Contracts For the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content

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In December 2015, the European Commission made a proposal for a Directive on contracts for the supply of digital content as a part of its digital agenda. The proposal breaks new ground in multiple ways, encompassing all kinds of different services, from music downloads to social networks. This article analyses the Commission’s proposal both with respect to its broad scope of application and departure from regulating particular types of contract, as well its approach towards harmonizing the standards for contractual liability, termination and rights to damages.

Contents

I. Introduction ........................................................................................................................................... 2
II. General Approach ................................................................................................................................... 2
III. Scope of Application ............................................................................................................................. 4
    A. Digital Content .................................................................................................................................. 4
    B. Personal Scope of Application .......................................................................................................... 6
    C. Free Digital Content ....................................................................................................................... 7
    D. Exempt Services and Areas ............................................................................................................ 9
IV. Art. 5 CSDC – Time and Place of Supply ........................................................................................... 10
V. Art. 6 CSDC - Conformity with the Contract – Contractual Performance and Defects .................. 10
    A. Incompatibility with System Environment as a Lack of Conformity with the Contract ............... 13
    B. No Defect of Title ............................................................................................................................ 14
    C. Patches .............................................................................................................................................. 15
VI. Art. 9 CSDC - Burden of Proof ........................................................................................................... 15
VII. Liability of the Supplier and Remedies of the Consumer ................................................................. 16
    A. Art. 11(1-4) CSDC- Supplementary Performance and Reduction of Price.................................... 16
    B. Art. 11 CSDC - Termination for the Failure to Supply ................................................................ 17
    C. Art 12(5) CSDC - Termination for Lack of Conformity ................................................................. 17
    D. Full Harmonization and Additional National Requirements ....................................................... 18
VIII. Art. 13 CSDC - Legal Consequences of Termination ..................................................................... 18
IX. Art. 14 CSDC – Right to Damages .................................................................................................... 21
X. Defects Liability Period and Statute of Limitation ............................................................................ 22
XI. Art. 15 CSDC - Modification of the Digital Content ......................................................................... 23
XII. Art. 16 CSDC – Right to terminate long term contracts .................................................................. 24
XIII. Miscellaneous Provisions ............................................................................................................... 24
    A. Art. 17 CSDC - Right of Redress .................................................................................................... 24
    B. Semi-Compulsory Nature .............................................................................................................. 24
I. Introduction

The Digital Agenda as one cornerstone of the Commission’s Europe 2020 strategy has steadily gained momentum and is starting to take increasingly concrete shape. While the DG CONNECT’s attempts to reform European copyright law sparked intense controversy and have thus been postponed, the DG Justice has submitted two new proposals on December 9th 2015 - one tackling the issue of consumer protection regarding the supply of digital content and the second concerning contracts for the online and other distance sales of goods. Though the second proposal entails practically significant changes, such as prolonging the presumption for a lack of conformity with the contract from 6 months to 2 years (Art. 8(3), recital 22, 23), the proposed “Directive on certain aspects concerning contracts for the supply of digital content” (CSDC Directive) is of far greater importance due to its far-reaching application and its innovative regulatory approach. Drawing inspiration from the (ultimately unsuccessful) proposal for a Common European Sales Law (CESL) as well as from preparatory studies the proposed regulatory framework has the potential to severely shake up the traditional typology of contracts in many Member States.

The following discussion seeks to describe and analyze the Commission’s proposal, focusing on the remarkably broad scope of application (III.) as well as its provisions for contractual liability (VII.), termination of contract (VIII.) and rights to damages (IX).

II. General Approach

Despite the proposed framework’s character of an all-encompassing, binding set of fixed rules, the Commission has decided not make use of its authority to issue a regulation, but has instead

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1 Communication from the Commission on Dec. 9th 015, towards a modern, more European copyright framework, COM(2015) 626 final, available at https://ec.europa.eu/transparency/regdoc/rep/12015/EN/1-2015-626-EN-F1-1.PDF. The Commission has not entirely given up on this project, however. See Id. at 12.
proposed a fully-harmonizing Directive to facilitate the implementation into national civil law (Art. 4, recital 5 CSDC). In light of the proposal’s broad scope of application, this approach is indeed the best way to achieve the law’s purpose while avoiding frictions with many Member States’ preexisting systems of distinct types of different contracts – even though a one-to-one transfer may nonetheless be a feasible option for many states. On the other hand, the fully-harmonizing nature of the Directive appeared to be necessary due to the dawning prospect of an increased fragmentation of digital content laws in Europe, with the Consumer Rights Acts in the UK being just one example of recent national activity in this field. Besides protecting the European Single Market (Art. 114 TFEU), the Commission also seeks to complement its efforts to foster European Cloud Computing as part of its Digital Single Market Strategy, which is supported by the Expert Group on Cloud Computing Contracts.

This brings us to one of the most significant aspects of the proposal: the absence of any typological distinction between different kinds of contracts and its primary focus on abstractly regulating general duties and remedies. Unlike prior legislation such as the Consumer Sales Directive, the proposal deliberately avoids differentiating between different kinds of contractual agreements, e.g. sales or service contracts, to prevent the new Directive from being outpaced by the rapid technological development and high level of innovation and evolution of new business models in the digital market. Thus, the proposal is not confined solely to data or copyright protected content, but encompasses all kinds of aspects of the supply of digital content, including accompanying services and other combinations of different contractual obligations which come along with the supply of digital content. It makes no difference if the contract is limited in time or not.

