in the other two categories. The second bullet is concerned with services allowing the creation, processing or storage of data **provided by the consumer**. The reference to 'creation, processing or storage of data' in the definition brings to mind cloud services that allow consumers to upload files that they have created themselves, such as photos and videos. The third bullet, finally, focuses on services that enable the sharing of, and other interaction with data **provided by other users of the service**. That definition is reminiscent of social media platforms that enable the sharing of data.

To what extent is this definition workable, and to what extent can it be future-proof? The following observations can be made:

(i) Distinguishing goods and digital content

For all three types of digital content that the proposed Directive identifies, **the digital content element should be the main feature** of the product or service. The proposed Directive indicates that it 'should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods' (recital 11). An example would be data storage in a car, which does not affect the main functionalities of the good, namely to be used for driving. However, the Directive should apply to goods, such as CDs or DVDs, where the goods only function as a carrier of the digital content (recital 12).

With these distinctions, it also should be clear which goods should be considered 'goods' in the sense of the proposed Directive for the sale of tangible goods, and which goods fall within the remit of the digital content Directive (see the similarly worded Art. 1(3) of the proposed Directive on online and other distance sales of goods). However, one may wonder **whether that distinction is workable in practice**. If, for example, the software in a car is hacked, that might also influence the safety of the car for driving.⁴ In that case, are we dealing with a case of non-conformity of goods or non-conformity of digital content (in relation to its security)?

(ii) Exclusion of the Internet of Things, and other demarcation problems

The proposed definition gives rise to a number of demarcation problems. The first concerns the proposed Directive's **exclusion of the Internet of Things** (further: IoT; see recital 17). The IoT connects devices and vehicles using sensors and the internet. Although recital 17 of the proposed Directive states that the IoT is excluded from its scope, in particular as it concerns the liability for data and machine-to-machine contracts, the definition laid down in Art. 2(1) could be read as much wider. Devices that collect consumer data—such as 'smart' energy meters in consumer homes, or wearable devices like Fitbit—do not automatically seem to fall outside the Directive's definition of digital content. Their primary purpose is the collection of data. Further, they would seem to fit under the second bullet, which refers to services allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer. Therefore, **does the Directive really exclude the IoT?** That question might be particularly important for contracts in which the goods function and the digital content function are hard to distinguish. An example could be Tesla electric cars, in which important elements of a car are replaced by digital technology. Apart from definition problems, since Tesla works with multiple parties for the supply of

⁴ Cases in which iOS software in cars was hacked have already been reported. It may be possible for a hacker to have control over certain aspects of a car, including the possibility to start it remotely. Even though it seems unlikely that a car can be driven without it sensing the key in the ignition, that could of course become a possibility in the future, and give rise to safety concerns. See e.g. <<http://blog.caranddriver.com/researcher-bmw-mercedes-vulnerable-to-remote-unlocking-hack/>> accessed 26 January 2016.

technology, it also becomes harder to determine who can be regarded as the 'supplier' of digital content or of goods, and who might therefore be liable for non-conformities. In short, the distinction between the digital and the physical world—as was indicated also under (i)—might not be workable in practice.

Another question that arises from the proposed definition is what is meant by '**data provided by the consumer**'. The same question can be asked for the choice to count data provided by the consumer as a counter-performance (Art. 3(1) and recital 14). Although recital 14 stipulates that the Directive should only apply to contracts in which the consumer has *actively* provided data—such as name and e-mail address or photos—it does not make clear why other types of contract should not be included. Why should a consumer not enjoy the Directive's protection when a supplier gathers data without the consumer's cooperation—e.g. the example in recital 14 of determining the consumer's geographical location for a mobile app to function properly?

A third problem is the **interplay between contract law and data protection**. Data protection regulation gives rights to consumers with an eye to the protection of privacy. Those rights can have a direct impact on a contractual relationship, e.g. where a consumer makes use of the right to withdraw consent for data collection by a supplier (Art. 7(3) and recital 53 of the EU General Data Protection Regulation, which is currently making its way through the EU legislative process).⁵ But what contractual consequences should the withdrawal of consent have? The Directive does not appear to give a fitting answer. If data collection or storage is a main feature of the contract—as might be the case with photos uploaded on social media platforms—the proposed Directive would apply to the contract. In case the consumer withdraws his or her consent for the storage of photos, data protection regulation gives users a 'right to be forgotten', which entails that data should be deleted by the service provider. The deletion of data would seem to be a contractual consequence that the digital content proposal associates with termination of contract (cf. Art. 13(2)(b) of the proposal). However, from a contract law perspective it is an odd remedy: after all, the contract itself is not being terminated, and the consumer may e.g. continue his or her social media account, only without photos. **The contractual response to a withdrawal of consent for the processing of data, therefore, does not seem adequately provided for by the Directive.** It might need to include a special type of withdrawal right, rather than a right of termination (notably, the rule on modification of the contract laid down in Art. 15 of the proposal deals with a different issue).

(iii) The difficulty of determining specific rules for varied forms of digital content

Finally, although a broad definition of digital content can indeed have the advantage that the Directive can cater for new technologies that are currently unknown, it also poses **challenges for the drafting of specific rules laid down in the Directive**. As will be discussed further on in this briefing paper, the variety of digital content products and services makes that general rules sometimes need to be broken down into more specific rules in order to provide solutions for particular types of contracts. The remedy of termination, for example, applies very differently to digital content delivered on a tangible medium, streaming services, or services in which the consumer has provided personal data to the supplier. Specific rules may therefore be required to tailor to each of these situations, resulting in a complex, and possibly fragmented list of consequences of termination of contract. Also, these rules might need to be updated to cover new situations and can therefore not be future-proof (see further part 6, below).

⁵ The latest available text, the 'General Approach' adopted by the Council is available here: <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf> accessed 26 January 2016.

Scope of Application

The scope of the Directive alleviates the potential fragmentation of rules somewhat, but **continues to raise questions of demarcation**. Art. 3 of the proposal specifies that the Directive applies to supplier-to-consumer contracts concerning digital content. The same provision, in Art. 3(5), however prescribes that a number of **specific types of contract are excluded from the scope of the Directive**. These exclusions seem justifiable on the ground that all of them are subject to specific regulatory regimes. It makes sense, from that perspective, not to extend the more general approach of the proposed digital content Directive to these types of contract. Yet, the following **questions of demarcation** arise:

- electronic communication services covered by Directive 2002/21/EC—is this a workable exclusion, seeing the very broad scope of ‘electronic communication services’ in that Directive? Does it not entail the risk of significantly diminishing the protection of consumers in digital content contracts?
- healthcare as defined in Art. 3 sub (a) of Directive 2011/24/EU—is this a workable exclusion, seeing that gadgets appear on the market in the form of wearables that transmit user data to health apps, such as Fitbit?
- gambling services—is this a workable exclusion, considering that online gambling services may (at least partly) cover similar issues as other digital content contracts, such as functionality, accessibility, continuity and security of the service?
- and financial services—similarly, is this workable?

The scope of the Directive also contains an interesting broadening of scope in comparison to regular contract laws. It would seem to be the first instrument of contract law to put on par contracts in which the counter-performance consists of a payment of money—the payment of a price—with contracts in which the counter-performance exists of something other than money. The proposed Directive suggests that the same rules can apply to contracts where the supplier supplies digital content to the consumer or undertakes to do so, and ‘the consumer actively provides **counter-performance other than money in the form of personal data or any other data**’ (Art. 3(1)).

