Contracts for supply of digital content

A legal analysis of the Commission's proposal for a new directive
This publication provides a legal appraisal of the Commission's proposal for a directive on certain aspects concerning contracts for supply of digital content [2015/0287(COD)].
EXECUTIVE SUMMARY

As part of the implementation of the Digital Single Market Strategy, in December 2015 the European Commission tabled a proposal for a directive on the supply of digital content. The proposed directive contains rules on the contractual aspects of the relationship between suppliers and consumers of digital content. In principle, the directive’s rules will be mandatory, in that a contract may not deviate from them to the consumer’s detriment. However, many rules are default ones, i.e. may be deviated from by the contract. This is especially so with regard to laying down the criteria for conformity of digital content. Importantly, the proposed directive is to be a ‘targeted maximum harmonisation' instrument, meaning that once in force Member States cannot retain or introduce more consumer-friendly rules within its scope.

The scope *ratione materiae* of the directive includes not only the supply of digital content to consumers in the strict sense, i.e. the supply of software, digital music, e-books, films or images, but also digital services, in particular rental of on-line computer programs, cloud computing and social media platforms. The directive extends only to contracts concluded for consideration (counter-performance), which can also take the form of digital data, including personal data, provided by the consumer. Finally, the scope *ratione materiae* includes all modes of conclusion, i.e. on-line and off-line. Importantly, according to the directive’s preamble, digital content embedded in tangible goods is to be excluded from its scope. The scope *ratione personae* comprises exclusively business-to-consumer contracts.

As regards criteria for evaluating whether the digital content is in conformity with the contract, the directive provides that a primary source for such criteria is the terms of the contract, as well as items of pre-contractual information which are deemed to be part of the contract. Subsidiary criteria for evaluating conformity include objective fitness for purpose, international technical standards, as well as public statements.

The proposal takes over from the Consumer Sales Directive the idea of a 'hierarchy of remedies’, meaning that in the case of non-conformity, consumers are barred from terminating the contract or claiming a reduction in price, instead having first to ask the trader to bring the digital content into conformity. Hence, consumers do not have a free choice of remedies. However, in the case of non-supply, consumers have the right to terminate immediately. They also have the right to terminate regardless of conformity in cases where the trader modifies the digital content, as well as in long-term contracts. The proposal contains detailed rules on the consequences of termination, particularly regarding the further use of consumers' personal data by traders, and the further use of digital content by consumers.

Experts have identified a number of issues which have not been, but potentially could be, addressed by the directive. These include consumers' rights to multiple downloads, to re-sell digital content and to receive essential updates and maintenance, as well as the issue of optional guarantees granted on top of statutory liability for conformity.

Finally, there are a number of questions about how the proposed directive relates to other legal instruments of EU law, in particular the General Data Protection Regulation, and intellectual property law. With regard to the former, the directive remains 'without prejudice', which means that its legal regime is parallel. With regard to all other legislation, the directive is a *lex generalis*, meaning that any sectoral or specific legislation will prevail over the directive’s rules in case of conflict.
1. Introduction

Contracts for supply of digital content (hereinafter: 'digital content contracts') are concluded on a daily basis by millions of consumers across the globe, constituting 'an integral part of the daily life of Europe's digital consumers'.\(^1\) Goods which were once available only in tangible form, such as books, films, games and music, are increasingly purchased in digital form. In addition, completely new digital goods with no tangible precursor have emerged, such as computer software and mobile applications. Digital services – including cloud computing, trading platforms and social media – are also increasingly popular.

The concept of 'digital content' appeared for the first time in EU legislation in the 2011 *Consumer Rights Directive*\(^2\) ('CRD'). Although the CRD did not provide for a comprehensive regulation for digital content contracts, it already contained a number of tailor-made rules designed for such contracts. Also in 2011, the Commission proposed a *Common European Sales Law* ('CESL')\(^3\) which was to regulate sales of tangible and digital goods alike. In parallel, a group of scholars headed by Marco Loos prepared, at the Commission's request, a comparative study of national laws dealing with the supply of digital content, accompanied by a set of proposed rules.\(^4\) In the meantime, the legal landscape has changed: the CESL proposal was withdrawn, and the UK enacted, as the first Member State, a set of specific rules for digital content contracts, as part of the Consumer Rights Act 2015.\(^5\)

The initial political impetus to regulate supply of digital content at EU level came in the form of the *Digital Single Market Strategy*,\(^6\) which explicitly includes a contract law dimension, making the current proposal for a Directive on the supply of digital content\(^7\) (hereinafter 'the proposal' or 'DCD') part of that Strategy's execution. The proposal was accompanied by an impact assessment\(^8\) and an explanatory memorandum.\(^9\)

2. General and horizontal issues

2.1. The proposed directive and other areas of EU law

2.1.1. Issues relating only to contract-law

The proposal would regulate selected contract-law aspects of digital content contracts, where 'digital content' is understood very broadly, including digital services such as

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\(^3\) COM(2011)0635 final – 2011/0284 (COD).


\(^5\) Consumer Rights Act 2015, Chapter 3: 'Digital content'.


\(^9\) COM(2015)634 final, pp. 2-13 ('Explanatory Memorandum').
cloud computing and social media (see section 3 below). Therefore, many private and public law aspects related to the provision of digital data and digital services remain outside the proposal's scope. Areas deliberately left outside include intellectual property law (especially copyright in digital data and licensing contracts), data protection law, as well as vast areas of private law (general civil law; general law of obligations; general contract law). Therefore, due to the specific and limited subject-matter of the proposal, there is a need to clearly delimit its relationship with other pieces of EU legislation, as well as the remaining part of (national) private law.

2.1.2. Relation to national private law
The relation to national private law is regulated in Article 3(9), which provides that 'in so far as not regulated' in the directive, it 'shall not affect' national contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.11

2.1.3. Relation to other EU legal acts
Article 3(7) provides that in the case of a conflict between any provision of the directive and any other EU legal act 'governing a specific sector or subject matter', the provision of that other legal act 'shall take precedence' over the directive. This rule enshrines the principle of lex specialis derogat legi generali, and provides that the directive must be seen as a lex generalis, applied only insofar as a more specific rule does not exist. At present, at least five EU legislative acts in the field of private law are applicable to digital content contracts. Three of them belong to contract law – the Consumer Rights Directive,13 the e-Commerce Directive14 and the Unfair Terms Directive15, and two further pieces of legislation deal with copyright issues – the General Copyright Directive16 and the Software Directive.17

The Commission presented its proposal relatively quickly, in particular without waiting for the outcome of the Regulatory Fitness Check of the EU consumer acquis, which will encompass, among other legislative acts, the Unfair Terms Directive and the Consumer Sales Directive. As the Commission admits, the data from the REFIT exercise 'are likely to be available in the 2nd half of 2016'. As Hubert Dalli points out, however, the adoption of the proposal 'without taking into account the results of the Fitness Check [creates] the risk of non-corresponding rules for online and offline goods'.19

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10 Any references to articles or recitals without further specification refer to the proposal.
11 The proposal uses the term 'national contract laws', although in many legal systems some of the matters mentioned in Article 3(9) belong to general private law.
12 For an overview see R Mańko, Contract Law and the Digital Single Market: Towards a new EU online consumer sales law, EPRS in-depth analysis, PE 568.322 (2015), pp. 8-13; idem, Contracts for supply, pp. 2-3.
18 Impact Assessment, p. 6.
19 Dalli, 'Initial appraisal', p. 8.
2.1.4. Relationship to intellectual property law
Most digital data supplied to consumers is – by its very nature – subject to intellectual property law.\textsuperscript{20} Copyright law differentiates between the \textit{protected work} itself (an \textit{intellectual creation}, by definition intangible) and a \textit{copy of the work} (which can be tangible, e.g. a paper book, or digital, e.g. an e-book). The proposal addresses the issue of intellectual property law in Article 8, where it provides that digital content must be, at the time of supply to the consumer, 'free from any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract'. In the case of contracts for subscription of digital content for a period of time, it must be free from third-party rights throughout the duration of the contract. Article 8 is somewhat more succinct than a rule proposed in the Loos Report:

\begin{quote}
...in the case of a digital content contract the seller must \textit{transfer the right to use the digital content} and, in so far as relevant, \textit{transfer the ownership of the tangible medium} on which the digital content is stored. The business is not required to transfer \textit{ownership of the intellectual property rights} in the digital content, unless such is expressly agreed otherwise by the parties.\textsuperscript{21}
\end{quote}

In contrast to the rule proposed in the Loos Report, the proposed directive does not, however, explicitly address the issue of \textit{transfer of copyright or licensing}. Furthermore, the proposal does not provide that the trader must either hold copyright in the digital content, or hold an appropriate license allowing him to sub-license the use of the digital content to the consumer. Whilst under Article 8 the digital content must be free from third-party intellectual property rights, in the case of sale of digital content, consumers could expect a positive rule explicitly stating that the trader is obliged to ensure that a license exists. Likewise, a rule on the transfer of ownership of the tangible medium would also be helpful in clarifying the extent of consumer rights.

A violation of Article 8 by the business will lead to non-conformity of the digital content with the contract. However, one may wonder what remedies will be available to the consumer if – upon purchasing digital content which infringes copyright laws – he faces legal sanctions (civil and/or criminal). The right to damages provided in the proposal does not apply here, as it is limited to damage to the consumer’s digital environment (see below, section 6.6).

The proposal addresses intellectual property-related issues with regard to termination (see section 8.3). A number of other copyright-related issues have been identified by scholars which could be addressed within the directive (see sections 9.1-9.3).

2.1.5. Special rule on relation to data protection law
In April 2016 the Parliament and the Council adopted the new General Data Protection Regulation ('GDPR'), which will become directly applicable in the Member States from May 2018.\textsuperscript{22} The GDPR will replace the existing Data Protection Directive 1999.\textsuperscript{23}

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20 Helberger et al., 'Digital Content', p. 44; R Milà Rafel, 'Intercambios digitales en Europa: las propuestas de directiva sobre compraventa en línea y suministro de contenidos digitales', \textit{Publicaciones Jurídicas – Centro de estudios de consumo} (18 March 2016) p. 28.
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23 Directive 95/46/EC of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. For a brief overview see S Monteleone, \textit{Data protection reform package: Final steps}, EPRS 'At a glance' note, PE 580.908 (April 2016).
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The relationship between the proposed Digital Content Directive and data protection law is laid down in Article 3(8) DCD, which provides that it 'is without prejudice to the protection of individuals with regard to the processing of personal data'. From this wording it seems to follow that the relation between the Digital Content Directive and data protection law is not that of lex specialis – lex generalis, as envisaged in Article 3(7) (see previous section), but rather one of parallel legal regimes.

There are three reasons for this. First of all, the relationship lex specialis – generalis is entirely dealt with in Article 3(7); if data protection law were to be included in this category (of lex specialis), it would have been mentioned in Article 3(7), or Article 3(8) would have made it clear that it develops the concept of lex generalis enshrined in Article 3(7). Secondly, the wording of Article 3(8) differs significantly from that of Article 3(7) by using the expression 'is without prejudice', which contrasts with 'conflict' and 'precedence' in Article 3(7)). Such an interpretation is corroborated by systemic arguments: whilst the DCD addresses the private-law aspects of purchasing digital content, and focuses on balancing the private interests of consumers and traders, data protection law focuses on protecting the public interest: the right to privacy in the EU is understood as a common good and a fundamental right.  
Specifically, the rules of data protection law can be enforced by data protection authorities, regardless of the will of data subjects, and the sanctions for breach of those rules are mainly administrative and criminal. In contrast, contract law protects private interests and relies on private enforcement.