Furthermore, the proposal includes not only contracts entered into for a monetary price, but also those in exchange for access to (personal) data. This is certainly a step in the right direction, although it also comes with several difficulties in drawing a reliable line of application, which will be discussed later. On the other side, even though the CSDC concentrates on full harmonization it does not preclude member states from implementing the CSDC into different contractual types such

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6 Explanatory Memorandum CSDC (n. 2) at 7.
7 The Consumer Rights Act came into effect on Oct. 1st 2015; part 1, ch. 3 deals with digital content. Available at http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf. Other countries such as the Netherlands have enacted or are apparently about to enact similar laws, see. Explanatory Memorandum CSDC (n. 2) at 3.
8 Explanatory Memorandum CSDC (n. 2) at 4, 8.
9 Expert Group on Cloud Computing Contracts, set up by the Commission on June 18th 2013. For detailed information about the composition of the group, its objectives, and the minutes of their meetings, see http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index_en.htm.
11 Art. 5(b) CESL already followed a similar content-centered approach.
12 Cf Wendland, Gemeinschaftsprivatrecht 2016, p. 8 (13).
13 Art 3(1), recital 13 CSDC.
as sales, services etc. or to opt for a “sui generis” approach – hence, still substantials differences may exist due to diverging ways of implementing the CSDC.  

While the proposal is generally broad in scope, it also makes sure to exclude other legislative areas in order to avoid frictions with European and national law. It neither deals with copyright and other intellectual property related law (recital 21 CSDC) or the general rules for entering contracts (Art. 3 (9), recital 10 CSDC), nor does it seek to alter the standards of data privacy law (Art. 3(8), recital 14, 22 CSDC). In fact, the proposal even has its own particular version of the principle of subsidiarity by stating that a conflict between any of its provisions and another Union act governing a specific sector or subject matter will render this provision inapplicable (Art. 3(7) CSDC). Thus, the Directive has no influence on issues like Digital Rights Management Systems (Art. 6 Info-Soc Directive), the doctrine of exhaustion of intellectual property rights, or exemptions and limitations to reproduction rights (Art. 5(2), (3) Info-Soc Directive). Thus, important issues for consumers such as the right to resell or to implement the digital content on another device are left untouched.

However, even this cautious approach may result in certain frictions and inconstancies. Take for example Art. 8 GDPR, which generally allows for the processing of the personal data of children at the age of 16 or older based on their own consent, whereas the proposal’s protections only apply once a contract is actually entered into – which usually requires the consent of a holder of parental responsibility until the age of 18. If such consent is not provided, the child may be left with only national remedies with varying degrees of effectiveness – at least with respect to his or her non-personal data.

III. Scope of Application

As mentioned before, one of the proposal’s main features is its exceptionally broad scope of application, which seeks to cover almost all kinds of contracts related to digital content:

A. Digital Content

The core criterion of the proposal is the concept of digital content as defined by Art. 2(1) CSDC. It includes any kind of digital content, such as “video, audio, applications, digital games and any other

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16 Explanatory Memorandum CSDC (n. 2) at 5, 6.


18 Critized also by Beale, Scope of application and general approach of the new rules for contracts in the digital environment, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.493 p. 27.


20 Art. 8(1) GDPR even allows for a national age of consent beginning at the age of 13.

21 Similar problems may also arise with respect to licensing agreements in social networks.
software” (Art. 2(1)(a) CSDC).22 Going beyond the former CESL proposal’s concept, it furthermore encompasses all related services that allow for “the creation, processing or storage of data in digital form, where such data is provided by the consumer” as well as “sharing of and any other interaction with data in digital form provided by other users of the service”. Hence, the proposal goes well beyond just covering the acquisition or use of digital content, which – depending on the Member State and individual nature of the contract – can be qualified as sales, service or rental contracts. Instead, the term “digital content” deliberately includes all kinds of services related to digital content, thereby covering such diverse services as Cloud Computing, social networks and media such as Facebook or Twitter, e-commerce and trading platforms such as Amazon or eBay, search engines such as Google, blog portals, data storage systems, web-streaming, or visual modelling files for 3D printers.23 However, the proposal does exclude services that use the digital format mainly as a carrier, while the actual services are provided predominantly by human intervention (Art. 3(5)(a), recital 19 CSDC). Thus, while carrier platforms like AirBNB or Uber are themselves subject to the proposal, the people ultimately providing the physical services are of course not.

Besides digital content originally pre-generated by a supplier, the proposed Directive is also meant to cover any content tailor-made for the consumer (recital 16 CSDC) as well as any user-generated content created by the consumer themselves (recital 15 CSDC). While the former category encompasses individualized software, expert databases24 and custom-made models for 3D printers, the latter seems to extend the scope of application even to personal photos, videos, tweets or customer ratings. However, the suppliers’ contractual duties and remedies as defined by the proposal are obviously only meant to apply to the services provided for this content and not the original content itself.

The most significant – and potentially most problematic – restriction to the Commission’s far-reaching approach to regulate all kinds of digital content can be found somewhat hidden in recital 11 of the CSDC proposal, which excludes all embedded digital content operating as an integral, yet subordinate element merely to support the main functionalities of a good. This somewhat vague concept of “embedded systems” is however destined to produce various classification issues in the future:25 Is the control software of a system really a subordinate part of the product as a whole if it cannot be used without it? What about smart TVs, which increasingly provide online-based services – some of which are not “embedded” in the narrow sense, but allow for firmware updates or additional applications? Why does it depend on the incidental integration of a system if it is covered or not?