The inclusion of contracts in which a consumer ‘pays’ for a product or service by providing personal or other data to the supplier seems **prudent for digital content contracts**. In practice, this has become an increasingly important mode of contracting. By including these types of contracts in the scope of the Directive, alongside contracts in which a price is paid, the rules can ensure that all types of contract involving digital content are treated likewise—or in other words, a level playing field for suppliers and minimum protection for consumers. Nonetheless, questions of demarcation can also arise here. Can the counter-performance for example also exist in the transfer of copyright? The terms and conditions of social media platforms often provide that users who upload movies or photos transfer copyright in those items to the platform, although many consumers will not be aware of it.

There are also **substantive reasons** for including contracts in which the counter-performance exists of something other than the payment of a price in the Directive’s scope.⁶ First, the rules applied to other contracts seem mostly fitting for these contracts too. Second, the inclusion of contracts for something other than money would provide a legal framework for an evaluation of unfair terms protection for these types of contracts, e.g. in relation to clauses limiting liability of suppliers, or clauses that infringe consumers’

⁶ M.B.M. Loos, N. Helberger, L. Guibault, C. Mak, L. Pessers, K.J. Cseres and B. van der Sloot, *Digital content contracts for consumers. Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts, final report: Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts. With an executive summary of the main points. Study performed for the European Commission* (2011) available at: ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf accessed 26 January 2016, pp. 177-178.

privacy. Third, the inclusion might improve legal certainty in particular for 'mixed' contracts in which one part of the performance requires the payment of a price whilst the other part of the performance comes for free or against 'payment' through personal or other data.

One point that merits further discussion, however, is whether contracts for something other than money should receive a different treatment than contracts for money in terms of conformity requirements. **It has been suggested that the conformity test may be influenced by the gratuitous nature of a contract**, since consumer expectations will be lower for digital content that comes for free than for content for which a market price has been paid.⁷ I am not convinced that this is generally the case (see further below, part 4).

⁷ Loos cs (n. 6), p. 177.

3. CLASSIFICATION AND IMPLEMENTATION

Contracts relating to digital content have until now in national laws been dealt with under existing rules for sales, services, or rental contracts, and sometimes as *sui generis* types of contract. In many cases, courts are able to find a solution for specific legal issues through application of the existing rules. The problem that the Directive seeks to address, it appears, is not so much that no legal solutions exist, but rather that **the existing legal framework contains a patchwork of different solutions**. One regime for digital content contracts, made up of specific rules, can decrease costs for businesses, increase legal certainty, enhance consumer trust in online shopping in the EU, and reduce the costs of consumer detriment due to non-conforming digital content products.⁸

Another question is whether the Directive chooses **the right approach** to achieve these aims. The proposal has made two important choices in this respect: (1) to leave it to Member States to decide whether to classify digital content contracts as sales, services, rental or *sui generis* contracts; and (2) to aim for full, rather than minimum harmonization. I will discuss both points in more detail.

Classification of Digital Content Contracts

A comparative study of digital content contracts by the CSECL/IvIR/ACLE research groups at the University of Amsterdam revealed that digital content contracts in national laws are dealt with as sales, services, or rental contracts. Sometimes *sui generis* approaches are chosen in which digital content is treated as 'rights' instead of goods, examples of which exist in the Netherlands or in France in relation to software sold on a durable medium such as a CD or DVD.⁹ The UK has also recently adopted a *sui generis* set of rules for digital content contracts in the Consumer Rights Act 2015.¹⁰

Which approach to take in the new harmonized rules? The proposed Directive has opted to leave this question open. It does not classify digital content contracts as sales, services, rental or *sui generis* contracts. The decision how to treat digital content contracts is left to the Member States.¹¹

What this means for the implementation of the proposed rules, is that Member States will be free to introduce the rules where they see fit in their national laws. **National legislators can opt to place the new rules within existing sales law, or within the (general) rules of contract law that regulate service contracts, in national rules concerning rental contracts, or as a separate set of *sui generis* rules.**

The advantage of this approach is that it enables legislators to introduce the new rules within established legal frameworks with which users, such as consumers but in particular businesses, will already be familiar. **Existing concepts can be applied to digital content, if need be with some modification.** For example, if a legislator opts to treat them as sales contracts, the concept of 'goods' could be extended to include digital content. This would require the definition of goods to confirm that 'goods' includes software and other digital products, whether stored on a physical medium or not and that a contract for the supply of software or other digital products is a contract for the sale of goods.¹² Of course the definition would also have to indicate that the specific rules for digital content following from the Directive—e.g. specific remedies—only apply to cases where the digital content is the main feature of the product (see above). Within sales law, therefore, a distinction between tangible goods and digital content would be visible.

⁸ See Impact Assessment n. **Error! Bookmark not defined.**, pp. 40-44. This approach follows the recommendation made in the report by Loos cs (n 6.), pp. 172, 174.

⁹ Loos cs (n. 6), pp. 32-33, 35.

¹⁰ The full text of the Act can be found here: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>.

¹¹ See the proposed digital content Directive, p. 6.

¹² Cf. Loos cs (n. 6), p. 172, citing R. Bradgate, *Consumer rights in digital products* 2010, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf accessed 26 January 2016, p. 68.

I have **two reservations with regard to this approach**. The first relates to the practical feasibility of this mode of implementation; the second to the risk of fragmentation. First, although the Directive appears to leave it to Member States to decide to treat digital content contracts as sales, services, or something else, the substance of the Directive implies that there are some restrictions to this choice. Whereas certain types of digital content could be treated as goods—e.g. software, e-books, content delivered on a tangible medium—other types do not fit well in this framework. Services through which digital content provided by the consumer is stored or processed (e.g. cloud services or social media platforms) are not so much similar to contracts for the sale or supply of goods, as they are to services. In these types of contracts, the performance rendered by the supplier is not related to the supply of a good—tangible or intangible—but rather to the supply of a service, which exists in storing data provided by the consumer, or enabling the sharing of such data. In fact, the proposed Directive even refers to these types of digital content contracts as *services* (Art. 2(1)).

Second, the possibility to place the new rules on digital content contracts within sales law, general contract law, or elsewhere carries the risk of fragmentation of rules. The rules relating to digital content may be **fragmented within national laws**, with some placed in specific legislation relating to sale of goods contracts and other rules in other specific regulation or in general contract law. Looking at the distinction of different types of digital content contracts proposed by Art. 2(1) of the Directive that possibility in fact seem almost unavoidable if a Member State indeed opts to place some of the rules in sales law. As indicated, some types of contract, such as those relating to cloud storage or social media platforms, can hardly be seen as anything else than services. Further, **fragmentation can occur between the laws of different Member States**. If one Member States introduces the new rules within its sales (and general contract) law, whilst another classifies digital content as services, and a third opts for a *sui generis* regime, anyone who wishes to identify the applicable rules for digital content contracts within a national system will first have to work out where to find those rules. Although, due to the full harmonization nature of the proposed Directive, the level of consumer protection must be the same in all Member States, that approach only goes so far in taking away barriers to trade in the internal market. Businesses will likely still have to obtain legal advice in order to make sure that they comply with relevant national legislation. That is the case, in particular, because the use of national, existing concepts can sometimes infuse some more open-textured norms in harmonizing legislation with national meaning.¹³

An advantage of the broad approach suggested by the Commission is that the new rules will be **future-proof**. In the light of the two reservations made here, one may wonder whether that goal cannot be achieved through **a slightly modified approach**. To prevent fragmentation, the Directive could specify **that all Member States should introduce the new rules for digital content contracts as a *sui generis* regime**. That would mean that the rules would be transposed into national laws as a separate set of rules for digital content contracts, similar to the approach taken in the UK Consumer Rights Act 2015.