Owing to the mandatory nature of the rules of the GDPR, it seems that a contractual term infringing those rules will be deemed illegal and therefore, in principle, null and void.

2.2. Proposed method of harmonisation

The Commission decided to pursue the track of maximum harmonisation, thereby limiting the degree of discretion left to the Member States with regard to the directive's implementation. As Hugh Beale observed, the new proposals 'are more intrusive upon the laws of the Member States than the CESL would have been, in the sense that they will result in a larger change in the Member State's existing consumer legislation'. Whilst this approach undoubtedly has the advantage of creating a more uniform regime than a minimum harmonisation directive would, it also runs the risk of making law non-responsive to developments in the sector, in particular preventing national legislatures from quickly and adequately responding to new practices detrimental to consumers. Furthermore, maximum harmonisation also has adverse effects for the coherence of national law and the technical quality of legislation. It forces national legislatures to follow as closely as possible the text of the directive, which often leads them to apply the so-called 'copy-and-paste' method, with serious implications for harmony between the 'harmonised' piece of national law and the

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25 ibid.
26 See e.g. Article 78-79 GDPR.
27 See e.g., approvingly, Mak, The new proposal, p. 14.
29 See e.g., approvingly, Mak, The new proposal, p. 14.
remaining part of the legal system. An additional risk posed by maximum harmonisation is that it often induces the national legislature to introduce a dualist regime: a maximum harmonisation regime for consumer transactions, and the 'ordinary' regime for other transactions, thereby leading to a greater fragmentation of national law.

2.3. Mandatory and default rules

Article 19 provides, as a general rule, that all provisions of the directive are to be implemented into national law as mandatory rules (ius cogens), meaning that contractual terms may not deviate from them to the detriment of the consumer. However, Article 19 applies only 'unless otherwise provided for' in the directive, and many detailed provisions of the proposal are to be implemented into national law as default rules (ius dispositivum), meaning that the contractual terms agreed on by the parties will prevail. This is the case in particular with standards for evaluating the conformity of digital content with a contract (Article 6), which are to be determined by the contract and pre-contractual information (for details see section 5). Therefore, despite the mandatory nature of the rules of the directive, due to the primacy of the contract as the main yardstick for verifying non-conformity, consumers would end up in a weaker position in comparison to the rules on tangible goods.

2.4. Enforcement by the Member States

The proposal requires the Member States to ensure that 'adequate and effective means' exist to ensure compliance with the directive (Article 18). In particular, they must allow for an administrative or judicial (civil, possibly also criminal) procedure to be launched by certain types of bodies and organisations. This kind of procedure is usually known as 'public interest litigation' or actio popularis. Member States may decide whether to grant standing to one or more of the following: public bodies; consumer organisations; professional organisations. This provision mirrors an identical one in the Online Sales proposal (Article 17).

3. Concept of 'supply of digital content'

The key provision for setting out the scope ratione materiae of the directive is the definition of 'supply of digital content', which is laid down jointly in Article 2(1) (definition of 'digital content') and (10) (definition of 'supply'). The concept of 'digital content' comprises three distinct elements: (1) supply of digital data (2) provision of a service allowing consumers to create, process or store digital data which they provide; (3) provision of a service allowing consumers to interact with third party digital data.

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31 For a discussion of maximum vs. minimum harmonisation see Mańko, Contract law, pp. 19-20.
34 See e.g. M Eliantonio et al (eds), Standing up for your right(s) in Europe: A Comparative study on Legal Standing (Locus Standi) before the EU and Member States’ Courts, Policy Dept C study, PE 462.478 (2012).
3.1. Concept of 'supply'

The concept of 'supply' (for the purposes of defining the concept of 'supply of digital content') is laid down in Article 2(10) and is understood as 'providing access to digital content or making digital content available'. It seems that both concepts (provision of access; making available) are actually synonyms.

3.2. Digital data

3.2.1. Data in digital form

The first element of the definition of digital content – 'data in digital form' (Article 2(1)(a)) corresponds to the definition of digital content in the Consumer Rights Directive. The latter defines digital content as 'data which are produced and supplied in digital form'. The proposed directive gives examples of 'video, audio, applications, digital games and any other software', and explicitly includes 'visual modelling files required in the context of 3D printing' (recital 16).

3.2.2. Exclusion of embedded digital content?

The definition of digital content in Article 2 seemingly encompasses all kind of digital data, regardless of whether supplied via a tangible medium, downloaded or webstreamed, whether embedded in a tangible good (such as an operating system or firmware), or delivered separately. In addition, the Explanatory Memorandum asserts that the definition is 'deliberately broad and encompasses all kinds of digital content'. However, surprisingly, in contrast to the prima facie all-encompassing definition in Article 2, Recital 12 in the preamble apparently provides for an important exception:

...this Directive 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.

Goods with 'embedded digital content' are referred to as 'smart' goods, since they 'combine features of tangible goods and of digital content', being 'embedded with electronics, sensors, software and network connectivity.' Surprisingly, such an important limitation of the scope of digital content is not placed in its definition (in Article 2) but in the preamble, which is problematic from the point of view of correct legislative technique (for an evaluation see section 3.4.6 below).

3.2.3. Exclusion of Internet of Things

The preamble also acknowledges that 'specific issues of liability related to the Internet of Things' are excluded from its scope (preamble, para. 17).

The 'Internet of Things' is 'a global, distributed network (or networks) of physical objects that are capable of sensing or acting on their environment, and able to communicate with each other, other machines or computers. Such "smart" objects come in a wide range of sizes and capacities, including simple objects with embedded sensors, household appliances, industrial robots, cars, trains, and wearable objects such as watches, bracelets or shirts'.

The dividing line between the concepts of 'smart' goods and the 'Internet of Things' is not entirely clear. Obviously, the Internet of Things presupposes smart goods (which

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35 Explanatory Memorandum, p. 11.
36 C Wendehorst, Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age, Policy Dept C in-depth analysis, PE 556.928 (2016) p. 7.
are interconnected with each other and/or with a cloud), but smart goods can also function on their own (without communicating with other objects). The proposed directive intends to exclude both from its scope, relegating smart goods to the two sales directives (DSD and CSD), whilst leaving the Internet of Things and the private-law relationships arising from it to national laws – at least for the time being.

3.3. Digital services as 'digital content'

3.3.1. Service allowing to create, process or store digital data provided by the consumer

The proposal's definition of 'digital content' includes not only actual 'sale' or 'rental' of digital content (where digital data flow from the business to the consumer), but also 'digital services'.\(^{38}\) In the latter case, there is actually a reverse flow of data from the consumer to the 'supplier'. The proposal enumerates two types of service, which are dealt with in this and the following section (3.3.2).

The service defined in Article 2(1)(b) of the proposal encompasses the 'creation, processing or storage' of digital data provided by the consumer. The 'creation' of digital data by the consumer (but on the basis of data the consumer provides himself) could encompass, for instance, the creation of a text document using an on-line office package, or the creation of digital images or music on-line. Since programs and applications for such purposes are already within the scope of Article 2(1)(a), it seems that the scope of prong (b) of the definition must apply only to making such services available online, on the supplier's servers.

The second category is 'processing' of digital data. The dividing line between 'creation' and 'processing' is not entirely clear, but presumably 'processing' refers to situations where the data already exists and is being modified. One could think, in this context, of on-line services allowing for splitting and merging PDF files, recovering deleted data (e.g. from a memory card), or processing datasets using on-line programs.

The third category envisaged by Article 2(1)(b) is the 'storage' of digital data provided by the consumer, and this concept seems rather uncontroversial, as it refers to what is known as 'cloud computing'.\(^{39}\) In this kind of service, the consumer provides data to the supplier, and the supplier makes his servers available for the storage of such data.

3.3.2. Service allowing to interact with third-party digital data

Article 2(1)(c) covers services 'allowing sharing of and any other interaction with data in digital form provided by other users of the service'. Here it is neither the supplier who actually supplies the digital data [as is the case in Article (2)(1)(a)], nor the consumer, who supplies the data to the supplier [as in Article 2(1)(b)]; instead, the data come from third parties – 'other users of the service'.

This prong of the definition seems to encompass, first of all, any kinds of social media platform\(^{40}\) where users interact with each other's data, e.g. by 'liking', commenting, or re-posting. Secondly, it also extends to cloud computing, to the extent that the data stored in the cloud may be offered for downloading to other users. Finally, shared on-line workspaces, as a sophisticated form of cloud computing, also belong to this category.

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\(^{38}\) Beale, Scope, p. 11.


\(^{40}\) Similarly Mak, The new proposal, 8; R. Milà Rafel, 'Intercambios', p. 20.
3.4. Analysis

3.4.1. Comparison with Consumer Rights Directive and CESL

The proposed definition of 'supply of digital content' differs from both the Consumer Rights Directive and the CESL, but broadly follows the approach suggested in the Loos Report. The latter proposed to include not only contracts for providing 'video, audio, picture or written content (...) in electronic form', but also 'gaming contracts', 'contracts pertaining to the provision of digital content applications that are hosted by the business', 'social networking services' and 'contracts enabling the consumer to create new digital content and to (...) interact with the creations of other consumers'. The most significant difference between the proposal on the one hand, and the Consumer Rights Directive, CESL and the UK Consumer Rights Act 2015 on the other, is the inclusion, under the umbrella of supply, of digital content — not only sale-like transactions in which the consumer receives digital content from the supplier, but also digital service contracts.

As Hugh Beale points out, at least in comparison to UK law, the inclusion of digital services under the umbrella of digital content is more favourable to consumers. This is because under the UK Consumer Rights Act, digital services are treated as ordinary services, making the supplier liable only for using 'reasonable care and skill', (obligation des moyens) whilst the liability for conformity under the Commission proposal is objective (obligation de résultat).

Another difference with respect to the Consumer Rights Directive is the inclusion of supply of digital content via a tangible medium. Under the CRD, such supply is included in the concept of 'sale', while the concept of supply of digital content is limited to transactions not involving a tangible medium (e.g. CDs, DVDs, USB keys, memory cards, etc.). The proposed directive excludes from its scope – albeit only in the recitals – digital content 'embedded' in tangible goods which – under the CRD – would be considered as sale of goods anyway (since a smart good would count as a 'tangible medium'). Finally, mention should be made here of the inclusion of contracts where consumers provide data instead of paying a price (for details see section 4.3 below).

3.4.2. Possible difficulties in implementation

The approach of the proposal, whereby the 'sale' of digital content is placed under the same legal category as services contracts, especially rental (of digital storage space, or computer programs available online), is certainly innovative and seems to have no precedent either in EU law or in national law. However, it is precisely this innovative character which may lead to difficulties, especially in implementing the directive into national law. Numerous Member States have already included digital contracts under the existing concepts for 'tangible' contracts, notably sale and rental (Germany) and

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41 The CESL explicitly excluded digital services from the scope of digital content, placing outside its definition of digital content 'the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users' (Art. 2(j)(vi) CESL).
42 Loos Report, p. 287 (proposed Article IV.A.-1:103(2) DCFR).
43 ibid p. 287 (proposed Article IV.A.-1:103(2) DCFR).
44 Consumer Rights Directive 2011, Art. 2(11); UK Consumer Rights Act 2015, s. 2(9).
46 Beale, Scope, p. 22.
47 UK Consumer Rights Act 2015, s49.
48 The distinction between the two types of obligations is clearly spelt out, e.g. in Article 5.1.4 of the Unidroit Principles (2010).
sale and services (Netherlands). Under Austrian law, which adopts a broad concept of a ‘thing’, the application of rules on sale, rental or other contracts to digital content does not pose conceptual problems. Finally, whilst the UK has enacted special rules for supply of digital content, these effectively are limited to sale-like transactions, but exclude digital services. On top of that, important in this context is the CJEU judgment in *UsedSoft v Oracle*, in which the Court explicitly stated that the concept of ‘sale’ in the Software Directive encompasses transactions for the sale of digital content.