The same applies to the “Internet of Things”, which is excluded from the proposal to address issues regarding liability and machine-to-machine contracts by a separate Directive. However, the proposal neither tries to define the term, nor does it provide a justification for why commercially


23 See also recital 11 CDSC with several examples.


used data or control software related to the internet of things shall not be subject to the proposed Directive. After all, there is no reason why a supplier of a separate app designed to control household appliances or cars should not be liable in accordance with the conditions of the Directive. These issues exemplify a fundamental, yet hardly avoidable problem of the Commission’s approach to address a wide variety of contracts related to digital content: while the broad scope of application spares the legislator from constantly adapting the legal framework to new technological developments and avoids putting courts in the uncomfortable position of creatively filling in the gaps, it is also prone to creating difficulties with setting appropriate limits at its margins.

On the other hand, the proposal successfully solves another problem that has caused some stir in other contexts. According to Art. 3(3) CSDC, the Directive shall also apply to every durable medium serving as a carrier for digital content (i.e. CDs/DVDs, etc.) and not just content directly supplied via internet. Hence, physical data carriers would no longer be subject to the Consumer Sales Directive and would instead fall under the new Directive’s rules regarding the reversal of the burden of proof and other standards – irrespective of the way such carriers are distributed. Since the proposal does not however regulate copyright law, related issues like the exhaustion doctrine’s complex and incoherent application in online vs. offline contexts still remain unsolved and will continue to occupy judicial resources.

B. Personal Scope of Application

The proposal explicitly limits the application to the relationship between consumers and traders (or in this context: “suppliers”), thereby adopting the traditional personal scope of application of earlier


29 See recitals 12, 13, 20 and 50 CSDC, with 20 stating that in cases of contracts or bundles of contracts with a set of multiple services or goods which do not entirely function as a carrier of the digital content, the new Directive shall only apply to the digital content component of such a bundle.

30 Recital 12 CSDC.

31 The ECJ is about to issue a decision regarding online-based exhaustion for non-software related copyrights, see Az. C-174/15 - Vereniging Openbare Bibliotheeken. Courts in Germany have so far been reluctant to accept such an exhaustion, see OLG Hamburg GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (JOURNAL) -RR 2015, 361, Rdnr. 30 f. – eBook-AGB; OLG Hamm Multimediarecht 2014, 689 – Hörbuch-AGB. For software products, see Usedsoft, C-128/11,EU:C:2012:407; and furthermore BGH Multimediarecht 2015, 530 m. Anm. Heyden – UsedSoft II; BGH Multimediarecht 2014, 232 m. Anm. Heyden – UsedSoft II; BGH Multimediarecht 2011, 305 m. Anm. Heyden – UsedSoft.
consumer protection laws and excluding other groups such as small and medium-sized companies. Consequently, it also adopts the traditional problems that come with defining these terms, particularly the well-known “dual use” problem.\footnote{See e.g. Gruber, C-464/01/EU:C:2005:32} On top of that, it is particularly hard for the supplier to determine the intended use of digital content, e.g. word processing software, which is frequently used for private as well as professional purposes. While voluntary self-declarations by the consumer and other concepts may help in some cases, they are not capable of solving the problem at its core and as a whole.

Since the CSDC’s personal scope is limited to the relationship between consumers and suppliers,\footnote{critizied by Beale, Scope of application and general approach of the new rules for contracts in the digital environment, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.493 p. 28 ss. who favours an optional instrument for small and medium enterprises.} it furthermore does not extend to the consumer’s relationship to third parties, notably to copyright owners and their relationship with consumers based on the widespread End User License Agreements (EULA).\footnote{It is however not yet settled whether the licensing agreement actually come into effect directly between the consumer and the copyright owner („click-wrap” etc.).; Gatte: Electronic commerce – click wrap agreements: the enforcability of click wrap agreements. Computer la wand security review, 404; Bakos, Yannis and Marotta-Wurgler, Florencia and Trossen, David R., Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts (January 1, 2014). Journal of Legal Studies, Vol. 43, No. 1, 2014; CELS 2009 4th Annual Conference on Empiric Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: http://ssrn.com/abstract=1443256, last access: 9.4.2016; Horowitz, Steven J., Competing Lockean Claims to Virtual Property (May 31, 2012). Harvard Journal of Law and Technology, Vol. 20, 2007. Available at SSRN: http://ssrn.com/abstract=981755, last access: 9.4.2016; with regard to the relationship between copyright la wand consumer protection, see Menell, Peter S. and Scotchmer, Suzanne, Intellectual Property. HANDBOOK OF LAW AND ECONOMICS, A. Mitchell Polinsky and Steven Shavell, Forthcoming; UC Berkeley Public Law Research Paper No. 741724. Available at SSRN: http://ssrn.com/abstract=741424, last access: 9.4.2016.} While the supplier, e.g. Cloud Computing services or software dealers, may be held liable when selling or granting access to the digital content, the Directive has no influence on liability exemptions and other limitations in the EULA that shield the copyright owner from being held accountable by the consumer. However, if the EULA supplier asks for personal data of the consumer it is be arguable that the digital content (software, eBooks etc.) may be covered by CSDC.\footnote{see also Beale, Scope of application and general approach of the new rules for contracts in the digital environment, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.493 p. 13.}

C. Free Digital Content

Another novelty of the proposal (which was, however, already part of the CESL)\footnote{See Recital 9 CESL (n. 4).} is its application to contracts regarding the supply of digital content for counter-performance other than money in the form of personal or other data (Art. 3(1), recital 13 CSDC). While the digital content appears to be “free” at first glace, it is indeed justified to extend the Directive’s consumer protections to such contracts, since the consumer may nonetheless have a legitimate interest in such content or services being free from defects and since suppliers would most likely not have offered the content without the benefits he or she may derive from the consumer’s data.\footnote{See also Schmidt-Kessel/Erler/Grimm/Kramme Gemeinschaftsprivatrecht 2016, p. 54 (57)}