Implementation: Full Harmonization

The proposed Directive, like the one concerning sales of tangible goods, is aimed at targeted, full harmonization. To this end, **Art. 4 provides:**

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

¹³ An example is Directive 93/13/EEC on unfair terms in consumer contracts. The test for unfairness has in national systems often been adapted to approaches that judges are familiar with in their own, national systems. For an analysis, see P. Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart 2007); C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht: de oneerlijkheidsnorm in vergelijkend perspectief* (Kluwer 2011).

The choice for full harmonization, instead of minimum harmonization, seems justified in light of the Directive's aims. Similar to earlier harmonization efforts in European private law, the new rules seek to take away differences between national laws with a view to decreasing costs made by businesses who wish to engage in cross-border trade in the EU. The harmonization of national laws can also increase legal certainty and consumer confidence in cross-border shopping (see the proposed Directive's recitals 3-7). The advantage of full harmonization over minimum harmonization is that it can truly take away differences between national laws. Where minimum harmonization allowed Member States to maintain or introduce more protective rules for consumer protection, which could result in a divergence of rules between Member States, that is not a possibility when full harmonization is aimed for.

Some problems can nevertheless be anticipated. First, if Member States are able to decide where to introduce the new rules in their national laws—e.g. to classify them as sales, services or something else—the resulting fragmentation might make it more complex to determine whether they have complied with the full harmonization provision.

Second, **the nature and effects of full harmonization continue to be subject to debate**. Opinions differ as to what types of divergence from fully harmonized EU-rules is allowed in national laws.¹⁴ It is clear that no divergence is allowed from the rules that fall within the 'harmonized field' or, in other words, the scope of the Directive. As to how this definition should be interpreted, however, two different viewpoints exist. On the one hand, it has been defended that full harmonization forecloses the possibility for national legislators to maintain or introduce *any* norms that give different protection to consumers. For example, general contract norms concerning defects of consent may not offer more protection than the general norm from the Unfair Commercial Practices Directive (Directive 2005/29/EC, Art. 5). That approach, however, appears to reflect a minority view. The more established view, on the other hand, holds that divergence from the fully harmonized rules is still possible, albeit only if a *different legal basis* is used. An example of that approach would be the possibility of liability in private law for breach of duties laid down in the Markets in Financial Instruments Directive (MiFID, Directive 2014/65/EU, repealing Directive 2004/39/EC); or the possibility to extend liability for defective products to suppliers on the basis of national tort law.¹⁵

The **problem of full harmonization** is in the proposed Directive perhaps the most urgent in relation to the damages rule laid down in Art. 14 (see further below). Generally speaking, what should be borne in mind, in particular if the Directive is to be 'future-proof', is that full harmonization is best achieved if rules are as specific as possible, preventing the possibility of confusion over its scope. Further, it might be worthwhile to investigate how the possibilities for tort liability in national laws relate to the Directive's proposed contract rules. Do they make it possible, for example, for the consumer to obtain a higher award of damages for defective digital content products? Or to obtain a remedy for different types of breach? This could be a potential point of divergence.

¹⁴ See e.g. V. Mak, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' (2009) 17 *European Review of Private Law* 55; O.O. Cherednychenko, 'Full Harmonisation of Retail Financial Services Contract Law in Europe: A Success or a Failure?', in: Stefan Grundmann and Yeşim Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting* (Kluwer Law International, Alphen aan den Rijn 2011), 221-58.

¹⁵ See CJEU 10 January 2006, Case C-402/03 *Skov* [2006] ECR I-199, ECLI:EU:C:2006:6.

4. CONFORMITY

The proposed Directive contains a conformity provision (Art. 6) that is largely similar to existing rules for sale of goods contracts, albeit with some modification in the light of specific characteristics of data. Like the proposed Directive for online or other distance sales, the Directive distinguishes between **contractual and statutory criteria for conformity of digital content** with the contract. It is also similar to the conformity provision in Directive 99/44/EC on certain aspects on the sale of consumer goods and associated guarantees (Art. 2).

An important difference in the digital content proposal, however, is that the Directive's approach to conformity provides much **weaker consumer protection than the sales rules**. Whereas the subjective and objective criteria in sale of goods contracts must all be met by the supplier (Art. 4(2) of the proposal, and compare Art. 2 of Directive 99/44/EC on consumer sales), the digital content proposal gives primary importance to the contractual terms. Suppliers would therefore largely be able to determine the boundaries for conformity, with statutory protection only applying in cases where there are gaps in the contract.

Even though conformity is generally not regarded as a major problem for cross-border sales or digital content contracts, there is another problem with regard to the objective criteria for conformity. Legal criteria are usually connected to the **reasonable expectations** that a consumer may have from the goods, or in this case digital content.¹⁶ These expectations are in sales contracts usually connected to the description of the goods, the quality and quantity, and the purpose for which the consumer wishes to use the goods or for which they are normally used. Whilst in digital content contracts the specific conformity problems might be of a different nature—e.g. related to accessibility, functionality, or security—the general benchmark, the consumer's reasonable expectations, is the same. To some extent, therefore, the **demarcation between different categories of non-conformity has no legal consequences**.¹⁷ However, the broader question **which expectations a consumer may reasonably have in relation to digital content products** is relevant.

Exactly this point, the assessment of the reasonable expectations that consumers may have, can be problematic in relation to digital content. **Objective benchmarks for that assessment are usually not available because of the innovative nature of digital content products**.¹⁸ To the extent that contract law can regulate the outer contours of the reasonable expectations that consumers may have—noting that constraints might exist because of intellectual property rights or technical protection measures that prevent transfer of digital content—the following observations can be made.

Contractual Criteria

First, the proposed Directive starts from the premise that the reasonable expectations that consumers may have in relation to digital content can be 'managed' by suppliers through contractual terms. That is in line with the general principle of freedom of contract, which holds that parties are free to decide with whom to contract and on what terms, but can be criticized for offering lower protection than the sales rules (on which more under the next heading). The question is where to strike the balance between business and consumer interests.

The proposed Directive appears to adopt an **information based policy**: as long as suppliers adequately inform consumers of the description and qualities of the digital content—e.g. in terms of interoperability or whether it is the most recent version—they will

¹⁶ Compare also the Explanatory Notes to the UK Consumer Rights Act 2015, no. 178; H. Beale (ed), *Chitty on Contracts* (vol II, Sweet & Maxwell 2015), p. 1262.

¹⁷ A similar viewpoint is put forward by Loos cs (n. 6), p. 108.