Further difficulties linked to the proposal’s regulatory approach may arise at the stage of implementation. Whilst the directive creates a new type of contract (*contractus nominatus*) – 'supply of digital content’ – it does not require the Member States to do so. Hence, national legislators are free to implement the specific rules of the directive within the existing rules on sale of goods, rental, services, and so forth. Vanessa Mak argues that this could lead to fragmentation of the directive’s regime not only within national laws, but also across Member States. Indeed, the qualification of a digital supply contract under national law (as sales, services, license contract, etc.) will be of special relevance outside the scope of application of the proposed directive, i.e. with regard to any non-harmonised aspects.

To eliminate the risk of fragmentation, Mak suggests forcing the Member States to create a new type of contract in their legal system, rather than implementing the rules across various areas of private law. However, this assumes that bundling together digital sale and services is an adequate approach and could be controversial from the point of view of the principles of subsidiarity and proportionality.

3.4.3. Exclusion of embedded digital content – problems of legislative technique

As mentioned above (section 3.2.2), the broad and all-encompassing definition of digital content in Article 2 is, somewhat surprisingly, limited in Recital 12 of the preamble. Admittedly, the CJEU frequently refers to preambles of EU legal acts in order to identify the purpose of the act and to use them as an aid to interpretation of the operative part of the act. However, the Court has made it clear that 'the preamble to a Community act has no binding legal force and cannot be validly relied on either as a ground for derogating from the actual provisions of the act or for interpreting those provisions in a manner clearly contrary to their wording'. Therefore, '[w]hilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule'.

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49 Mańko, ‘Contracts’, pp. 3-4.
51 C-128/11 *UsedSoft v Oracle*, para. 42.
52 Explanatory Memorandum, 6; Mak, *The new proposal*, p. 13.
58 *Case C-134/08* Tyson Parketthandel. See also *Case C-136/04* Deutsches Milch-Kontor, para. 32.
59 *Case C-214/88* Casa Fleischhandel, para. 31.
Consequently, where the preamble and the wording of the operative text diverge, priority must be given to the operative text.\textsuperscript{60}

\section*{3.4.4. Exclusion of embedded digital content – definition issues}
What is more, the concepts of being an 'integral part', and of the 'subordination' of digital content to the 'main functionalities' of a tangible object, are not defined in any way in the directive. As Vanessa Mak points out, these concepts are by no means clear, which could lead to practical difficulties.\textsuperscript{61} In particular, one may wonder whether the operating system of a computer or mobile device is digital content, or rather if it is 'embedded' in the hardware.\textsuperscript{62} What about applications: which of them are an 'integral' part and which are not?

An alternative definition of 'embedded digital content' has been put forward by Christiane Wendehorst, who would exclude from the directive's scope 'digital content ... which has been \textit{installed by or with the assent of the seller}, producer or another person in the chain of transactions and which (i) operates as an \textit{integral part} of the goods and \textit{cannot easily be de-installed} by the average consumer using this type of goods; or (ii) is \textit{necessary for the conformity} of the goods with the contract'.\textsuperscript{63}

The definition proposed by Wendehorst avoids using the concept of 'subordination to the main functionalities' and instead introduces three criteria, the first of which must always be fulfilled, jointly with one of the two latter ones. The first criterion refers to the installer (producer, seller, another person in the chain of transactions, who may have acted through an authorised third party). The second criterion points to the fact that the software is an 'integral part' of the goods \textit{and} that the average consumer cannot easily remove that software. As Wendehorst points out, an app which can be easily uninstalled would not count as an 'integral part'. It seems that, in contrast to apps, the very operating system of a device would pass the test, since the average consumer is not familiar with uninstalling it and installing a different one instead. However, under Wendehorst's proposal, it would be sufficient to treat software as embedded if it is 'necessary for the conformity of the goods', e.g. if goods are not functional without that software.

\textbf{Example}. A smartphone is advertised as having a high-end built-in camera and pre-installed image editing software. In that case, the software necessary to operate the camera and to edit images will be necessary for the smartphone to conform to the contract.

\section*{3.4.5. Exclusion of embedded digital content – systemic issues}
A further consequence of the exclusion of embedded digital content from the scope of the proposed directive is that the contract would be governed by the Online Sales Directive (if concluded at a distance) or the Consumer Sales Directive (if concluded face-to-face).\textsuperscript{64} In fact, one and the same transaction could end up being a 'mixed contract', if it contains elements subject to the Digital Content Directive (optional software) and the Consumer Sales Directive/Online Sales Directive (embedded software). This could lead to serious discrepancies, especially with regard to the

\textsuperscript{60} Case C-412/93 \textit{Leclerc-Siplec}, para. 45-47.
\textsuperscript{61} Mak, \textit{The new proposal}, p. 8.
\textsuperscript{62} Wendehorst, \textit{Sale of goods}, p. 8. The difficulty in the case of an operating system arises from the fact that although it is embedded, it can (often) be replaced by a different operating system.
\textsuperscript{64} \textit{ibid} p. 7.
remedies available to the consumer. Courts, in order to determine which law to apply, would be forced to resolve borderline issues concerning the very definition of 'embeddedness' and 'functionality', which are not at all obvious (see 3.4.4 above).

| Example 1. John buys a smartphone. An instant messaging application, which was pre-installed on the device but was not part of the operating system, is not working properly. If the app is 'embedded' as an 'integral part', the Digital Content Directive will not apply. Instead, the Online Sales Directive will apply (if the device was bought online) or the Consumer Sales Directive. |
| Example 2. Mary buys a fitness bracelet to calculate the amount of calories she burns while jogging. However, for the bracelet to work, she needs to download an app on her smartphone and connect the smartphone to the bracelet. If the bracelet does not work, it will be difficult to determine the appropriate legal regime. The software embedded in the bracelet will probably be excluded from the Digital Content Directive, but the app downloaded on the smartphone (also necessary for the bracelet to function) probably would be subject to that Directive (it is essential, but is not 'embedded'). |

3.4.6. A 'digitalisation' of sales law instead of a separate law on digital content?
As Christiane Wendehorst points out, "it is hardly possible to draw a clear line between "supply of goods with embedded digital content" (sales contract) and "supply of goods and of digital content" (mixed or linked contract)". Indeed, advances in modern technology are blurring the distinction between the digital and non-digital world, making the distinction – fundamental for the proposed directive – difficult to implement and apply in practice. The Commission acknowledges the need to avoid the creation of 'artificial boundaries between converging digital content and corresponding business models'. Therefore, with the on-going integration of digital and non-digital content, the distinction will be much more difficult to maintain, which could be an argument for introducing a uniform regime in which digital and non-digital are merged, rather than creating two parallel regimes (tangible and digital). The former could prove to be a more future-proof solution, especially considering that soon 'the majority of goods will be embedded with digital content and network connectivity', effectively becoming 'hybrid products consisting of the tangible substance, of digital content that is stored on the device, and of digital content that is provided online with long-term framework relationships'. Hence, perhaps a better way forward would be a 'cautious "digitalisation" of general sales law' by way of introducing digital-oriented rules into the law of sale of goods and on services contracts.

4. Other rules determining scope

4.1. Scope ratione personae

4.1.1. Limitation to business-to-consumer transactions only
The proposed directive would cover business-to-consumer transactions only (Article 3(1)). Business-to-business contracts, as well as transactions between private citizens (consumer-to-consumer) would be left outside its scope. This approach is

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65 ibid.
66 ibid p. 8.
70 ibid p. 12.
consistent with most EU contract law, and the definitions of consumer and supplier (Article 2(3)-(4)) mirror the usual definitions of 'consumer' and 'trader' in other EU legal acts.  

4.1.2. Analysis

The limitation of the directive's subject matter to consumer transactions only will leave the Member States two options: either to implement the directive only within its (narrow) scope ratione personae, leaving other transactions covered by the pre-existing rules, or to devise a broader regime encompassing all transactions. The latter approach – a spill-over of EU rules, or 'spontaneous harmonisation' – would have undeniable advantages with regard to the coherence of private law. At the same time, it could be possible to enact rules providing a lower level of protection for professional purchasers.

Hugh Beale has argued in favour of extending the scope of the directive to cover professional transactions, thereby contributing to the development of the internal market. He points out that it is difficult for a business operating a website to distinguish between consumers and businesses, especially given that many SMEs operate from home addresses. According to Beale, the directive could 'provide a simple system by which traders may make simple online purchases without having to worry about withdrawal rights, inadequate information or unfair terms', which would be particularly beneficial for SMEs. Beale posits that the differentiation of legal rights of consumers and professional buyers should be limited, since professional buyers should enjoy, at least by default, withdrawal and information rights.

From the point of view of EU competence, there is nothing that compels the EU legislature to limit a contract law instrument to consumer transactions only. Nevertheless, within the existing contract law acquis, only the Late Payments Directive and the Product Liability Directive are applicable beyond the scope of consumer law. Furthermore, an instrument applicable also to business transactions, as well as transactions between two private parties (consumer-to-consumer), would have to pass the test of subsidiarity and proportionality. Arguably, limitation to business-to-consumer transactions complies more clearly with those principles.

4.2. Application to on-line and off-line transactions

In contrast with the proposed Online Sales Directive, the Digital Content Directive is intended to apply to both on-line and off-line transactions. Whilst the bulk of digital content (and digital services) is purchased online and then downloaded or webstreamed, some consumers still purchase digital content off-line. This is the case

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71 Explanatory Memorandum, p. 11.
73 Beale, Scope, p. 28.
74 Beale, Scope, p. 28.
75 Beale, Scope, p. 28.
76 Mańko, EU competence, pp. 5-7; idem, Contract law, pp. 5-6.
77 Directive 2011/7/EU of 16.2.2011 on combating late payment in commercial transactions.
79 Milà Rafel, 'Intercambios', p. 23.
80 Beale, Scope, p. 12.
whether a consumer buys the digital content on a durable medium (e.g. a CD with a program, such as a word processor, purchased from an off-line shop), or whether they merely complete the transaction in an off-line shop, and then use an access code to download the purchased content. The same can apply to certain digital services, for instance if a consumer signs a cloud computing contract in an off-line shop.

4.3. Counter-performance other than payment

4.3.1. Commodification of personal data

Empirical research has revealed that personal data have an economic value to individuals. Furthermore, such data can be 'monetised' by businesses providing digital content and digital services. Some scholars have also considered the 'propertisation' of personal data, i.e. the creation of property rights (in rem) over one's personal data. The proposed directive seems roughly to go in this direction by allowing consumers to use their personal data (or other data) as counter-performance for digital content or services. The introduction of this innovation follows the Parliament’s resolution on CESL from February 2014.