The latter does not however apply to situations where the supplier collects data necessary for the digital content to function in conformity with the contract (e.g. for geographical localization
purposes) or the (sole) purpose of meeting legal requirements (e.g. security and identification purposes by applicable law), which is why those cases shall not fall under the CSDC (Art. 3(4), recital 13, 14 CSDC). While this distinction is somewhat clear cut, it nonetheless results in some grey areas. Take for example services with user-generated content like Wikipedia: while users do provide personal data in exchange for using the site’s digital content, one could argue that Wikipedia needs the data only in order to link it with the article’s version history and thus only for purposes necessary to make its service function in conformity with the contract. If however one does apply the proposed Directive to user-generated articles, this qualification would entail several problems for the particular service Wikipedia provides – notably with respect to its obligation to delete personal data, which would make it hard to understand and compare the course of discussions the user took part in. Questions like these have also remained unsolved in other contexts, e.g. with respect to the future effects of Art. 17(3)(d) GDPR.

Apart from these issues, the Commission’s proposals also include other exeptions to the applicability of the CSDC to “free” content, which may not be overly ambiguous, but could lead to a few interesting results. First, the Directive shall not apply to cases in which the consumer does not “actively” provide data to the supplier, i.e. without an individual registration or explicit granting of access to the consumer’s data. Hence, classic forms of free digital content like Open Access Data, Open Source Software or Freeware will not be covered, since they typically do not require an active registration. The picture does however change once the consumer is provided with further services like patches or additional information if these services require a personal account.

More importantly, the proposal also excludes two other practically important situations from its scope: the users’ exposure to advertisements as a “price” in exchange for the supply of the content, and data collected by cookies, even if the consumer actively accepts the use of cookies. Though excluding advertisements may seem understandable since they do not necessarily require the supplier to collect consumer data, disregarding cookies requires a reasonable justification. Cookie-based services like Google Analytics are known to collect personal data on a particular large scale to process them for commercial purposes. The sheer amount of data allows for a targeted collection of data and eventually personal identification, as the discussions that evolved around the

38 This resembles Art. 6 (1) (2) GDPR (n. 19). If the supplier does however process the date any further or uses it in other commercial ways, the exeption does not apply anymore.
39 At least those users who create an account have to provide Wikipedia with their personal IP address.
40 Recital 14 CSDC.
42 Recital 14 CSDC; see however Beale, Scope of application and general approach of the new rules for contracts in the digital environment, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.493 p. 13 who argues that cookie collecting activities are covered by “actively”; criticized also by Schmidt-Kessel/Erler/Grimm/Kramme Gemeinschaftsprivatrecht 2016, p. 54 (58)
GDPR have vividly underlined. Still, even services such as Google’s data intense search engine would basically not be covered by the Directive’s scope as long as the consumer does not create an (optional) account, while other services like Facebook would always be confronted with the consumer’s new remedies.

While the proposal’s general approach to seemingly “free” digital content in exchange for economically valuable data is a desirable one, it is also important to keep in mind that its implications will not remain without consequences for several other areas of law in many Member States. For example, qualifying such contracts as essentially similar to contracts entered into for a particular price may influence how courts view the fairness of certain clauses in consumer contracts. Another question is whether qualifying the supply of data as equivalent to promising a monetary price results in the supply of (personal) data being an enforceable contractual duty, e.g. when the consumer submits false personal information useless to the provider of digital content.

In other terms, qualifying personal data as a counter-performance the CDSC runs into problems with the GDPR: Whereas the GDPR stipulates that consent may freely withdrawn with the result that all data processing has to be stopped and data even has to be deleted, dealing with data as a counterperformance would be contradicting that right to free revocation of consent as the consumer is obliged to reveal and disclose his personal data.

D. Exempt Services and Areas

Several services and areas are explicitly exempt from the proposal’s legal regime by Art. 3(3) CSDC, which are all subject to their own intense regulation, which justifies excluding them from the DCDS’s additional requirements. This includes Access Providing and all electronic communication services covered by the Framework Directive of 2002 (Art. 3(5)(b) CSDC), healthcare services, gambling and – most significantly – financial services (Art. 3(3)(d) DCDC). Consequentially, Paypal and other services are not covered by the proposed Directive, but are instead regulated by the Payment Service Directive II, which covers a large variety of internet-based payment and financial services. While Bitcoins still fall thorough the cracks of much of

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47 While especially Art. 7 DSGV (n. 19) places strong emphasis on the fact that the data subject’s consent must be freely given, the DSGV does not exclude this possibility once the consent is valid.


financial sectors’s regulation,\textsuperscript{50} they are nonetheless exempt from regulation under the CSDC, since the proposal refers to financial services in general.\textsuperscript{51} However, we have to take into account that some of these regulated areas still do not in particular acknowledge digital content and digital services as something specific to be regulated.\textsuperscript{52}