¹⁸ Loos cs (n. 6), p. 164.

have fulfilled the conformity requirements of the contract. This approach assumes that consumers will have the capacity to process that information and to make rational considerations based on it. Seeing the highly complex nature of many digital content products, of which the supplier normally has a better understanding than the consumer (cf. Art. 9 of the proposed Directive on the reversal of the burden of proof), one wonders however whether the balance might be struck towards **a greater degree consumer protection**. If we adopt this different viewpoint, what would it entail for the wording of the proposal?

Art. 6(1), which deals with the **criteria that may be stipulated in the contract**, covers factors that would normally appear in a conformity test, with modification for digital content contracts. In order to conform to the contract, digital content should be of the 'quantity, quality, duration and version' and shall possess 'functionality, interoperability and other performance features such as accessibility, continuity and security' as required by the contract (Art. 6(1)(a)). The digital content should also be 'fit for any particular purpose' specified by the consumer and accepted by the supplier (Art. 6(1)(b)). These criteria are very similar to the normal rules for sale of goods. The only additions are the references to features that are typical for digital content products, such as interoperability (i.e. being able to play digital content on specified devices), accessibility, continuity, etc. Those elements can be seen as specifications of the general rule that performance should be in accordance with the contract.

More specific, but also logical additions are laid down in Artt. 6(1)(c) and 6(1)(d) of the proposal. The requirement that digital content shall be supplied along with instructions and customer assistance as stipulated by the contract makes sense, as many digital content products are significantly complex or unfamiliar for consumers to require a bit of help to understand how to use them. Further, updates of digital content occur frequently in practice—e.g. updates of software on a computer—and it makes sense that these updates also fulfil the conformity requirements of the contract.

The challenge lies in determining the cut-off line between the stipulations that a supplier might reasonably include in the contract to restrict the expectations that a consumer may have of the content, and the otherwise existing consumer expectations. **Where can the supplier draw the line**, e.g. for digital content that requires updates to keep functioning in the future, such as road navigation software or anti-virus programs? To answer that question, a comparison needs to be made with the **benchmark set by the objective statutory criteria for conformity** that apply mandatory to all business-to-consumer contracts for the supply of digital content if no stipulations have been made in the contract.

Statutory Criteria

The statutory criteria are important because they lay down **a template for the assessment of the reasonable expectations of a consumer in the absence of contractual stipulations**, i.e. as default rules. Although suppliers can stipulate contractual restrictions on these expectations, the statutory benchmarks provide an indication of what the legislator deems **a good balance between the interests of the supplier and the consumer**. The question is whether, in the light of the complexity of digital content products, the proposed rules give sufficient protection to consumers. That question concerns not only whether the subjective and the objective criteria for conformity should apply in a cumulative manner, but also the question what benchmark would be appropriate for the protection provided through the objective test. The following observations can be made in relation to the requirements laid down in Art. 6 of the proposed Directive.

First, as with tangible goods, the **quality of the digital content** forms a central element of the conformity test. Quality is an interesting concept because of its open-textured nature. What quality can be expected for digital content is largely dependent on the type of

product or service and of the normal functioning of such content. With new products or services, quality standards do often not (yet) exist.¹⁹

One problem that arises is that rapid innovation can make digital content outdated fairly quickly. For example, if technology improves video content may be viewed with a higher resolution than before. The proposed Directive suggest that in such cases the supplier who sells an older, no longer state-of-the-art movie should not be liable for a lack of conformity **if the contract specifies that it concerns and older version** (cf. the proposed Art. 6(4) of the Directive). That approach is not per se at odds with existing rules of EU law or national contract laws. However, it would only seem to be acceptable if the contract stipulates this divergence from the norm in **plain, intelligible language**, in line with the rules laid down for example in Directive 93/13/EC on unfair terms in consumer contracts.

Another problem is how consumer expectations should be assessed for **digital content products that require updates to keep functioning**—such as road navigations software or anti-virus programs. This is in particular important in the light of the Directive's proposal not to set a limitation period for supplier liability for non-conformity of digital content products on the ground that **digital content, other than tangible goods, is not subject to deterioration over time**. Consumers may therefore expect the digital content to function satisfactorily indefinitely after it has been supplied (see also Art. 6(3) and recital 43). As discussed below in relation to the reversal of the burden of proof and the absence of a time limit for supplier liability, the proposed Directive might require further consideration on this point.

A third point is security. Recent cases that have made headlines show that **security issues** can be a real problem in relation to digital content products.²⁰ Hackers can relatively easily bypass security technology and access for example data or account information of customers using online platforms (e.g. photos stored on a cloud service platform),²¹ data stored on a mobile phone (e.g. older models of Samsung smartphones),²² or even data obtained through interactive toys (e.g. internet-connected Barbie dolls).²³ Including it in the list of conformity requirements therefore seems fitting. Of course **the supplier can then stipulate in the contract what kind of security might be expected from the product or service that he supplies**. It may be, however, that the consumer may reasonably have higher expectations—e.g. if security technology has improved and could be operated on the product bought from the supplier. A recent example is the case of Samsung mobile phones using Android as an operating system.²⁴ Samsung promises two years of security updates on its devices, rather than updates to the latest available technology. Seeing that the two-year period starts at the moment that a new mobile phone model first comes out, a consumer who buys an older model—say from 2013—could be purchasing a product of which the security technology is already out of date at the time of purchase. This seems contrary to the normal, reasonable expectations that consumers may have. **It could be an example of a case where contractual stipulations of the supplier to 'manage' the expectations of the consumer should be superseded by statutory consumer protection.**

Fourth, a separate provision for contracts in which the digital content is supplied in exchange for **a counter-performance other than money** (Art. 6(2)(a)). Although it has been suggested that consumer expectations may be lower in case of contracts for

¹⁹ Loos cs (n. 6), p. 117.

²⁰ See also Loos (n. 6), pp. 120-123.

²¹ One such hack led to celebrity photos taken from iCloud accounts being widely publicized on the internet, albeit that Apple contested the lack of security of its platform. See e.g. Financial Times 2 September 2014, 'Apple admits celebrity accounts hacked but denies iCloud breach', available at: <www.ft.com/cms/s/0/916d7d24-327e-11e4-93c6-00144feabdc0.html#axzz3xhck8LqH> accessed 26 January 2016.

²² Legal action against Samsung has been instigated by the Dutch *Consumentenbond*, the main consumer organisation in the Netherlands. See <<http://nos.nl/artikel/2081243-consumentenbond-eist-betere-android-updates-van-samsung.html>> accessed on 26 January 2016.

²³ The Guardian 26 November 2015, 'Hackers can hijack Wi-Fi Hello Barbie to spy on your children', available at: <www.theguardian.com/technology/2015/nov/26/hackers-can-hijack-wi-fi-hello-barbie-to-spy-on-your-children> accessed on 26 January 2016.

²⁴ See the Dutch case referred to above, n. 22.

something other than money,²⁵ it seems doubtful that this applies in all cases. The increasing importance of privacy protection in relation to new technologies has not escaped consumers' attention—as exemplified by the case of *Schrems v. Facebook*²⁶—and it could well be that consumers value their data equally, or perhaps even more, than payments in money. In that sense, the supply of digital content against a performance other than payment of a price is not 'free' at all. The conformity test, therefore, might take account of different values of payment, but it **should never fall below the protection that consumers can normally expect** in sale or supply contracts simply because the payment is in something other than money.