4.3.2. Type of data

The relevant rules are set out in Article 3(1) and (4) of the proposal. Article 3(1) states that the directive shall apply to contracts under which 'a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data'. Article 3(4) of the proposed directive excludes from its scope contracts in which consumers provide only the bare minimum of personal data 'strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in any way incompatible for this purpose'. Such limited communication of personal data is not treated by the proposed directive as a counter-performance. Hence, a contract in which a consumer communicates only data which are strictly necessary to conclude the contract is a gratuitous contract and falls outside the directive's scope.

This approach is line with the prevailing approach of private law, under which contracts such as sale, lease or services are not gratuitous, but require some kind of economically valuable counter-performance from the buyer of goods or purchaser of services.

4.3.3. Analysis

The Commission justifies the inclusion of digital content contracts in which consumers 'pay' with data by pointing out that '[c]overing only digital content paid for with money would discriminate between different business models [and] would provide an unjustified incentive for businesses to move towards offering digital content against data'. However, the same economic argument could be used against excluding from the directive's scope entirely gratuitous contracts, especially considering that – as the Commission points out – a 'significant share of consumers face problems with “free” digital content'. In this context, it is worth recalling that the Loos report

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82 Impact Assessment, 122-123.
83 N Purtova, Property Rights in Personal Data: A European Perspective (Diss. Tilburg 2011).
84 Milà Rafel, Intercambios p. 22.
85 Impact Assessment, p. 123.
86 ibid.
recommended that gratuitous contracts also be included, under the concept of digital content contracts.\textsuperscript{87}

Scholars have expressed doubts as to the exact scope of Article 3(1) and (4), since it encompasses consumers \textbf{actively providing} such data to digital content suppliers. For instance, Hugh Beale considers that consenting to being tracked by traders’ 'cookies' is already an instance of 'active provision'.\textsuperscript{88} In his view, if consumers are not asked to consent, then the proposed directive would not apply, which would 'create a perverse incentive not to ask for the consumer’s consent'\textsuperscript{89} (this, however, would be a violation of the E-privacy Directive).\textsuperscript{90} Furthermore, it seems that users who pay for the supply of digital content and those who do not pay, but provide non-pecuniary counter-performance may be, in some cases, treated differently. This is because Article 6 of the proposal, when describing the subsidiary factors to be taken into account when evaluating conformity (if the features of the digital content are not sufficiently described in the contract), mentions that account must be taken of 'whether the digital content is supplied in exchange for a price or other counter-performance other than money' (Article 6(2)(a)).

\begin{quote}
It seems that the rationale of Article 6(2)(a) is that consumers who pay money can expect a higher level of performance, whereas those who 'merely' give away their data instead of paying should have lower expectations about quality. Vanessa Mak is critical of this solution, pointing out that consumers often value their privacy more than money, and that the protection granted to consumers paying with their data 'should never fall below the protection that consumers can normally expect'.\textsuperscript{91}
\end{quote}

5. Requirements for conformity of digital content

In order to establish that the supplier is liable towards the consumer for defects, opening the path to resorting to one of the remedies, the digital content must be \textbf{not in conformity} with the contract. The concept of 'conformity' is developed by referring to a series of standards (yardsticks) against which the digital content should be evaluated as to its conformity. The sources for such standards can be divided into two groups: \textbf{primary and secondary}. The primary standard is the contract, including binding pre-contractual information; the secondary standards include objective criteria, including international technical standards and public statements. However, the secondary standards will come into play only 'to the extent that the contract does not stipulate' such requirements 'in a clear and comprehensive manner' [Article 6(2) \textit{in principio}].

5.1. Primary criteria for ascertaining conformity

5.1.1. \textbf{Contract as main yardstick for determining conformity} 

The contract between the supplier and consumer is the central and primary source of standards for the conformity of the digital content.\textsuperscript{92} This follows from Article 6(1)(a), which indicates that the content must be of the quantity, quality, duration, version,

\begin{footnotesize}
\begin{enumerate}
\item Loos Report, p. 287 (proposed Article IV.A.-1:103(4) DCFR).
\item Beale, \textit{Scope}, p. 13.
\item \textit{ibid}.
\item Article 5(3) \textbf{Directive 2002/58/EC} 12.7.2002 on privacy and electronic communications.
\item Mak, \textit{The new proposal}, p. 18.
\item Impact Assessment, p. 123; Explanatory Memorandum, p. 12.
\end{enumerate}
\end{footnotesize}
functionality, interoperability and other performance features (accessibility, continuity, security) **as required by the contract.** Usually, in the context of supply of digital content, the contract will also come in the form of a digital document (rather than a written document, an oral one, or a document with a certified electronic signature).

### 5.1.2. Legally binding pre-contractual information

Alongside the actual contract document, items of pre-contractual information which, under the law, are considered binding (i.e. are an 'integral part' of the contract), are also primary points of reference for determining the conformity standard. The proposal does not, by itself, indicate what items of pre-contractual information exactly are an integral part of the contract. Within EU law, Article 6(5) CRD provides that the obligatory pre-contractual information given to the consumer in line with information duties for distance and off-premises contracts (under Article 6(1) CRD) becomes, automatically, an integral part of the contract. Indeed, with a view to the phenomenon of 'information overload' in which, upon receiving all the required information from the trader the consumer 'often ends up being more confused than enlightened', the idea that the 'click and wrap' information is **legally binding** seems to be an efficient solution.

> However, the Consumer Rights Directive also provides for information duties in face-to-face contracts [Article 5(1)], as well as allowing, in certain cases, the Member States to create additional information duties on top of those provided for by that Directive [Article 5(4) and 6(8)]. In neither case, however, does the Consumer Rights Directive specify whether or not information given to consumers by traders in the performance of such duties also becomes an integral part of the contract. The issue is therefore left to national law to determine.

Furthermore, on top of the information duties required by the law, traders may voluntarily provide additional information to individual consumers which, however, constitutes neither a 'public statement' (as mentioned in Article 6(2)(b) of the proposed directive) nor a compulsory item of information. Similarly, the question of whether such information and non-public statements influence the content of the contract or its interpretation is left to national laws which vary on the issue.

### 5.1.3. Fitness for purpose

Apart from the description of the goods provided in the contract and in any binding pre-contractual information, the proposed directive also includes the requirement of **fitness for purpose** [Article 6(1)(b)]. This criterion is operational only if the consumer actually has disclosed such a purpose to the supplier and the supplier has accepted that requirement.

### 5.1.4. Consumer’s right to instructions, customer assistance, updates – only if provided for by the contract

The proposal contains a rule whereby content should be delivered with any instructions and customer assistance 'as stipulated by the contract' [Article 6(1)(c)], and a similarly formulated one whereby the content needs to be 'updated as stipulated by the contract' [Article 6(1)(d)]. Since both rules actually refer to the contract, they have no practical significance, not even as default rules or as rules creating a presumption in favour of the consumer. This is because it will be sufficient for the supplier simply to

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not provide for any instructions, customer assistance or updates in the contract, without the need to exclude such requirements.

5.2. Subsidiary criteria for ascertaining conformity

5.2.1. Subsidiary criteria – only if contract is not sufficient
The contract between the trader and the consumer is the primary source of criteria for ascertaining conformity of the digital content. Therefore, resort to subsidiary criteria is permissible only to the extent that the contract is insufficient or intransparent with regard to the requirements of digital content (Article 6(2); Recital 25). The subsidiary criteria are 'objective' in that they do not refer to what the parties agreed, but to factors independent of the parties.

5.2.2. Objective fitness for purpose
The primary criterion is fitness 'for the purposes for which digital content of the same description would normally be used, including its functionality, interoperability and other performance features, such as accessibility, continuity and functionality' (Article 6(2) in medio). The criterion refers therefore not to the use the particular consumer would like the digital content for, but what the typical consumer of such content would 'normally' use it for. It is therefore an objective fitness for purpose. In order to evaluate such objective fitness for purpose, the proposal also requires four additional factors to be taken into account alongside the 'normal' use of the digital content in question:

- the nature of the consumer's counter-performance, namely whether he paid a price for the digital content or merely supplied data (Article 6(2)(a)) – presumably on the assumption that consumers paying money can expect more, while consumer's 'merely' giving away their data should expect less;
- where relevant, any existing international technical standards (Article 6(2)(b) in principio);
- in the absence of existing technical standards – applicable industry codes of conduct and good practice (Article 6(2)(b) in fine);
- public statements made by the supplier, on behalf of the supplier, or by other persons earlier in the chain of transactions, unless the supplier can show that those statements cannot be imputed to him (Article 6(2)(c)).

In order to prevent being bound by the public statements in question, the supplier needs to prove that: (i) they were not aware of them or could not reasonably have been aware; or (ii) that the statement was corrected prior to the conclusion of the contract; or (iii) that the consumer's purchasing decision was not influenced by that statement (Article 6(2)(c)(i)-(iii)).

5.2.3. Reference to international technical standards
Reference to 'existing international technical standards' is presumably, above all, a reference to standards created by the International Organization for Standardization (ISO). However, it should be pointed out that ISO standards – in contrast to legal provisions – are not freely available to all citizens, but need to be purchased. Furthermore, issues of democratic legitimacy arise, since ISO is an independent and
non-governmental organization, federating national standardization entities, but is not answerable to any democratically elected body.\textsuperscript{98} When it sets standards concerning consumer interests in particular, it ultimately has to make political choices (even if presented as purely 'technical' standards), thereby balancing conflicting social interests.

From the point of view of digital contract law, it is worth mentioning that ISO has developed a number of standards potentially relevant in this field, including: 'Guidelines for business-to-consumer electronic commerce transactions',\textsuperscript{99} a standard on 'the acquisition, supply, development, operation and maintenance of computer software and related support services',\textsuperscript{100} 'Recommendations for addressing consumer issues',\textsuperscript{101} 'Comparative testing of consumer products and related services',\textsuperscript{102} and 'Consumer product recall – Guidelines for suppliers'.\textsuperscript{103} There is also a number of ISO standards for cloud computing.\textsuperscript{104}

Whilst the proposed directive refers to 'international technical standards', the Loos Report suggests leaving the matter to national standardisation organisations, proposing a rule according to which each Member State would 'designate the competent authorities to specify standards for the compatibility and functionality of certain digital content'.\textsuperscript{105} The preamble – in contrast to the operative text of the Directive – mentions European and national standards (Recital 28).

### 5.3. Consumer’s right to most recent version – only at time of supply

The proposal includes a default rule whereby digital content must be in conformity with the most recent version of that content, as available when the contract is concluded [Article 6(7)]. However, there is no default rule on the consumer’s right to updates – neither in the case of one-off contracts nor (which is all the more puzzling) in the case of subscription contracts (see section 11.4 below).

### 5.4. Material time for ascertaining conformity

Digital content supplied on a one-off basis (as opposed to subscriptions for a given period of time), must be in conformity only \textit{at the time of supply}. Consequently, the consumer has no legal remedy against the supplier if a defect appears later on and it \textit{did not exist} at the time of delivery. This is remedied by the reversal of the burden of proof (section 5.5 below), because it will be up to the supplier to prove that a given defect was not present at the time of supply. The situation is even better for consumers who have taken out a subscription of digital content (which is to be supplied over a period of time), because in that case the goods must be in conformity throughout the subscription period [Article 10(c)], making the supplier liable also for defects which did


\textsuperscript{99} \texttt{ISO\_10008:2013} which ‘provides guidance for planning, designing, developing, implementing, maintaining and improving an effective and efficient business-to-consumer electronic commerce transaction’.

\textsuperscript{100} \texttt{ISO/IEC 90003:2014}.

\textsuperscript{101} \texttt{ISO/IEC Guide 76:2008}.