IV. Art. 5 CSDC – Time and Place of Supply

Given the broad scope of the proposal and its unavoidable refusal to define different types of contracts that deal with digital content, the CSDC says very little about the specific duties of the supplier and mostly leaves questions about when, where and how the digital content must be supplied to the individual agreement between the parties. The proposal does however state that – absent contractual specifications – the digital content has to be supplied immediately (Art. 5(2) CSDC) and that the supplier is not responsible for whether the consumer can actually access the content, as long as he delivers the content to a third party chosen by the consumer (Art. 5(1) (b), recital 23 CSDC).\textsuperscript{53} In cases where the supplier offers a bundle of services, which include providing immediate access (e.g. an Access Provider offering additional content), this may of course lead to somewhat inconsistent results.\textsuperscript{54}

Given that the proposal applies to all kinds of contracts, be it recurring or non-recurring obligations, the proposal does not say anything about the duration of the data supply or possible interruptions – which contracts that deal with digital content frequently exclude from liability, at least if the time of the interruption is short or for maintenance purposes. As the Directive does not define different types of contracts, courts may find it hard to determine if such or similar clauses are merely a specification of the contract or a potential breach of duty, triggering the consumer rights of the CSDC.\textsuperscript{55} Time will tell if the proposed Directive’s high level of abstraction will enable suppliers to circumvent its intentions by redefining contractual duties as predisposed matters of contractual performance.\textsuperscript{56}

V. Art. 6 CSDC - Conformity with the Contract

A. Contractual Performance and Defects – Subjective and objective test

In close connection to time and place of supply, Art. 6 CSDC deals with the digital content’s conformity with the contract. Following the now prevalent approach of combining subjective and


\textsuperscript{52} Critized thus by Mak, The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.494 p. 10.

\textsuperscript{53} This is of course appropriate since the supplier usually has no control over internet providers and other carriers.

\textsuperscript{54} In a bundles of contracts, the new Directive only applies to the part of the contract which deals with digital content (Recital 20 CSDC, n. 29), thus an access provider could not be held liable (under the CSDC) if he fails to actually grant the consumer access to the content.

\textsuperscript{55} Which may entitle the consumer to terminate the contract or assert other remedies, see below at VII.

\textsuperscript{56} Again, national implementations of the Directive on unfair terms in consumer contracts (n. 46) as well as related national laws and regulations may play an important role in this context.
objective elements.\textsuperscript{57} Art. 6(1) CSDC first refers to the requirements of the contract as agreed on (including pre-contractual information as well as additional instructions) and – in the absence of valid contractual stipulations – the general purposes for which digital content of the same description would normally be used (including purposes that can be inferred from public statement by third parties), as per Art. 6(2) CSDC.\textsuperscript{58} While contractual agreements thus prevail over objective expectations, it is however important to note that the proposal requires those agreements to be stipulated in a clear and comprehensive (i.e. transparent) manner – be it in general terms and conditions or individual agreements (\textsuperscript{59}).

Art. 6(1)(a) CSDC lists a couple of important conformity elements to be included in the contract, such as functionality, interoperability, accessibility\textsuperscript{60} and security. Though stressing the importance of the digital contents security is certainly desirable,\textsuperscript{61} the proposal does not define what kind of technical security standards are to be expected in a contractual context. Given that most Member States have not yet set concrete, reliable standards, it is unlikely that this element will become clearly definable (and thus practically more important) any time soon.\textsuperscript{62} Still, the proposal’s burden shift will make it easier for consumers to assert and remedy inherent security defects of the digital content, even if those defects could not be foreseen by the supplier at the time the content has initially been supplied. On the other hand, the supplier cannot be held liable for security risks which are not an inherent part of the content, but merely evolve over time due to subsequent changes of the digital environment, e.g. by a different software later installed by the consumer.

In recognition of the important role digital environments play for the functionality of almost all digital content, the CSDC seeks to place special emphasis on the interoperability of such content - defined as the content’s interaction (not portability) with other hard- and software (especially operating systems). While recital 26 CSDC mentions the absence or presence of any technical restrictions such as protection via Digital Rights Management systems or regional coding, it does not bar those restrictions from being part of the contract, meaning that suppliers can still freely restrict their digital content to be used solely within the environment of their own devices or software. Given the importance of the digital content’s interoperability as part of its functionality however leads to the question of whether it will be sufficient for the supplier to advise the consumer that the content is designed only for a particular environment, or if he will be obliged to explicitly tell the consumer which kind of environments will render the content inoperable in order to meet


\textsuperscript{58} Similar to the Consumer Sales Directive (n.10), the proposal only includes statements which the supplier should have been aware of and that influenced the consumer’s decision, Art. 2(2)(c) CSDC.

\textsuperscript{59} Though the ECJ has decided that – for purposes of the Consumer Sales Directive – even the the definition of the main subject-matter in general terms and conditions has to be transparent, extending this requirement to individual agreements is a novelty. See Van Hove, C-96/14, EU:C:2015:262 n. 27; Kásler ua/OTP Jelzálogbank Zrt, C-96/14, EU:C:2014:282 n. 68; Unlike Annex Art. 80 Nr. 2 CESL, the CSDC’s transparency control will also extend to definitions of the contractual main subject, see recital 18 CSDC.

\textsuperscript{60} The accessibility is of course limited to the requirements of Art. 5(1)(b), recital 23 CSDC.

\textsuperscript{61} See recital 27 CSDC.

\textsuperscript{62} Although some countries have taken first steps in this direction already, see e.g. for Germany https://www.bsi.bund.de/DE/Themen/ITGrundschutz/ITGrundschutzStandards/ITGrundschutzStandards_node.html;jsessionid=852E3D098B511545F77FF164368C68B7.2_cid286; and https://www.bsi.bund.de/DE/Themen/ITGrundschutz/ITGrundschutzKataloge/itgrundschutzkataloge_node.html;
the CSDC’s transparency requirement. In any case, the supplier has to prove that he adequately informed the consumer to avoid liability, as per Art. 9(2) CSDC.