Fifth, the requirement that, where relevant, account should be taken of any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices (Art. 6(2)(b)). This seems a useful addition, seeing that standardization is becoming an increasingly important technique for rulemaking in European contract law.²⁷ **What is interesting, however, is that the provision speaks of 'international' technical standards—why not include other, for example national standards?** Recital 28 of the proposed Directive already seems to draw the scope somewhat broader: it includes standards 'established at the international level, the European level, or at the level of a specific industry sector'.

Sixth, Art. 7 of the proposal deals with **incorrect integration of the digital content** in its environment. Seeing the complexity of many digital content products, one wonders whether the responsibility should lie with the consumer in all cases outside the scope of this provision. If e.g. the instructions were available and clear, but the integration of the digital content was by its nature complex, perhaps greater responsibility should be placed on the supplier.

Finally, it should be noted that the aspects included in the Directive concern issues that can presumably be dealt with (best) by contract law. Nonetheless, consumer expectations can exist with regard to digital content that are regulated by other areas of law, such as intellectual property law or digital rights management. An often seen example is that consumers expect to be able to transfer or copy data—e.g. music—to other devices. Licensing rules or technical protection measures might however prevent that.²⁸ Although the digital content in such cases is technically in conformity with the contract, a revision of other areas of law might be called for in the future in order to do justice to those consumer expectations.

²⁵ Loos cs (n. 6), p. 177.

²⁶ Court of Justice of the EU (CJEU) 6 October 2015, Case C-362/14 *Maximilian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

²⁷ See e.g. Hans Schulte-Nölke, 'The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?' (2015) 4 *Journal of European Consumer and Market Law* 135, 137.

²⁸ Loos cs (n. 6), p. 164.

5. BURDEN OF PROOF AND TIME LIMIT

One of the most striking provisions of the proposed Directive is Art. 9. It suggests a reversal of the burden of proof with respect to conformity with the contract. **Instead of placing the burden of proof on the consumer to show that digital content was already non-conforming at the time of supply—or another time indicated in Art. 10—the burden is placed on the supplier to show that the content was in conformity at that time.** The reversal of the burden of proof is **not bound to a time limit**, which is different from contracts for tangible goods (where the period is set at two years from the relevant moment for establishing conformity, see Art. 8(3) of the proposed tangible goods Directive).

The ratio behind the reversal of the burden of proof is that **the supplier will normally be in a better position** than the consumer to determine the reasons for digital content not being in conformity with the contract (see recital 32 of the proposed Directive). The absence of a time limit is justified on the ground that digital content is **not subject to wear and tear** while being used and is often supplied over a period of time rather than as a one-off supply (recital 43).

While the reversal of the burden of proof seems favourable in terms of consumer protection, one may wonder whether it does not overshoot its goal, in particular by not imposing a time limitation. Consumer claims concerning non-conformity are always subject to limitation and prescription periods, if not established at EU level then those laid down in national laws. This means that consumers, in case of limitation periods, will not be able to legally enforce claims after a certain period of time. For sale of goods contracts between businesses and consumers the minimum limitation period, or legal guarantee, needs to be at least two years (as established by Directive 99/44/EC on consumer sales, Art. 5(1)). The goal of such limitation and prescription periods is to prevent that traders are at risk of liability claims for an indefinite period of time. The balance that a time limit makes, therefore, is between the interests of the consumer and the trader: the consumer's interest in enforcing rights relating to the conformity of the goods, and the trader's interest in knowing when he will be free from potential liability claims for goods that were delivered some time ago.

Setting a time limit can also have benefits for consumers. Although the consumer's interests might seem to be curtailed by a limitation period, after the expiration of which no rights can be enforced against the trader with regard to non-conformity, an economic argument can speak against that conclusion. **Economic literature suggests that traders who are faced with additional costs due to enhanced consumer protection, will seek to recover those costs elsewhere, for example through increasing the price of goods.**²⁹ That could indeed be the effect of a prolonged time period during which a presumption of non-conformity works in favour of the consumer. The question therefore is, for digital content but also for tangible goods, which duration for a reversal of the burden of proof can provide the best solution for the EU consumer market.

Whilst recital 43 of the proposed Directive states that 'Member States should remain **free to rely on national prescription rules** in order to ensure legal certainty', that seems a rather weak way of dealing with the problem. It means that suppliers will have to deal with different prescription periods that apply in national systems, therefore at least on this point not providing a solution for the fragmentation of national rules for digital content that the Directive aims for.

If we make a brief comparison, it can be seen that the **proposed tangible goods Directive** adopts a new approach in relation to goods, extending the reversal of the burden

²⁹ See e.g. G. Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights' (2010), issue 1, *Erasmus Law Review*, available at: <http://elr.tijdschriften.budh.nl/tijdschrift/ELR/2010/1/ELR_2210-2671_2010_003_001_004> accessed on 26 January 2016.

of proof laid down by Directive 99/44/EC on consumer sales. Whereas that Directive stipulated that a presumption of non-conformity applies to all defects that become apparent within six months after delivery of the goods, **the proposed tangible goods Directive extends that period to two years from the relevant time for establishing conformity** (Art. 8(3) of the proposed tangible goods Directive). The two-year period covers exactly the same time as the limitation period laid down in Art. 14 of the proposal (and already established in Art. 5(1) of Directive 99/44/EC). Of course that extension of the reversal of the burden of proof will only apply to sale of goods contracts falling within the ambit of the proposed Directive—online and other distance sales—and not to all sales (e.g. not to sales contracts concluded in a physical store).

The advantage of a fully harmonized, two-year time limitation for goods contracts is that traders and consumers will encounter the same rule in every EU Member State. That enhances legal certainty and might support cross-border trade in the internal market (see also recital 26 of the proposed tangible goods Directive which, interestingly, refers to the Digital Single Market rather than the internal market).

Why should a time limitation for liability of the supplier, and for the reversal of the burden of proof, not apply to digital content contracts? The justification for the reversal of the burden of proof put forward in the proposed Directive is that the supplier is in a better position than the consumer to determine the reasons for digital content not being in conformity with the contract. Factors mentioned to support this approach are: the specific nature of digital content with its high complexity, the supplier's better knowledge and access to know how, technical information and high-tech assistance. Also, the proposal submits that the seller is in a better position to assess whether the lack of conformity with the contract is due to incompatibility of the consumer's digital environment with the technical requirements for the digital content (recital 32). An escape exists for the supplier where he can prove that the non-conformity is due to interoperability problems between the consumer's digital environment and the digital content, or with other technical requirements, as long as the supplier had informed the consumer of these requirements before the conclusion of the contract (Art. 9(2) and recital 32). The consumer is required to cooperate with the supplier in case he needs information about the consumer's digital environment to determine the reasons for the non-conformity (Art. 9(3) and recital 33).