\textsuperscript{102} \texttt{ISO/IEC Guide 46:1985}.

\textsuperscript{103} \texttt{ISO 10393:2013}.


\textsuperscript{105} Loos Report, p. 289 (proposed Article XX).
not exist at the beginning of the subscription period but appeared later on. The latter rule mirrors a similar one proposed in the Loos Report.\footnote{Loos Report, p. 288, proposed Article IV.A.-2:308(4) DCFR: 'In the case of a digital content contract where the digital content is not provided on a one-time permanent basis, the business must ensure that the digital content remains in conformity with the contract throughout the contract period.'}

### 5.5. Integration of digital content as part of conformity

Digital content usually needs to interact with existing software and hardware. Hence, the concept of conformity also covers integration of digital content (Article 7). Incorrect integration amounts to non-conformity if it was integrated by the supplier (or they were responsible for it), or if the intention was for the consumer to integrate the digital content but their failure to properly do so was due to shortcomings in the instructions provided by the supplier.

Whilst purchasers of a subscription to digital content can count on its continuous interoperability, this is not the case with one-off purchasers, who have a right to interoperability only at the time of supply, but not thereafter. Furthermore, the right to interoperability does not encompass the right of a secondary purchaser, e.g. if the consumer decides to sell his device, the proposed directive does not provide any rules on the interoperability with a new digital environment of the secondary buyer to whom the initial consumer has resold the digital content (see below, section 9.3).

### 5.6. Shift of burden of proof

The burden of proof of conformity of digital content with a contract \textit{rests with the supplier, with regard to non-conformity existing at the time of supply} (reversal of burden of proof in favour of the consumer) (Article 9), or with regard to subscriptions \textit{throughout the subscription period}. The \textit{ratio} behind shifting the burden of proof onto suppliers is explained by the Commission with reference to the 'technical nature of digital content', which makes it 'more efficient for the supplier to determine the source' of the non-conformity.\footnote{Impact Assessment, p. 125.} The Commission also expects that shifting the burden of proof will create a 'competitive/cost-benefit pressure [on businesses] to accept all complaints without investigating the matter',\footnote{Impact Assessment, p. 125.} which should benefit consumers.

A different solution was adopted in the recent UK Consumer Rights Act 2015, where the burden of proof regarding non-conformity (defects) is reversed for a period of 6 months from the moment of supply of digital content,\footnote{UK Consumer Rights Act 2015, s42(9).} mirroring the existing rule for tangible goods.

Finally, the proposed directive did not include a rule suggested in the Loos Report, whereby digital content should not be regarded as non-conforming 'for the sole reason that better digital content has subsequently been put into circulation'.\footnote{Loos Report, p. 288 (proposed Article IV.A.-2:308(5) DCFR).}

The reversal of the burden of proof of conformity (in favour of consumers) can be undone by suppliers if they show that the 'digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content, and where they had informed the consumer about such requirements' prior to the contract's conclusion. Furthermore, the burden of proof of defect returns to the consumer if the latter fails to cooperate with the supplier 'to the extent possible and
necessary to determine the consumer’s digital environment’, e.g. to check the version of the operating system or the type of hardware (e.g. printer, camera etc.) used by the consumer.

5.7. Analysis

The criteria for conformity of digital content have been modelled in a way which gives primacy to the contract (agreement of the parties) over objective factors.111 Such an approach undoubtedly favours freedom of contract. The Commission itself admits that the 'priority given to contractual criteria ensures the flexibility needed for businesses'.112 However, although the Impact Assessment states that the subsidiary criteria for ascertaining conformity 'constitute a safety net for consumers',113 this is questionable given the priority of the contract over the objective criteria (the latter apply only 'to the extent that the contract does not stipulate ... in a clear and comprehensive manner, the requirements for digital content' – Article 6(2) in principio).

Vanessa Mak points out that this approach can be called ‘an information based policy’, whereby consumers need to be informed (in the contract) what quality they should expect, instead of relying on objective quality standards.114 In addition, the Commission points out that the information expected from the contractual terms is actually 'part of the already compulsory pre-contractual information' under the CRD.115

One reason for the shift from objective criteria of conformity (as in the proposal on tangible goods and in the Consumer Sales Directive 1999) towards subjective (contractual) criteria might be the difficulty, perceived by the drafters of the current proposal, of assessing objectively the typical quality requirements for digital content, which is still developing rapidly.116

However, it must be kept in mind that digital content contracts usually take the form of very long documents, which the consumer has to scroll through and consent to by clicking at the end, before gaining access to the content. In fact, the consumer is faced with the option of either accepting the pre-formulated standard terms, drawn up in advance by the trader, or not gaining access to the digital content at all. Furthermore, empirical research has shown that consumers do not actually read the terms of contract, and even if they read them, it is highly unlikely that an average consumer would understand the legal and technological jargon which permeates such terms. This may induce traders to limit greatly the extent of their liability for non-conformity by way of introducing very low standards into the contract. In comparison to the UK Consumer Rights Act, which always provides for objective criteria of conformity of digital content, this would represent a lowering of the level of consumer protection.117

Likewise, it would put consumers of digital goods at a disadvantage in comparison with consumers of tangible goods, because Article 4(3) of the proposed Online Sales Directive makes any agreements derogating from the conformity requirements set out in the directive invalid, unless they are made after the non-conformity has already been

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111 Explanatory Memorandum, p. 12.
112 Impact Assessment, p. 124.
113 Ibid.
114 Mak, The new proposal, pp. 15-16.
116 Mak, The new proposal, pp. 16-17.
117 Beale, Scope, p. 23.
brought to the attention of the consumer. A similar rule is to be found in the Consumer Sales Directive 1999 (Article 2(5) CSD).

This raises the issue of the need to protect consumers against unfair terms in digital content contracts. Theoretically, such contracts are already encompassed by the Unfair Terms Directive. However, the list of unfair terms – annexed to the Directive – was drawn up in the early 1990s, and does not take stock of the developments of the digital economy. Typical unfair terms in digital content contracts, such as those prohibiting the consumer from making a private copy, reselling the digital content, or requiring the consumer to transfer copyright in all content uploaded to a cloud or social media platform, are missing from the list. While it is true that the Unfair Terms Directive includes a general prohibition of unfair terms, its activist application to digital contracts would require a considerable interpretive effort by the judiciary, including by national judges applying it on a day-to-day basis.

Therefore, leaving aside the question of a future revision of the Unfair Terms Directive, one could wonder about the need to include a number of additional mandatory provisions in the proposed Digital Content Directive, aimed at explicitly prohibiting the most common unfair terms that occur in digital content contracts.

6. Consumer remedies

6.1. Introduction

Consumer remedies, i.e. consumers' rights when a business does not perform the contractual obligation or performs it incorrectly, must be differentiated from other situations in which the consumer has a right to end the contract unilaterally. These include the right of withdrawal under the Consumer Rights Directive, as well as two rights of termination provided for in the Digital Content Directive: the right to terminate in case of modification of the digital content, and the right to terminate a long-term contract. Neither of these rights has anything to do with the supplier's performance of the contract, and they will therefore be discussed separately (section 7 below).

Importantly the proposal introduces a hierarchy of remedies, mirroring in this respect the Consumer Sales Directive and the proposed Online Sales Directive. The hierarchy of remedies means that – leaving aside the right of immediate termination for non-supply (see below, section 6.1) – the consumer, in case of non-conformity, must first seek cure (specific performance), and only if this is impossible, unlawful or does not occur, may the consumer, in a second step, seek termination and total refund, or partial refund.

6.2. Immediate termination for non-supply

Chronologically speaking, the first remedy the consumer may avail himself of is immediate termination for failure to supply the digital content by the business. This remedy is not subject to the system of hierarchy of remedies, as it follows clearly from the wording of Article 11. The termination occurs, according to that article, 'immediately'. Termination occurs by giving the supplier notice by any means. The

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118 Explanatory Memorandum, pp. 12-13; Mak, The new proposal, p. 23.
consumer must be reimbursed ‘without undue delay’ and no later than 14 days from receipt of the termination notice.

According to Bénédicte Fauvarque-Cosson, the distinction between failure to supply and non-conformity ‘cannot easily be transposed in the context of digital content’. In her view, the rule may be abused to the detriment of consumers, with traders rejecting termination for non-supply and pleading non-conformity, with the result that the consumer will have to waste time waiting for the trader to cure instead of terminating upfront. Indeed, this problem is a direct consequence of the system of hierarchy of remedies adopted in the proposed directive.

6.3. Cure (specific performance)

If the supplier did supply the digital content, but it does not conform to the contract, the consumer has the right to have the content brought into conformity free of charge, unless that would be impossible, disproportionate or unlawful (Article 12(1) para 1). In contrast with the rules on tangible goods, the proposed directive does not differentiate between two types of cure: repair and replacement, which is probably linked to the diversity of performances brought under the umbrella of 'supply of digital content', and notably the inclusion of services (which can be neither 'repaired' nor 'replaced').

The supplier must cure the non-conformity 'within a reasonable time' from the moment when the consumer informs them about the non-conformity (Article 12(2) in principio). Cure is a primary remedy, which means that the consumer must at least try to have the digital content brought to conformity before he can make use of secondary remedies, i.e. termination for non-performance (rescission) and, optionally, a claim for price reduction. This scheme of remedies mirrors both the Consumer Sales Directive and the proposed Online Sales Directive, where the consumer must first request a repair or replacement of the faulty tangible good before he can opt for rescission or a price reduction. This 'hierarchy of remedies' is in contrast with the approach taken, inter alia, in the UK Consumer Rights Act 2015, which gives consumers the right to demand a refund upfront, without asking the trader first to cure the defects within a 'reasonable' time frame.

6.4. Termination for non-performance (rescission)

6.4.1. Secondary nature of rescission

The right to have non-conformity cured is a primary remedy. Hence, the consumer may not demand a total or partial refund upfront, but must wait for the supplier to cure the digital content 'within a reasonable time'. Therefore, a consumer may resort to a secondary remedy – namely terminating the contract or claiming a partial refund (reduction of price) – only if:

- cure of non-conformity is impossible, disproportionate or unlawful [Art. 12(1) para.1]; or
- cure of non-conformity was not completed within a 'reasonable' period (but the exact period is not defined in the proposal, creating legal uncertainty) [Art. 12(2) in principio], or
- cure of non-conformity would cause 'significant inconvenience' to the consumer; in

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121 Milà Rafel, 'Intercambios', pp. 30-31.
122 Milà Rafel, 'Intercambios', p. 31.
order to evaluate whether the inconvenience is 'significant' or not, account must be taken of the 'nature' of the digital content and the purpose for which the consumer required it [Art. 12(2) in fine]; nevertheless, the concept of 'significant inconvenience' remains an open-ended norm, and determining what it means in practice will be left to the discretion of a judge; or
- the supplier has declared they will not cure the non-conformity [Art. 12(3)(d) in principio], or
- it is clear from the circumstances that the supplier will not cure the non-conformity [Art. 12(3)(d) in fine].

It is sufficient for one of the above premises to be fulfilled for the consumer to exercise one of the secondary remedies, namely termination (actio redhibitoria) or claim for price reduction (actio quanti minoris).

6.4.2. Exclusion of the right to terminate when non-conformity is minor

The consumer's right to terminate, despite an uncured non-conformity, is excluded if the non-conformity does not impair the functionality, interoperability or 'other main performance' features of the digital content (accessibility, continuity, security) (Article 12(5)). The burden of proof lies with the supplier.