The proposal further acknowledges that digital content and software in particular will often demand frequent updates and patches, as per Art. 6(1)(d) CSDC. Yet again, the proposal does however leave it up to the parties to define if and when updates or patches are deemed to be necessary, allowing for their complete exclusion by means of agreements about the contractual performance, even if the content is prone to be malfunctioning (e.g. beta versions). If the digital content does however have (initial) defects, e.g. exploits or lack of security, the supplier will be subject to the consumer’s rights and remedies as discussed before.

While not explicitly mentioned in the (non-exhaustive) enumeration in Art. 6 CSDC, principles of data privacy law – such as data avoidance and minimization – should be considered part of the minimum elements of a contract, since they likewise determine the quality of digital content and services.

(Only) To the extent that the contract does not stipulate the requirements for digital content (or fails to do so in a transparent manner), Art. 6(3) CSDC states that the digital content has to conform with the usual expectations consumers may have for this particular kind of content. While such “objective” standards necessarily come along with an unavoidable level of uncertainty, the Commission’s attempt to clarify this standard makes things somewhat worse in several ways. First, Art. 6(2)(a) CSDC differentiates between digital content supplied for a price or for other counter-performances in money, thereby thwarting the proposal’s intention to create a level playing field for business models based on direct payments on the one hand and those based on the commercial use of (personal) data on the other. The second problematic attempt to clarify the standard is the proposal’s instruction to take into account “any existing international technical standards” and industry codes of conduct and good practice, as per Art. 6(2)(b) CSDC. While deferring to such standards does seem to make sense, it is troubling that the Commission does not set up any requirements whatsoever with respect to standard-setting institutions or process, entirely leaving out any kind of mandatory consumer representation or consideration of consumer interest. Given that the Commission seeks to encourage trade organizations and “other representative organizations” to establish codes of conducts to support the uniform implementation of the Directive (recital 28 CSDC), leaving out consumer interests for the benefit of a swift implementation appears to be a deliberate choice.

Taking all the above into account, it is not very likely that Art. 6 CSDC will actually improve the level of consumer protection for digital content. Art. 6(1) CSDC leaves the contract’s content almost entirely to the parties’ individual stipulations (which in practice usually means to the supplier’s pre-designed terms and conditions), while the proposal’s high level of abstraction makes it harder to counterbalance those stipulations with considerations for the common requirements of

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63 Despite this, the supplier of course has to supply the most recent version of the digital content if not otherwise agreed, which may warrant updates during long term contracts, Art. 6(4) CSDC.

64 Similarly, Annex Art. 103 CESL also clarified that updated digital content does not per se render the product to be defective.

65 Annex Art. 130(6) CESL already made a similar distinction, likewise failing to explain which practical consequences this approach is supposed to entail.

66 It is not clear whether the term “international” rules out every kind of national or (solely) European standards.

comparable types of contracts. Only if those stipulations are missing or not sufficiently transparent does the objective criteria of Art. 6(2) CSDC come into play, potentially replacing invalid elements without rendering the contract invalid as a whole. If the suppliers manage to meet the transparency standards, they are free to define the main subject matter of the contract, which allows for limiting the liability e.g. for beta software or software “as such” to only those (security) deficiencies currently known. In addition to that, reasonable consumer expectations are neither an explicit part of the objective requirements, nor will they necessarily be included into technical industry standards.

Something that will however become even more important in future are the pre-contractual obligations of the supplier to inform the consumer about the interoperability of the digital content, i.e. what kind of technical environment, operating system or additional software (like Adobe’s Flash Player, etc.) is required allow the digital content to function in accordance to its (stipulated) purposes.

B. Incompatibility with System Environment as a Lack of Conformity with the Contract

Specific problems arise out of the fact that functions etc. of a digital content depend largely on other digital contents/software/environment. Digital content can be itself free of any defects but may turn out to be functionless when the environment changes or another service provider stops his services upon which the digital content depends.

Since the use of digital content depends on a system environment, Art. 7 CSDC qualifies the incorrect implementation of goods in the consumer’s digital environment as a lack of conformity with the contract. Even if the digital content itself is faultless, an incorrect installation can lead to non-conformity. This rule corresponds to those known from the Consumer Sales and likewise confines the supplier’s accountability to an installation performed by him or herself or incorrect instructions given by the supplier.

At first sight, this term seems like a useful addition and continuation of the principles known from the sale of consumer goods, but again this approach may become blurry at the margins. In particular, it is questionable when the provider conducts an implementation: can an installation routine activated by the consumer already be considered as an act of the supplier? Or how about an installation of an App on a consumer’s smartphone accomplished by an App routine, such as used within the iTunes Store or Google Play Store? Can this process be called an installation performed by the supplier? Considering that the digital content is now beyond the supplier’s sphere of influence and the supplier is not able to control the consumer’s digital environment it seems reasonable that only in case of incorrect installation routines is he held accountable. Of course, this does not include any incorrect use by the consumer.