At first glance, **this division of responsibilities with regard to proof of conformity seems fair. However, whether it is necessary to hold the supplier to a reversed burden of proof for an indefinite time is a different matter.** Interoperability or compatibility problems between digital content and the consumer's digital environment often become apparent fairly soon after the installation of the content (e.g. because an application does not run or a CD does not play on the chosen device). Also in case of accessibility problems, the consumer will normally notice immediately upon first use if a service (e.g. cloud storage) does not work satisfactorily. Should the supply of a service fail at a later time—interruptions of access are amongst the most reported problems with digital content—³⁰ that would indeed be a conformity problem. However, since the contract in that case is aimed at long-term use the time limit for establishing the non-conformity would presumably not start running before the end of the agreed contract period (Art. 10 of the proposed Directive). **In these instances, therefore, an indefinite liability of the supplier is not required.**

The extension of the time limitation only makes sense for products or services where hidden defects become apparent at a longer time after the supply of the digital content—in case of a one-off supply of the digital content for permanent use afterwards—or beyond the contractually agreed period for supply in case of a long-term contract (cf. the moments at which conformity needs to be established, Art. 10). **In the digital market it is not that easy to come up with examples.** If a digital content product works fine for a number of years, but malfunctions at a later time, that problem can be due to a change in the

³⁰ Loos cs (n. 6), p. 109, with reference to Europe Economics, *Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 3 Assessment of consumers' experience and possible problems*, Final Report, London: 2011, p. 82.

consumer's digital environment—e.g. an update of a computer's operating system that causes blips in existing programmes—in which case the fault lies with the consumer's digital environment. In that case, the supplier of the digital content would be able to avoid liability (Art. 9(2) and (3)). On the other hand, digital content contracts exist that include regular updates without charge for a period of time, such as contracts for road map software or anti-virus programs.³¹ These might be regarded as one-off purchases for permanent use after the supply of the content, rather than long-term contracts (such as leases or subscriptions). **The study conducted by the UvA research groups shows that national legal systems adopt diverging approaches in relation to such contracts.** Liability for non-conformity may arise in cases where the consumer is no longer able to use the digital content due to technological changes if s/he could reasonably have expected to use the digital content during a period of time after the conclusion of the contract (which is the view in Finland, Germany, the Netherlands, Norway, Poland and Spain). Spanish legislation even explicitly provides that consumers should be able to make use of the digital content for a period of at least five years from the date that the manufacturing of the digital content was discontinued.³² The position in other systems is uncertain (e.g. the United Kingdom, Hungary). Further, common opinion seems to say that the consumer may not reasonably expect that updates will be available for an unlimited amount of time, even against remuneration. At some point it becomes commercially unviable to provide such updates, e.g. if the product itself has become obsolete.³³

Interestingly, **the UK Consumer Rights Act 2015**—which appears to contain the first set of national rules that is tailored explicitly to digital content contracts—simply copies the rules on time limit that apply to sale of goods contracts. Under current law, in accordance with Directive 99/44/EC, a presumption of non-conformity applies for defects that become apparent within six months after the supply of the digital content (s.42 of the Act). Should that time limit be extended for online and distance sales, as proposed by the new tangible goods Directive, that presumption would be extended to cover a two-year period from the moment of supply. The advantage of a clear rule like this is that it provides legal certainty for consumers and suppliers.

In sum, it may be questioned whether the absence of a time limitation for the supplier's liability is required. Practically, it does not seem to add much to the consumer's ability to make use of the rights given by the Directive in relation to the conformity of the digital content. Liability claims can normally be submitted well within the range of reasonable time limits that can be envisaged—examples in current laws opt for six months, two years, or possibly five years. **The primary value of the rule would then be symbolic:** to emphasize that consumer protection is strong in the EU Digital Single Market. The weaker bargaining position of consumers, attributed to the highly technical and often complex nature of such products and the greater knowledge and expertise of suppliers, is countered by a robust regime that places the main responsibility on the seller. **Substantively, the rule may have one additional advantage:** it leaves open the possibility that it can be applied to innovative digital content products which only reveal hidden defects long after they have been supplied or the contract for supply during a certain time period has ended. In that sense, Art. 9 could be one of the **'future-proof'** provisions of the Directive. Still, one may wonder if that is desirable if it comes at the cost of legal certainty.

Alternative solutions that might be considered are: (i) to stipulate a clear time limit of e.g. five years; or (ii) to stipulate the supplier is liable for non-conformity within a 'reasonable time' after the time for conformity established in Art. 10 of the proposed Directive. The advantage of a fixed time limit is that it would offer more legal certainty than the other options. A challenge would be to determine what time to fix: two years seems rather short for digital content, especially since bugs and other hidden defects—other than accessibility problems—do not always become apparent immediately. Looking at the rapid

³¹ Loos cs (n. 6), p. 120.

³² It is unclear whether this period should run from the moment when the digital content was delivered, or from the date of the delivery of the most recent update. See Loos cs (n 6), pp. 119-120.

³³ Loos cs (n. 6), p. 120.

pace of development in technology, perhaps five years would be a good starting point. The advantage of an open-textured norm like 'reasonable time' would be that it allows for flexibility, so that solutions can be tailored to specific cases

6. REMEDIES

content contracts is very similar to the regime for consumer sale of goods contracts. Some variations exist, nonetheless. I will sketch a very brief outline of the regime and will then focus on the main points for discussion to which the proposal gives rise.

Hierarchy of Remedies – General Observations

The hierarchy of remedies proposed by the Directive is as follows. If the digital content does not conform to the contract, the consumer is entitled to:

- have the digital content brought into conformity with the contract free of charge, or
- to a price reduction or termination of the contract.

Further conditions are specified in Art. 12 of the proposed Directive. They are very similar to the hierarchy of remedies laid down in the proposed Directive for online and other distance sales, and the existing rules of Directive 99/44/EC on consumer sales. The conditions stipulated to move from level one of the hierarchy—bringing the digital content into conformity with the contract—to level two of the hierarchy—price reduction or termination—are the following (Art. 12(3)):

- the remedy to bring the digital content in conformity is impossible, disproportionate or unlawful (as stipulated also in Art. 12(1));
- the supplier has not completed the remedy within a reasonable time (as stipulated in Art. 12(2));
- the remedy to bring the digital content in conformity would cause significant inconvenience to the consumer (also stipulated in Art. 12(2));
- the supplier has declared, or it is equally clear from the circumstances that he will not bring the digital content in conformity with the contract.

Although these conditions are almost exactly the same as those for tangible goods, the proposal presents them in a slightly different format. There is some repetition in the conditions as they are listed in Art. 12 sub 1 and Art. 12 sub 3. Sub 1 stipulates that the consumer is entitled to have the digital content brought into conformity with the contract ‘unless this is impossible, disproportionate or unlawful’. Sub 3 uses the same clause as a condition for the right to termination of the contract to arise or, in other words, to move from the level one remedies to the level two remedies. The drafting could probably be more focused here, to prevent unnecessary repetition. By contrast, the proposed tangible goods Directive uses a similar mechanism—impossibility, disproportionality or unlawfulness—to distinguish between the two levels of remedies. However, it presents them differently: each remedies gets its own specific provision. Even if it is just a choice in the presentation of the rules, it makes the overview of available remedies somewhat more transparent.

An additional remedy is laid down in Art. 14: consumers have a **right to damages**. Loss covered by this provision is ‘any economic damage to the digital environment of the consumer caused by the lack of conformity with the contract or a failure to supply the digital content’. Since the remedy is not presented as part of the hierarchy of remedies in Art. 12 it is presumably available in addition to each of the other remedies. I will discuss it in more detail below.