6.4.3. Termination pro rata temporis

If the consumer subscribed to digital content for a certain period of time in exchange for a fee, and the digital content was defective for part of that time (but was in conformity with the contract during the remaining part of the subscription period), the consumer may terminate only with regard to the period of time when there was non-conformity (Article 13(5)-6). In that case, the refund due from the supplier will also be proportionate.

6.5. Reduction of price

If the consumer purchased the digital content in exchange for the payment of a price (in money), and is entitled to termination because of non-conformity, they may instead choose partial reduction in the price (Article 12(3)-(4)). Such a price reduction is in proportion to the reduced value of the digital content actually supplied in comparison to the digital content which would have conformed to the contract.

6.6. Consumer's right to damages from the supplier

6.6.1. Claim for damages ex contractu

In general, EU legislative acts in the field of private law do not deal with the issue of damages, with the exception of the Package Travel Directive, which deals with ex contractu damages, and the Product Liability Directive. The proposal is, therefore, an exception, because in addition to the standard remedies for non-conformity, it also provides for supplier's liability in damages towards the consumer. The right to damages is presented by the Commission as a complementary remedy, and it is available whenever the non-conforming digital content has caused 'economic damage to the digital environment of the consumer' (Article 14). The same applies if such 'economic damage' was caused by the non-delivery of the digital content by the supplier. The damages are intended to 'put the consumer as nearly as possible into the position' in

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which they would have been had the digital content been duly supplied in conformity with the contract. The concept of 'economic damage' is not defined, and the preamble merely explains that the harm suffered by the consumer can extend both to software and hardware. The proposal provides that detailed rules on the 'exercise of the right to damages' are to be laid down by the Member States.

It is not entirely clear from the wording of Article 14 whether it seeks to harmonise any and all national rules regarding the consumer's right to damages under the contract. According to Hugh Beale, under the proposal the Member States may not grant consumers 'any right to damages for other losses', and the only aspect which is left to the discretion of national legislators are the detailed conditions of the exercise of the right to damages, but not the scope of such a right. Beale's understanding is seemingly corroborated by Recital 44, which states that the 'principle of the supplier's liability for damages ... should ... be regulated at Union level...'. The recital further adds that 'it should be for the Member States to lay down detailed conditions for the exercise of the right to damages'. On the other hand, Vanessa Mak considers that the provision is inconclusive. Unfortunately, the wording of the Impact Assessment and Explanatory Memorandum do not provide any clarification.

It seems, however, that it would be unreasonable for the Directive to be interpreted as regulating all contractual claims for damages a consumer may be exposed to. A more plausible interpretation seems to be that the scope of maximum harmonisation is only intended to cover liability for damages to the consumer’s digital environment, and not any other possible form of contractual or extra-contractual liability of the supplier towards the consumer. National general contract laws provide, as a rule, that an aggrieved party has the right to contractual damages if the other party does not perform the contract correctly, although there are considerable differences as to the conditions of the debtor's liability and the exact extent and type of damages. In any event, it would perhaps be worth clarifying explicitly in Article 3(9) whether the Directive really intends to eliminate the consumer's right to damages outside the scope of harm inflicted on the consumer’s digital environment.

Whilst the proposed directive harmonises only selected aspects of contractual liability, it clearly does not preclude delictual (tortious) liability of the supplier towards the consumer. Such an interpretation is consistent with the ECJ decision in Skov, where it ruled that the total harmonisation of non-fault liability of suppliers of dangerous products under the Product Liability Directive does not preclude the Member States from regulating, at their discretion, fault-based liability of suppliers of such products, whether under tort law or contract law.

6.6.2. Right to compensation under the GDPR
The fact that digital content contracts will be jointly subject to the proposed directive and data protection law means that businesses will have to comply not only with their duties under the contract, but also with duties foreseen by the GDPR for 'data controllers'. Consumers, on the other hand, will also enjoy – on top of their contractual

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126 Beale, 'Scope', p. 23.
127 Mak, The new proposal, p. 27.
128 Impact Assessment, 128-129; Explanatory Memorandum, p. 12.
130 Case C-402/03 Skov, para 47, where it held that the maximum harmonisation clause of the Directive 'must be interpreted as meaning that the system of rules put in place by the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.'
rights – rights for 'data subjects' provided for under the GDPR. Of particular relevance in this context is Article 82 GDPR, which provides for a right to compensation (damages claim) for any person who ‘has suffered material or non-material damage as a result of an infringement of this Regulation’. The GDPR makes data controllers and processors liable for such infringements, specifically indicating that controllers will be liable ‘for the damage caused by processing which infringes’ the GDPR, while processors will only be liable if they did not comply with GDPR rules 'specifically directed to processors' or if they acted 'outside or contrary to lawful instructions of the controller'.

Owing to the fact that the Digital Content Directive regime and the GDPR regime are to be considered parallel in line with Article 3(8) DCD, the consumer whose rights as data subject under the GDPR were violated by the supplier of digital data will have the option of asserting his right to compensation under Article 82(2) GDPR. The possibility of bringing both a claim under the GDPR and under contract law on the basis of the same material facts remains, and the possible legal consequences remain to be explored.

6.7. Supplier’s right of redress

Whenever suppliers are liable to the consumer because of non-supply or non-conformity of the digital content, they may pursue remedies against persons earlier in the chain of transactions (Article 17). Details are left to national law.

6.8. No time-limit for extinction of consumer remedies

In contrast with the Consumer Sales Directive and the proposed Online Sales Directive, there will be no EU-wide time-limit for bringing a claim of non-conformity by the consumer. The Commission justifies this solution by pointing to the fact that 'digital content is not subject to wear and tear'.

The extinction of a claim, as is the case with claims for non-conformity in sales of goods, needs to be differentiated from prescription of a claim under the general rules of private law on prescription. Strictly speaking, prescribed claims still exist (do not become extinct), although the debtor is allowed to raise the defence of prescription in court. In contrast, once a claim becomes extinguished, it no longer exists and courts need to take this into account ex officio.

While claims based on non-conformity of digital content will not be extinguished for two years from delivery of the digital content (as in the case of sale of goods), they may still be subject to general rules on the prescription of claims (statute of limitations) under national law. This is because the directive does not harmonise this area, and there is no EU legal act harmonising prescription under national private laws. Needless to say, regimes for prescription of claims vary from country to country, not least in terms of the time-limits after which prescription operates and the (exceptional) possibilities for pursuing prescribed claims in court.

6.9. Analysis

The proposal is based on the idea of hierarchy of remedies, following in this respect the Consumer Sales Directive and mirroring the proposed Online Sales Directive. As

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131 Impact Assessment, p. 126.
132 Explanatory Memorandum, p. 12.
133 See e.g. K Piasecki in Kodeks cywilny. Księga pierwsza. Część ogólna. Komentarz (Zakamycze 2003), comment to Article 117.
134 For instance, under Polish law, the debtor’s defence of prescription may be regarded by the court as an abuse of rights (e.g. judgment of the Polish S.Ct. of 20.10.2011, Case IV CSK 16/11, LEX no. 1111006).
Vanessa Mak points out, ‘consumers will normally always have to grant the supplier a second chance to perform the contract’.\textsuperscript{135} As the Commission admits, the ratio legis for introducing a hierarchy of remedies it to allow businesses to ‘face significantly less costs for refunds’.\textsuperscript{136} The rule whereby termination is excluded when non-conformity is minor is also meant 'save further costs' to businesses.\textsuperscript{137} However, whilst the seller's right to cure in the case of tangible goods, especially those sold face-to-face, may be justified (because the seller can easily exchange the faulty goods), one question is whether the hierarchy of remedies is an optimal solution in the context of digital content. Granting consumers the right to terminate upfront would certainly strengthen their bargaining position\textsuperscript{138} and boost competition in the digital single market.

Furthermore, scholars have identified gaps in the treatment of termination, especially with regard to situations when non-conformity is minor (it is not clear whether termination is allowed or not), as well as in cases where the non-performance is excused under the general law of obligations or general contract law.\textsuperscript{139} A clear rule providing that the supplier's liability for non-supply and non-conformity are objective, and non-performance cannot be excused by any circumstances, would clarify the legal situation and provide for better consumer protection. After all, it would be unfair for the trader, even if excused under the general law of obligations (e.g. vis maior) to keep the money paid by the consumer or to continue to use the consumer’s personal data, despite the (otherwise excusable) lack of performance.

Furthermore, the hierarchy of remedies, which gives preference to specific performance as the primary remedy, needs to be seen against the background both of general contract law and specific sales law in the Member States.\textsuperscript{140} For instance, English general contract law allows the aggrieved party to terminate a contract if the breach of contract is sufficiently serious, whilst in Germany, termination is allowed in case of any non-performance, on condition that the aggrieved party gives the debtor an additional deadline (a second chance to perform).

As for the hierarchy of remedies, under general contract law of Civil Law jurisdictions, in principle the aggrieved party has the right to choose the remedy, i.e. either to demand specific performance or (if allowed) to terminate (as well as to demand contractual damages on top of these remedies– see section 6.6.1 above). In Common Law systems, however, the aggrieved party can normally terminate and sue for damages, while a claim for specific performance is seen as exceptional. Furthermore, in some legal systems (e.g. England, Germany, Poland), termination occurs through notice given to the other party, while in others (e.g. France, Italy, Belgium) only a judge can terminate the contract, but exceptions are provided, e.g. for commercial contracts.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{135} Mak, The new proposal, p. 24.
\item \textsuperscript{136} Impact Assessment, p. 125.
\item \textsuperscript{137} ibid.
\item \textsuperscript{138} Mak, The new proposal, p. 24.
\item \textsuperscript{139} B Fauvarque-Cosson, The new proposal for harmonised rules for certain aspects concerning contracts for the supply of digital content (termination, modification of the digital content and right to terminate long term contracts), Policy Dept C in-depth analysis, PE 536.495 (2016), p. 11.
\item \textsuperscript{140} J Smits, Contract Law, 229-242. For Polish law see P Machnikowski, J Balcarczyk, M Drela, Contract Law in Poland (Wolters Kluwer 2011), pp. 141-156.
\end{itemize}
\end{footnotesize}
Many national private laws also provide, in addition to the general remedies for non-performance, sales-specific remedies that either replace or complement the general ones. In those legal systems where termination for non-performance is restricted in general contract law, termination as a buyer's remedy is often formulated more generously (e.g. in Belgium and France). As regards the hierarchy of remedies in sales law, the traditional solution in Civil Law jurisdictions has been to allow the buyer to terminate the contract in case of non-conformity, without having to seek specific performance beforehand. This solution was maintained in German sales law until 2002, and is still maintained in French law. English law also allows the buyer to choose between termination and claiming performance, without imposing any hierarchy on these remedies. However, many legal systems have abandoned the traditional solution, transforming termination into 'a remedy of last resort which should be granted only if other remedies (such as [specific] performance, price reduction or damages) will not lead to an adequate result.' Often, a hierarchy of remedies has been introduced in consumer law (following the model of the Consumer Sales Directive), although a free choice of buyer's remedies has been maintained also for consumers in the UK, Ireland, Greece, Portugal and Estonia.

7. Other consumer rights to end the contract unilaterally

In addition to the system of remedies for non-performance or inadequate performance of the contract (see section 9, above), the proposal provides for two situations in which the consumer may end the contract unilaterally by giving notice to the supplier: the case of modification of digital content, and the case of long-term contracts.