Especially in this case, problems are caused by the burden of proof for a correct implementation of digital content. Based on Art. 9(1) of CSDC Directive the supplier bears the burden of proof for the correctness of the given assembly instructions, and furthermore he must prove the digital content’s

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69 Art. 2(5) Directive 1999/44/EC classifies an incorrect assembly as a lack of conformity with the contract if the assembly is part of the sales contract or if the seller took responsibility for it. Also an incorrect assembly caused by incorrect assembly instructions is equivalent to a defect.
conformity with the contract. On the other hand, according to Art. 9(2) CSDC the consumer bears the burden of proof for his digital environment. However, those regulations do not solve all problems: Since an assembly instruction for a correctly performed installation depends on the consumer’s digital environment, a strict responsibility of the supplier to hand out faultless instructions can only result from Art. 9(3) CSDC if the consumer fulfilled his obligation to cooperate with the supplier in examining his digital environment. Similar to regulations known in banking and capital market law, a rudimentary obligation to “know your customer” would be helpful, since an evaluation regarding online goods and services can be performed automatically. Of course, this practice would not include goods used offline, which do not use an Internet connection after installation.

However, Art. 7 CSDC does not deal with digital content which once has correctly been implemented but now – after a change of digital environment not imputable to the supplier – turns out to lose its functions, e.g. connection to a specific service providers who interrupts his services. As liability for specific purposes or functions of a digital content depend upon the description of the digital content and the promises by the supplier a change of digital environment may often not be treated as a defect – as long as the consumer cannot expect the supplier to safeguard the perpetuation of the specific digital environment.

Since it is within the nature of the digital environment to change its appearance, caused by newly installed software or different digital content, in case of a one-time sales contract the seller would be well advised if he records the consumer’s digital environment at the time of the implementation of digital content and holds on to it for purposes of proof. The consumer’s digital environment should be recorded even if the supplier did not owe an implementation, because instructions or an installation routine performed by the consumer also depends on his digital environment.

C. No Defect of Title

Art. 8 CSDC Directive claims that the supplied digital content must be free of any right of a third party, including based on intellectual property – a formula which is somehow misleading as the consumer exactly needs the rights of third parties in order to use the digital content (in case of intellectual property rights). If the digital content is supplied in terms of a continuing contract, this regulation is of course limited to this period. Of course, this does not violate the principle of territoriality, since the scope depends on the stipulated terms of the contracts, which may include territorial restriction rights (irrespective of the proposal for a cross-border-portability regulation70). While Art. 8 CSDC seeks to protect the consumer from third party rights, it should not be misunderstood in the way that it could limit any right of the title owner. The proposal explicitly excludes copyright law from its regulatory scope, thus leaving any (national) right of the copyright owner to withdraw the content to protect his or her personal right untouched. If this does however occur, the supplier can be held liable, since this “defect” is inherent in the digital content from the beginning of the contract, even though it may manifest itself much later.71 This result must of course be modified if the reason for the withdrawal lies in the consumer’s sphere of influence (e.g. by disfiguring works of art).


71 If however the copyright owner asserts his or her rights after the statute of limitation has expired, this leaves the consumer without contractual remedies.
D. Patches

If a supplier uses patches to fix defects and other problems which may not have existed when the digital content was first supplied, the question arises if those patches are still covered by the CSDC liability framework. As long as the original contract does not include additional technical maintenance services, patches are to be considered new digital content.

Unfortunately, these patches will usually be provided neither in exchange for a monetary price, nor will they be supplied in exchange for personal data. While the consumer may of course refuse to implement additional patches (which he almost certainly will not do), it would be thus be advisable for the final version of the Directive to include a clarification that patches are nonetheless covered by its scope.

VI. Art. 9 CSDC – Timeless Burden of Proof

Just like every right or remedy, the effectiveness of the CSDC’s consumer rights depends on their practical enforceability. Art. 9 CSDC helps the consumer by stating that the onus of proof with respect to the conformity with the contract at the time of supply shall be on the supplier. Interestingly – and unlike the Consumer Sales Directive – this burden shift is not subject to any kind of time restrictions, as digital content is not subject to wear and tear. However, this does not lead to an infinite liability of the supplier, as will be explained later when discussing the CSDC’s statute of limitation. Hence, it depends largely on the way of how member states will implement the CSDC with prescription limits – it could also be argued that the timeless burden of proof should be limited per se to a certain time, such as 2 years.

The burden shift does not apply if the supplier can prove that the digital environment of the consumer was not compatible with the digital content (and the supplier has transparently informed the consumer about the limits of interoperability and other technical requirements), as per Art. 9(2) CSDC. The proposal tries to ease the supplier’s burden of proof by requiring the consumer to cooperate to determine his or her digital environment, while also limiting the supplier’s efforts to the means least intrusive to the consumer’s fundamental rights to the protection of private life and his or her personal data, as per Art. 9(3), recital 33 CSDC. Though the Commission considers automatically generated incident reports to be a less intrusive form of determination, it may turn out to be hard for the supplier to collect the necessary data without collecting personal data at the same time. On top of that, suppliers will usually have a difficult time determining whether the consumer has altered the parameters of the digital environment or if e.g. malware hidden in the system data caused the content to malfunction. In any case, the Commission sees direct virtual access to the consumer’s digital environment only as a last resort.

73 Explanatory Memorandum CSDC (n. 2) at 13.
74 See supra X. Defects Liability Period and Statute of Limitation.
75 See the arguments brought forward by Mak, The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.494 p. 21/211.
76 Recital 33 CSDC.
VII. Liability of the Supplier and Remedies for the Consumer

According to Art. 10 CSDC, the supplier is liable for any failure to supply the digital content, for any lack which exists at the time the content is supplied, and for any lack which occurs during the duration of a contract for the supply of digital content over a period of time. The supplier’s liability results in various remedies for the consumer – all of which are a staple of European consumer protection laws, but also come along with a number of characteristics specific to the supply of digital content.