Remedies for Non-Conformity in Digital Content Contracts

The Directive proposes four main remedies for non-conformity in digital content contracts: (i) to have the digital content brought into conformity with the contract free of charge; (ii)

price reduction; (iii) termination of the contract; and (iv) damages. These are similar to existing remedies for non-conformity in sales law. Since digital content often has other characteristics than goods—in particular the possibility to be multiplied easily and shared with other users—the remedies do not fit neatly with it. Some modifications are suggested by the Directive. The following observations can be made.

(i) Having the digital content brought into conformity with the contract

The remedy of bringing the digital content into conformity with the contract is **a form of specific performance**. Whereas in sales contracts it is easy to identify sub-forms of specific performance as repair or replacement, such a distinction might be more difficult to draw in case of digital content contracts because of the large variety of possible formats. Some examples: whereas an e-book or a movie file might be replaced, repair is harder to envisage. Malfunctioning software, on the other hand, could well be fixed through an update that repairs certain bugs. For problems with accessing data on cloud services the terms 'repair' or 'replacement' seem by definition inept. The specific performance type remedy would in that case be to restore access to the data. Seeing this diversity, it makes sense not to include specifications as to what a specific performance type remedy should look like for digital content contracts.

The inclusion of a right to specific performance, and the general wording chosen in the proposed Directive, seem uncontroversial. Like Directive 99/44/EC on consumer sales, as well as the proposed tangible goods Directive, **the rule emphasizes that consumers are entitled to have the performance that they contracted for enforced through a specific performance type remedy**.

What might be regarded as controversial, however, is to place this remedy at the top of the hierarchy. It means that **consumers will normally always have to grant the supplier a second chance to perform the contract** if it is still possible to do so, and not disproportionate or unlawful. That solution is often seen as problematic, in particular by those with a common law background, since it takes away the consumer's possibility—as available for example in English law—upon breach to immediately terminate the contract and claim one's money back. The possibility for the consumer **to terminate immediately upon breach is seen as a very strong remedy** for the consumer. It enables him to walk away from the contract without much further ado. Moreover, also in those situations where he does not wish to walk away—for example because he very much likes the product that he sought to buy from this particular seller—the right to terminate can provide the consumer with a strong bargaining tool. The consumer might in that case pressure the seller to make good the performance, and wield his right to terminate as a sword: if the seller does not succeed, the consumer can simply walk away and claim his money back, therefore the seller had better do a good job if he wants to make a profit on the contract.

By comparison, many national **general contract laws** do not impose a hierarchy of remedies but leave the choice of remedy entirely to the aggrieved party. The idea is that the aggrieved party, in case of digital content contracts the consumer, has a free choice of remedy and can therefore choose the remedy that best fits his interests.

Even if no hierarchy is imposed, in some national systems the conditions for availability of the remedies still result in a preference for specific performance typed remedies. In Dutch and German law, for example, the rule in general contract law is that, if performance is not impossible, termination is only available after the buyer/consumer has set an additional time for performance and the seller/supplier fails to perform within that time.³⁴ Practically, this is similar to a right to cure for the seller/supplier. Exceptions apply if the parties had agreed on performance on or before a specific date, if it is clear that the seller/supplier will not perform, or if the breach is trivial.³⁵ In English law a similar rule concerning minor

³⁴ See para. 323(1) Bürgerliches Gesetzbuch (BGB) and artt. 6:74, 6:81, 6:82 and 6:83 Burgerlijk Wetboek (BW). For a more comprehensive discussion, see V. Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart 2009).

³⁵ Para. 323(3) and (5) BGB and artt. 6:80 and 6:265(1) BW.

breaches applies, whereas in Polish law a supplier has the possibility to once block termination of the contract (and hence have a chance to cure).³⁶

Whilst the choice for a hierarchy of remedies therefore can encounter resistance from national systems, at least two substantive arguments can support it. First, giving the supplier at least one opportunity to cure the non-performance or defective performance can be a cost-effective solution. It means that consumer-buyers will not have to look for another supplier—a transaction costs argument—and it benefits businesses because they will be able to continue the contract and (in many cases) still make a profit. The cost of cure is also likely to be low for some types of digital content, e.g. the replacement of a defective music or movie file. Second, the proposed hierarchy is virtually similar to the hierarchy of remedies that applies to consumer sales contracts on the basis of Directive 99/44/EC. Adopting a similar regime for digital content can make the rules appear more consistent and familiar to businesses and consumers. Moreover, it prevents problematic differences in case of 'mixed' contracts that combine sales and digital content elements (e.g. an e-reader with e-books).

(ii) Price reduction

This is perhaps the least controversial remedy of them all. **Price reduction is easily carried out and it can provide an adequate remedy in cases where the digital content is sub-standard, but where the consumer still wishes to hold on to it.** An example can be access to a database that turns out to be incomplete but is still usable, or keeping a set of music files when one song was not delivered.

A problem would of course be that the consumer does not receive the digital content that he contracted for. In cases where the consumer can obtain the same digital content from another supplier it is therefore more likely that he will opt for termination.

(iii) Termination

Termination of the contract is a strong remedy: it allows the consumer to walk away from the contract and to receive his own performance—often: the price paid—back from the supplier. The only real problem that arises in relation to the termination of digital content contracts is how to give shape to the **restitutionary effects** that are normally associated with termination. With some types of digital content it will practically be very difficult, if not impossible, to return the content.³⁷

The proposed Directive stipulates several possible restitutionary effects in Art. 13(2). Besides reimbursement of the price to the consumer with undue delay and no later than 14 days from the receipt of the termination notice (sub 2a), the **supplier** can be obliged to refrain from using the counter-performance other than money which the consumer has provided in exchange for the digital content and other data (sub 2b). He can also be obliged to take certain measures to enable the consumer to retrieve data, e.g. data stored on a cloud or social media platform (sub 2c). The provision also stipulates certain obligations that can apply to the **consumer**. If the digital content was supplied on a durable medium, the consumer should return the durable medium to the supplier without undue delay and in any event no later than 14 days from the receipt of the supplier's request. He should also delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it or making it available to third parties (sub 2e). For digital content that was not supplied on a durable medium, a similar obligation applies for the consumer not to make use of the digital content, in particular by deleting it or rendering it otherwise unintelligible (sub 2d).

The practical problem lies with the obligation of the consumer to return the digital content, or to delete it or render it otherwise unintelligible. **It is very hard, if not impossible, for the supplier to monitor whether a consumer has actually rendered the digital**

³⁶ Loos cs (n. 6), p. 128.

³⁷ For a discussion of this problem, see also Loos cs (n 6), pp. 230 ff.

content unusable. In some instances it may be possible for a supplier to cut off access to a digital content service (e.g. a cloud; see Art. 13(3) of the proposal), but blocking usage or sharing of digital content is not always possible with files that have been transferred to the consumer (e.g. movies, music, or software).

A possible solution could be to charge the consumer **a payment for the value of the benefit** that he enjoys by keeping the digital content. This solution was recommended by the UvA study on digital content contracts.³⁸ Taking its lead from the DCFR, the study suggested that a consumer could be charged a payment based on the value of the digital content, where possible determined by comparing the value of the actual performance to the value of the promised performance. That seems to be a workable solution: a consumer who would retain some benefit (e.g. use of a partial database) would pay a reasonable sum to the supplier, whereas a consumer who retains no benefit from the digital content is not obliged to pay for it. For gratuitous contracts, for which it would be strange to ask a payment only upon termination, a stipulation can be made that exempts the consumer from paying for the value of the benefit.