7.1. Modification of digital content

If the consumer has taken out a subscription to digital content for a period of time, the supplier may modify that digital content only if the contract allows for it and provided that the consumer is notified and has the right to terminate within 30 days of the notice (Article 15). The supplier must then refund the consumer pro rata temporis for the unused period of subscription. If the consumer provided a counter-performance other than money (e.g. personal data), the supplier must stop using it.

7.2. Long-term contracts

Article 16 of the proposal provides for special rules applicable to long-term contracts, defined as those which last over 12 months (including as the sum of renewed subscription periods). In the case of such contracts, consumers may terminate them by giving notice to the supplier by any means. The contract will be ended within 14 days of the moment when the supplier receives the notice. The proposal contains detailed rules on the effects of termination of long-term digital contracts with regard to the

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142 P Huber, 'Comparative Sales Law' in M Reimann, R Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006) p. 961.
143 ibid.
145 ibid.
further use of the content and the retrieval of the consumer's content provided. The Commission indicates that the ratio for this rule is to 'prevent unjustified lock-in effects', pointing to a recent study in which many users of on-line services complain about difficulties in terminating their subscription.\(^\text{147}\)

### 7.3. Analysis

The right to terminate long-term obligations, including contractual obligations, is recognised by many national private laws. This right of termination is given to any of the parties, and is simply exercised by notice given to the other party, without any need to assert non-performance of the obligation by the other party.\(^\text{148}\) Likewise, national laws provide for the possibility of terminating a continuous contractual relationship if the other party introduces modifications in the standard terms.\(^\text{149}\) The proposal, however, grants such a right to terminate a long-term contract only to consumers, rather than to both parties (i.e. also to businesses). This stems presumably from the fact that the focus of the proposal is on consumer rights. Whether the Member States would still be permitted to grant suppliers the right to terminate on the basis of general contract law (in line with Article 3(9)) requires further clarification.

The use of the same term 'termination' for two different types of consumer remedy (immediate termination for non-supply, and termination for non-conformity), as well as for consumers' right to end a contracts even where digital content conforms to contract, may be somewhat misleading. In order to avoid confusion, the directive could differentiate its terminology.

### 8. Legal consequences of ending a contract

The contractual relationship can be ended by immediate termination for non-supply, by termination for non-conformity, by termination for modification of digital content, or by termination of a long-term contract. Furthermore, digital content contracts for a definite period expire automatically at the end of the period for which they were concluded. The ending of the contractual relationship between the consumer and the supplier of digital content gives rise to a number of consequences. If termination is done for non-supply or non-conformity, the restitution of performances will occur. In other situations this is not the case, although the consumer must stop using the digital content, whilst the supplier must stop using the consumer's personal data. All these issues are regulated in detail in the proposal.

#### 8.1. Restitutory duties

In cases of termination for non-supply and for non-conformity, the supplier must reimburse the consumer without undue delay, but within 14 days at the latest (Article 13(2)(b) DCD). This rule is has its equivalent in the proposed Online Sales Directive (Article 13(3)(b) OSD). If the digital content was supplied on a digital medium, the consumer must – if the supplier so requests – return it to the supplier at the supplier's expense, without undue delay (but no later than 14 days after the request). The duty to delete digital content that was copied from a durable medium also applies.

\(^\text{147}\) Impact Assessment, p. 127.

\(^\text{148}\) See e.g. Art. 365\(^1\) Polish Civil Code (a deadline for notice may be imposed by contract, statute or custom; otherwise, termination is immediate).

\(^\text{149}\) See e.g. Art. 384\(^1\) Polish Civil Code.
8.2. Data protection issues

8.2.1. Supplier’s duty to stop using consumer data
If the consumer provided a counter-performance other than money (e.g. personal data), the supplier must take any appropriate measures to refrain from the use of that counter-performance (Article 13(2)(b) and 16(4)(a)). The same applies to content uploaded by the consumer (e.g. to the cloud, to a social media platform), except for content generated jointly by the terminating consumer and other users, if those other users are still using that content.

8.2.2. Relationship with GDPR
The supplier’s contractual duty to stop using the consumer’s data is in parallel with the regime of consent for personal data processing and its withdrawal under the GDPR (see above, section 2.1.5). In fact, the GDPR provides that processing of personal data is lawful if *inter alia* the data subject has given consent to such processing (Article 6(1)(a) GDPR) or where such processing is necessary to the performance of a contract to which the data subject is a party or intends to conclude (Article 6(1)(b)). The latter ‘necessary’ data seemingly correspond to the concept of data which cannot be deemed to be the consumer’s counter-performance under Article 3(4) DCD.

Article 7(3) GDPR grants data subjects ‘the right to withdraw his or her consent at any time’, requiring that it must be ‘as easy to withdraw as to give consent’. However, the withdrawal of consent operates only ex nunc, and therefore it does ‘not affect the lawfulness of processing based on consent before its withdrawal’.

The relationship between withdrawal based on Article 7(3) GDPR and termination of contract under the Digital Content Directive must be construed taking into account the relationship of the two instruments (which constitute parallel legal regimes – see section 2.1.5 above). It seems that termination which, by virtue of the Digital Content Directive, has the effect of ending the supplier’s right to use the consumer’s data should be treated as withdrawal of consent under Article 7(3) GDPR. In other words, the consumer, by giving notice of termination, will be withdrawing his consent in the same declaration of will. Therefore, a supplier of digital content who does not comply with his contractual duties of refraining from using the consumer’s data from termination (Articles 13(2)(b) and 16(4)(b) DCD) will also be violating the GDPR, which may give rise to his liability under Article 82 GDPR (see above, section 13.2.2).

It seems however, that a withdrawal of consent under Article 7(3) GDPR should not be seen as automatically amounting to termination of contract, especially considering that many digital content contracts can be performed by the supplier without processing the consumer’s data beyond the absolute minimum. And in the case of one-off sale of digital content (e.g. sale of computer program on a CD), the supplier actually does not need any of consumer’s personal data once the content has been supplied.

Nonetheless, if the contract was based on a counter-performance in the form of personal data (as contemplated in Article 3(1) DCD), and the consumer-data subject subsequently withdraws his consent in exercise of his fundamental right, laid down *inter alia* in Article 7(3) GDPR, it seems that the contract does not remain unaffected. This is because the counter-performance, which was the basis of the agreement, becomes illegal under the GDPR and the supplier must, in performance of his duty under data protection legislation, cease to use the consumer’s data. It could be possible, however, for the contract to continue in existence if, for instance, the parties agree that the contract is to become gratuitous (with the effect that the contract is
removed from the scope of the DCD), or if the consumer agrees to pay a price instead of the withdrawn personal data.

8.2.3. Right to data portability
Under the proposed directive, upon termination the supplier must provide the consumer with technical means to retrieve all the content they provided, as well as any other data produced or generated by the consumer, to the extent that data has been retained by the supplier (Articles 13(2)(c) and 16(4)(b)). This must be provided to the consumer free of charge, in reasonable time and in a commonly used format (e.g. a popular file format).

A similar right – called the right to data portability – is provided for in Article 20 GDPR. A data subject has ‘the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided’ if the processing was based on consent and ‘carried out by automated means’. What is more, under Article 20(1) GDPR, if it is technically possible, the data subject may require that his data be transmitted directly from one controller to another. The GDPR right to portability will exist in parallel to similar contractual rights provided under the DCD in case of termination of contract. As with the relationship between withdrawal of consent under GDPR and termination under the DCD, here also the question of interrelation between the two regimes arises. In line with Article 3(7) DCD it seems that a consumer in his capacity as data subject will be able to exercise his right to data portability under Article 20 GDPR independently of a possible termination of contract.

8.3. Intellectual property issues
Although the proposal, as a matter of principle, is meant to refrain from addressing intellectual property issues (see section 2.1.4), it does contain a number of rules regarding the further use of digital content (which is usually subject to copyright) upon termination. If the digital content was not supplied on a durable medium, the consumer must refrain from using it, must not make it available to third parties and should delete it or make it otherwise unintelligible (Article 13(2)(d)-(e)). Once the contract is terminated, the supplier has a right to prevent any further use of the digital content by the consumer, for example by making it inaccessible or by disabling the consumer’s user account. However, a consumer who terminates the contract may not be charged for using the digital content up to the moment of termination (Article 13(4)). In contrast, a consumer who continues to use the digital content later on (which is prohibited) may be subject to an additional charge by the supplier. This could occur, for example, in situations where a business has no technical possibility to prevent future use of the digital content by the consumer. If the digital content was supplied on a durable medium, the consumer must return such a durable medium, at the supplier’s expense, without ‘undue’ delay, but no later than 14 days from the moment the consumer receives the supplier’s request to return it (Article 13(2)(e)).

8.4. Analysis
Scholars have pointed out that the requirement of the supplier to stop using the consumer’s data provided as counter-performance may be practically unworkable if the

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data have already been processed or passed on to third parties, especially that processing done before the withdrawal of consent remains legal.\textsuperscript{152} In line with that assumption, the Loos Report proposes a rule whereby, upon termination, the consumer would be obliged to ‘pay the value (at the time of performance) of the digital content if its nature makes it impossible for the business to determine whether the consumer has retained the possibility to use it’.\textsuperscript{153} For situations where digital content does not conform to the contract, the Loos Report suggests requiring the consumer to pay the proportionate value of the non-conforming digital content, unless the content was provided gratuitously.\textsuperscript{154} This solution has been advocated in the context of the proposed directive by Vanessa Mak, who considers it a ‘workable solution’.\textsuperscript{155}

Another issue which has drawn criticism is the systematic arrangement of the rules on termination, which has led to repetitions of similar or almost identical provisions on the rule on the supplier's duty to stop using the consumer's data provided as counter-performance (Article 13(2)(b); 15(2)(b) Article 16(4)(a)), the rule on the supplier's duty to provide the consumer with technical means to retrieve all content (Article 13(2)(c); 13(1)(d) 13(2)(c); 16(4)(b)), and the rule on the consumer's duty to delete any usable copy of the digital content or render it unintelligible (Article 13(2)(ii); Article 16(4)(c)). Perhaps another way of arranging the provisions could be to group those pertaining to the legal effects of termination together, thereby providing for greater clarity.

Finally, the relationship between the business's duty to stop using the consumer's data after termination on the one hand, and the effects of the withdrawal of consent for data processing under the GDPR on the other, undoubtedly need clarification.\textsuperscript{156}

9. Issues not addressed in the proposal

9.1. Consumer's right to repeated downloads

The proposed directive does not regulate the quantity of downloads of the digital content to which the consumer is entitled. Two situations arise in this context: (1) the use of the same digital content on more than one device belonging to the same consumer or their family,\textsuperscript{157} and (2) the need to make a second download due to the damage or erasure of the existing (first) copy.\textsuperscript{158} Modern digital consumers usually make use of more than one device, and expect that it will be possible to use the software they purchase on all or at least some of them. Currently, software licensing agreements usually allow simultaneous use of the same computer program on more than one device. The proposal could encompass a (default) rule addressing this issue.