It might be that such a solution—i.e. payment for the value of the benefit—is possible under the proposed Directive, even if it does not expressly stipulates it. Art. 13(4) determines that '[t]he consumer shall not be liable to pay for any use made of the digital content in the period *prior to the termination of the contract*'. That provision copies the rule that applies to the use that a consumer has had of non-conforming goods before termination, for which the CJEU has established that no payment for use may be charged (CJEU, *Quelle*).³⁹ That rule does not prevent the possibility, however, that the consumer should pay for use made of the digital content *after termination of the contract*. If that is indeed the case, **the Directive would win much in clarification by stipulating it.** Inspiration could be taken from the UvA study, which provides concrete recommendations of what a provision to this effect could look like.

Finally, a particular point to note in terms of restitutionary effects is the restitution of data provided by the consumer. An example can be return of data such as photos or movies on a cloud platform. Another example could be the return of personal data—such as credit card information—stored in an account for a social media type service. Art. 13(2)(b) and (c) make provision for the return of such data, or for enabling the consumer to retrieve the data, and also stipulate that the supplier should refrain from making use of the data from the time of termination of the contract onwards. These rules are tailored to those digital content services in which data generated by the consumer is processed or stored by the supplier (see the definition of 'digital content' in Art. 2(1)(b) and (c) of the proposed Directive, as well as the discussion in part 2, above). **The inclusion of these very specific rules enhances consumer rights in relation to their data and can provide a significant back-up through contract law of rights otherwise laid down in data protection regulation.** As said before, however, the interplay between contract law and data protection regulation needs further clarification. For example, the contractual consequences of a user's withdrawal of consent for the collection or storage of data are not immediately clear.

(iv) Damages

The proposed Directive states in Art. 14 that '[t]he supplier shall be liable to the consumer for any **economic damage to the digital environment of the consumer** caused by a lack of conformity with the contract or a failure to supply the digital content'. It also indicates how damages should be measured, and that detailed rules for the exercise of the right to damages shall be laid down in national laws.

It is unusual for a Directive in the field of consumer contract law to seek to harmonize the remedy of damages for breach. Directive 99/44/EC on consumer sales did not include damages in its remedial scheme—only repair, replacement, price reduction and

³⁸ Loos cs (n. 6), pp. 230 ff.

³⁹ CJEU 17 April 2008, Case C-404/06 *Quelle* [2008] ECR I-2685, ECLI:EU:C:2008:231.

termination—and left damages to national laws. Directive 2011/83/EU on consumer rights also left damages untouched, only referring to the possibility of a remedy in damages under national law (recital 53). An example, but in a very specific area, can be found in Directive 90/314/EEC on package travel, which according to the case law of the CJEU also covers immaterial loss (CJEU, *Simone Leitner*).⁴⁰

What is striking about the proposed rule on damages is that it has a very **limited scope**. It only concerns damage to the digital environment of the consumer—i.e. consequential losses—and **not damage to the digital content itself**. In that respect it resembles the approach taken by Directive 85/374/EEC on product liability (Art. 9), although that Directive also provides for damage caused by death or by personal injuries. Further, the proposed damages rule does not cover **consequential loss** in the form of damage other than to the consumer's digital environment.⁴¹ What if, however, software contains a bug that allows hackers to gain access to a consumer's computer and steal photos and other data? Or even to access and clean out the consumer's bank account? This is not damage to the consumer's digital environment, but it should be possible for consumers also to claim damages for these losses. Also, even if photos do not per se have an economic value, they have a moral value that could be compensated through damages. Other example might be cases where a bug in software 'bricks' hardware—i.e. makes it unresponsive to commands and further updates—and thereby causes harm to the consumer, perhaps even physically.

Further, the assessment of damages suggested by the proposed Directive must be to 'put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract'. That measure is similar to national law approaches for **expectation damages, albeit a limited one since damage to the digital content itself and the consequential losses identified here are not included**. The provision therefore gives some sort of benchmark for users but not a very precise one. In addition, the further details for the exercise of the right to damages are left to national law. Differences may therefore exist in the assessment of the foreseeability of consequential loss, the duty to mitigate, but also in specific conditions for the availability of damages (e.g. the requirement to set an additional time for the supplier to perform).⁴²

This raises another question. The proposed digital content Directive aims for **full harmonization**, therefore prohibiting the Member States from introducing or maintaining rules that diverge from the Directive. Seeing that the 'harmonized field' of the damages rule in the proposal is limited, in particular due to the stipulation that details are to be worked out by the Member States, the effect of full harmonization may be limited. However, the wording of the provision does not make very clear what is in, and what is outside the scope of the harmonized field.

Nevertheless, the inclusion of a rule on damages can have one major advantage for consumers: it gives an unequivocal right to damages for consequential loss, perhaps even including damages for pure economic loss (i.e. economic loss occurring independent of any physical damage to the person or to property). That can be helpful since not all legal systems enable the recovery of e.g. pure economic loss. Moreover, businesses often seek to limit liability for these type of losses through contractual exclusions.

⁴⁰ CJEU 12 March 2002, Case C-168/00 *Simone Leitner* [2002] ECR I-2631, ECLI:EU:C:2002:163.

⁴¹ See explicitly the explanation for Art. 14 provided with the proposal; COM(2015) 634 final, p. 13.

⁴² E.g. para. 281 BGB, or artt. 6:74, 6:95 and 6:96 BW.

7. CONCLUSION AND RECOMMENDATIONS

In conclusion, although a Directive on digital content contracts could enhance consumer protection and provide greater legal certainty for businesses and consumers in the EU, the proposal raises a number of points for further consideration. The main ones can be summarized as follows:

- The proposal's **lack of classification** of digital content contracts as sales or services contracts will lead to a different positioning of digital content rules in national laws. That is likely to result in **fragmentation** and could be confusing for addressees of the rules, such as consumers and SMEs. A solution may be to include an obligation for Member States to introduce the rules as ***sui generis* rules** in national legislation.
- The **definition of 'digital content'** should be re-assessed. In particular, the demarcation between digital content and the physical world—e.g. the Internet of Things—may not be workable in practice. The Directive may apply to a broader range of contracts than the text, incl. the recitals suggests. That may not be problematic, and it may even enhance consumer protection, but a re-assessment of the proposal would help to identify the full effects of the Directive.
- The **absence of a time limit for the supplier's liability for non-conformity** of digital content is not easy to justify. If consumer protection can be guaranteed by lesser means, e.g. a fixed prescription period, that might moreover be a more economic solution for both businesses and consumers.
- Consumer protection for contracts where a consumer 'pays' by providing data should not fall below the protection adopted for contracts in which a price in money has been paid for the supply of digital content. The **criteria for conformity** should therefore apply in the same way to both types of contract.
- The **restitutionary effects** of termination can be specified in more detail. The proposal does not adequately address situations in which the supplier cannot monitor the return of goods. Where the consumer retains a benefit, payment of the value of the benefit may be required.
- The provision on **damages poses dangers to consumer protection**. Its limitation of scope to damage to the consumer's digital environment means that a range of losses will not be recoverable for consumers. Moreover, the Directive aims at full harmonization, which would prohibit Member States from maintaining or introducing rules of national law that would enable consumers to recover other losses.

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