9.2. Consumer's right to make back-up and private copies

The proposed directive does not provide for the consumer's explicit right to make a back-up copy or private copies, as was suggested in the Loos Report. The rule proposed in that Report on backup copies provided that:

\begin{itemize}
\item \textsuperscript{152} Fauvarque-Cosson, \textit{The new proposal}, p. 15; Mak, \textit{The new proposal}, pp. 25-26.
\item \textsuperscript{153} Loos Report, p. 287 (proposed Article III.-3:512(1)(aa) DCFR).
\item \textsuperscript{154} \textit{ibid} (proposed Article III.-3:512(2) DCFR).
\item \textsuperscript{155} Mak, \textit{The new proposal}, p. 26.
\item \textsuperscript{156} \textit{ibid}.
\item \textsuperscript{157} \textit{ibid}, p. 18.
\item \textsuperscript{158} Beale, \textit{Scope}, p. 27.
\end{itemize}
Where digital content is transferred to the consumer permanently, the consumer is entitled to make a copy insofar as it is necessary to make use of the digital content in accordance with its ordinary purpose.\(^{159}\)

The Loos Report also suggested a more elaborate rule on private copies, which would apply only where 'digital content is transferred to the consumer permanently'.\(^{160}\) According to the proposed rule, the number of copies would have to be 'limited', and they would have to be 'for purely private use and for ends that are neither directly nor indirectly commercial'. The rights-holder would be entitled to 'fair compensation', but the latter would be assumed if the digital content supplier has reached an agreement with the copyright holder.

### 9.3. Consumer's right to re-sell the digital content

The Software Directive (see above, section 2.1.5) provides a rule whereby, once the first copy of a computer program is sold, the buyer may freely resell it. In its judgment in *UsedSoft v Oracle* (2012),\(^{161}\) the CJEU held that the sale of a copy refers also to the sale of a purely digital copy on the basis of an end-user license agreement with the software proprietor. The buyer gains ownership of the intangible copy which he can then freely resell. Whilst the proposed directive tends to steer clear from copyright issues,\(^{162}\) arguably the right to re-sell the (used) digital content is in the essential interest of the consumer, and failing to deal with this issue in the directive significantly limits the protection it provides to consumers.\(^{163}\)

### 9.4. Consumer's right to essential updates and maintenance

The sale of software is often accompanied by maintenance contracts which provide that the seller will supply patches (to correct errors in the software), as well as program updates.\(^{164}\) According to the CJEU, such maintenance contracts are services contracts, which are separable from the sale contract.\(^{165}\) Nevertheless, especially since the proposed directive is meant to cover both sale of digital content and digital services, it could equally regulate post-sale maintenance contracts.

As the proposal now stands, it differentiates between one-off sale of digital content and subscription contracts. In the former case, conformity is required only at the time of supply. However, especially in the case of software, consumers could expect an (at least default) rule providing for maintenance of the software, at least for a reasonable period of time, depending on the type of software (e.g. operating system, image editing, word processing) and the usual frequency with which new versions are released. Hugh Beale has proposed that a rule be included in the proposed directive, whereby the consumer would be entitled to

\[\ldots \text{future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, automatically and free of any extra}\]

\(^{159}\) Loos Report, p. 288 (proposed Article IV.A.-2:308a DCFR).

\(^{160}\) *ibid*, 289 (proposed Article IV.A.-2:308b DCFR).

\(^{161}\) Case C-128/11 *UsedSoft v Oracle*.

\(^{162}\) See Recital 21.

\(^{163}\) *Cfr* Beale, *Scope*, p. 27.

\(^{164}\) See Case C-128/11 *UsedSoft v Oracle*, para. 67.

\(^{165}\) *ibid*, para. 66.
charge ... unless the contract or pre-contract advertising makes it clear, in prominent and intelligible language that the consumer [will not benefit from this entitlement].

Patches and critical updates need to be differentiated from newer versions, which overhaul the functionality of the program in question, and which should be treated as a new product. However, some digital products, such as car navigation systems or anti-virus software, simply require constant updates in order to be usable, i.e. in conformity. The same concerns security issues. A digital product may have been fully in conformity with any requirements at the time of its supply, but failure to update it in order to protect the user from new threats can lead to serious damages to the consumer’s digital environment and beyond. Therefore, limiting the conformity requirement to the moment of supply could be an inadequate solution in a dynamically changing digital world, with new security threats emerging unexpectedly.

9.5. Optional (contractual) guarantee

In contrast with the Consumer Sales Directive 1999 and the proposed Online Sales Directive, the proposed Digital Content Directive focuses only on consumers’ remedies for non-conformity, but does not address at all the issue of optional guarantees given by a third party (the guarantor) on top of the statutory warranty of conformity (which is enforceable vis-à-vis the direct supplier, i.e. the retailer). Whilst it is true that in the case of digital content the supplier is often the producer, it remains the case that often digital content is also marketed by retailers. In such cases, the direct manufacturer of the digital content, e.g. the software development company, may be in a better position to remedy any defects in the software under guarantee.

9.6. Passing of risk

In contrast with the Online Sale of Goods proposal, the proposed DCD does not contain a rule on passing of risk. The Loos Report proposed including a rule whereby '[i]n so far as the digital content is not provided on a tangible medium but is provided on a one-time permanent basis, the risk does not pass until the consumer or a third person designated by the consumer for this purpose has obtained control of the digital content.'

10. Conclusions

The legislative process concerning the proposed directive will have to address, on top of a number of technicalities, at least three fundamental questions. The first is whether dividing the legal material along the lines of 'digital vs non-digital' is the best approach to the on-going technological revolution. The proposed directive explicitly intends to cover the supply of digital content and the provision of digital services, but notably excludes from its scope software which is 'embedded' in smart tangible goods. Such a dividing line can be problematic for at least two reasons. First of all, because it is no longer justified in view of technological developments, thanks to which software is embedded in an increasing number of consumer goods, effectively blurring the line

166 Beale, Scope, p. 27. Emphasis added.
167 Mak, The new proposal, p. 17.
168 ibid.
170 Loos Report, p. 289 (proposed Article IV.A.-5:103(1a) DCFR).
between the digital and the non-digital. Secondly, such a line may be very difficult to draw in practice, leading to difficulties not only at the stage of legislative transposition of the directive into national law, but increasingly also later, at the stage of the application of the national implementing provisions by the courts.

The alternative approach could be to set aside the digital vs. non-digital divide, and instead apply well-known legal categories hitherto applied to the non-digital world, by extending them to new technological phenomena. This path has already been taken by some Member States where rules on 'non-digital' contracts, such as sale of goods, services contracts, or rental contract, are being applied to digital content too. Instead of splitting up 'smart goods' into the tangible goods on the one hand, and the non-embedded digital content, on the other hand, and applying three different legal regimes to them depending on how important the software is or how easily it can be deleted by the user, perhaps a more sustainable solution could be to create a 'smart' sales law, designed equally for tangible and digital objects, sold on-line or off-line.

The second fundamental question that will need to be addressed is the level of harmonisation, namely whether maximum harmonisation, envisaged in the proposed directive, is the best option. Undoubtedly, legislation should be future-proof, and this applies all the more to a field of burgeoning technological development. It is difficult to foresee today what kind of problems, requiring legislative intervention in favour of consumers, may arise in the near future, simply because we do not know what kind of technological developments there will be. Whilst maximum harmonisation is presented as creating a level-playing field for businesses across Europe, it must not be forgotten that the relevant rules implementing the directive will be scattered across 28 legal systems, and, more importantly, they will be closely linked with the remaining part of the private law of each Member State. The proposal addresses only selected issues, and the bulk of rules affecting the validity, content and interpretation of a digital content contract will remain at national level. Therefore, the advantages for businesses will be at least partly outweighed by the divergence of general contract laws.

Minimum harmonisation would allow for a more flexible and responsive approach on the part of national legislatures, but at the same time, divergence between the legal systems of the EU would be greater. A political choice therefore has to be made between, on the one hand, achieving maximum protection of consumers (definitely better served by minimum harmonisation), and the relative advantage of having a (partly) level-playing field for businesses (better served by maximum harmonisation).

The third fundamental question regards the feasibility and desirability of bringing the sale of digital content together with digital services in one single legislative act. It is true that sale of digital content is often bundled with digital services, but this occurs not only in the digital world, but also with regard to the sale of tangible goods, where it has not, in principle, led to the blurring of the distinction between sale and other contracts. Furthermore, a detailed legal analysis of the proposal reveals that most of the rules actually pertain to the sale of digital content (e.g. software), and only a minority are tailor-made for digital services. Perhaps this could be a factor in favour of eliminating them from the proposal.

The fourth fundamental issue which needs to be addressed is the relationship of the directive to intellectual property law and data protection law. As the proposal stands now, the links between the proposed directive and the legislation in the two other relevant fields seem to be insufficiently developed, and the directive aims to steer clear of those fields, despite their direct relevance for the consumer’s interests. Experts have
pointed to the need to provide more efficient ways of coordinating the various legal areas. In particular, due to the fact that digital content, by its very nature, is usually within the scope of copyright law, there is a need to ensure that the consumer can enjoy a set of basic rights of control over his legally acquired copy of digital content, for instance to download it on various devices, to make a new download in case the copy breaks down, to resell the digital content and to receive essential updates and maintenance for a reasonable time. Without this set of basic rights, the consumer’s remedies for non-conformity may become illusory.

Finally, a number of detailed issues will need to be looked at more closely, especially regarding the balance of rights and duties of the consumer and the business. These include, in particular, the **primacy of the contract** in determining the standard for conformity, with the possibility of forcing the consumer to accept a very low level of quality of digital content in the fine print, i.e. the 'scroll and click' terms of contract. Secondly, the **hierarchy of remedies** favouring specific performance over termination is certainly to the detriment of the consumer. Whilst perhaps justified and workable in the tangible world, it seems doubtful whether it is the right way forward for digital content contracts. Thirdly, the right to damages, as it is framed now, is limited only to economic damages to the consumer's digital environment, and arguably prevents the Member States from granting the consumer any further compensation for damage caused by the faulty digital content. This rule seems to be out of balance. On the other hand, the lack of a time-limit for consumer remedies seems to unnecessarily favour consumers, especially with a view to the short 'shelf life' of digital content.

**11. Main references**


Fauvarque-Cosson, B. *The new proposal for harmonised rules for certain aspects concerning contracts for the supply of digital content (termination, modification of the digital content and right to terminate long term contracts)*, Policy Dept C in-depth analysis, PE 536.495 (2016).


Mak, V. *The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content*, Policy Dept C in-depth analysis, PE 536.494 (2016).


Wendehorst, C. *Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age*, Policy Dept C in-depth analysis, PE 556.928 (2016).
The proposed directive on supply of digital content contains rules on the contractual aspects of the relationship between suppliers and consumers of digital content. The scope *ratione materiae* of the directive includes not only the supply of digital content to consumers in the strict sense, i.e. the supply of software, digital music, e-books, films and images, but also digital services, in particular rental of on-line computer programs, cloud computing and social media platforms. However, sale of digital content embedded in tangible goods is excluded from its scope. The scope *ratione personae* extends only to consumer contracts. The directive extends only to contracts concluded for consideration, which can also take the form of digital data, including personal data, provided by the consumer.

Regarding criteria for evaluating the conformity of the digital content, the directive ostensibly gives precedence to the contract, before any objective measure of conformity. Subsidiary criteria for evaluating conformity include objective fitness for purpose, international technical standards, as well as public statements.

The proposal takes over from the existing *acquis* the idea of a hierarchy of remedies, meaning that in the case of non-conformity, consumers are barred from terminating or claiming a price reduction, but must first ask the trader to bring the digital content to conformity. However, in case of non-supply, consumers have the right to terminate immediately. They also enjoy the right to terminate regardless of conformity, in cases where the trader modifies the digital content, as well as in long-term contracts. The proposal contains detailed rules on the consequences of termination, in particular with regard to the further use of the consumer's personal data by the trader, and the further use of digital content by the consumer.