The CSDC follows the traditional hierarchy of remedies: first, the obligation of the supplier to bring the digital content in conformity to the contract, second, in case of failing price reduction and/or termination of the contract (Art. 12 (3) CSDC). 77

In contrast to other directives regarding consumer contracts the CSDC does not provide any norm concerning commercial guarantees. 78 However, there is no reason why commercial guarantees should be excluded from the scope of the CSDC.

A. Art. 11(1-4) CSDC- Supplementary Performance and Reduction of Price

Following the principles of prior legislation like the Consumer Sales Directive, 79 the consumer is entitled to have deficient digital content brought into conformity with the contract (Art. 12 (1), (2) CSDC) or – if the supplier fails to do so within a reasonable period of time 80 – may reduce the price proportionate to the decrease in value (Art. 12 (3), (4) CSDC). 81 Taking into account the diverse nature and different types of contracts covered by the vast scope of the Directive, the proposal is right in not trying to state any fixed period of time to be considered reasonable for every kind of digital content (Art. 12(2), recital 36 CSDC).

Building on ECJ decisions specifying the Consumer Sales Directive, 82 the proposal exempts the supplier from the duty to bring the digital content into conformity free off charge for the consumer, if this duty would impose unreasonable costs upon the supplier. Art. 12(1) (a) and (b) CSDC flesh out this (un)reasonableness standard by taking into account the eventual value of the content and the significance of the deficiency. Consumers will thus often find it hard to remedy a lack of conformity e.g. of low value apps, unless they will be able to proof an exceptionally high personal


80 This includes cases where remediing the non-conformity is impossible, disproportionate or unlawful, not completed in time, significantly inconvenient for the consumer or simply refused by the supplier, Art. 12 No 3 CSDC.

81 Not that the proposal explicitly refers to the reduction of a (monetary) price. A “reduction” of (personal) data or similar remedy for contracts not entered in exchange for a price is not provided. Consumers will of course have the right to terminate the contract under additional circumstances (VII. B.).

82 For the seller’s duties regarding removal of non-conforming and installation of conforming goods, see polished tiles, C-65/09 & C-87/09, EU:C:2011:396.
interest in the conformity of the digital content. Apart from that, it may turn out difficult to define the (market) value of a digital content offered against counter-performance other than money.

**B. Art. 11 CSDC - Termination for the Failure to Supply**

According to Art. 11 CSDC, the consumer is entitled to terminate the contract if the supplier has failed to supply the digital content, which usually means that if the supplier does not provide the content immediately (Art. 5(2) CSDC), the consumer can unilaterally end the contract right away, without having to set any deadline or giving the supplier a second chance to provide access to the content.\(^3\) If however the contract is designed as a continuing obligation over a period of time, short\(^4\) interruptions of the supply are not deemed to be a failure of supply under Art. 11 CSDC, but are instead supposed to be treated as non-conformity with the contract under Art. 12 CSDC.\(^5\)

This brings us back to the aforementioned interruptions for maintenance purposes and lack of accessibility on the site of (the supplier’s) Access Providers or Cloud Computing Services, which – as part of (transparent!) Service Level Agreements, etc. – can be incorporated into the contract and thus shield the supplier from liability, indirectly limiting the consumers remedies. On the other hand, the proposal does not adopt Annex Art. 107 CESL exclusion of contracts not in exchange for a (monetary) price, granting consumers who “pay” with their data the exact same rights as everybody else.

Art. 11 has been criticized for not taking into account principle differences between tangible goods and digital content concerning the failure to supply, in particular supplying only some digital content.\(^6\) However, this criticism seems to be overstated as courts mostly assess a gross failure of supply as a non-supply in the end, thus granting the consumer the right to terminate. There is no evidence why for instance a obligation to deliver a certain amount of goods should be treated otherwise as digital content.

**C. Art 12(5) CSDC - Termination for Lack of Conformity**

If the supplier fails to remedy a lack of conformity and this deficiency also “impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security”, the consumer is entitled to terminate the contract without further notice. However, the consumer has no right to terminate the contract without giving the supplier a second chance to bring the digital content in conformity.\(^7\)

Again, the supplier bears the burden to show this is not the case (Art. 12(5) CSDC). Interestingly, the proposal does explicitly mention a failure to meet the digital content’s contractual purpose (if

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\(^3\) Recital 35 CSDC justifies this strict approach to the seriousness of such a breach of the main contractual obligation.

\(^4\) Yet again, the variety of contracts regarding digital content makes it impossible to define the duration of what is considered to be a „short” interruption, leaving this determination to the courts in the case at hand.

\(^5\) Recital 35 CSDC. While the proposal seems to indicate that long term interruptions are considered to be failures to supply, they should of course be treated as (serious) non-conformities with the contract, thus allowing the consumer to either terminate the contract or assert any of the other remedies of Art. 12 CSDC.


\(^7\) Critized by 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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 9 as some jurisdictions do not know such a hierarchy.
specifically agreed upon, see Art. 6(1)(b) CSDC), although this should at least fall under the open category of “other main performance features”.

However, the Commission also failed to mention cases where minor non-conformities add up over time and thus may warrant a termination of the contract even though the single deficiencies themselves would not warrant such a reaction. This includes cases of continuous short-term interruption, e.g. when a social network can frequently not be accessed by the consumer over a longer period of time. Though one may try to argue that an accumulation of minor performance failures also essentially impairs a “main performance feature”, it would be preferable if the Commission explicitly includes this category to avoid future controversy.

On the other side, and more from the perspective of industry, Art. 12 CSDC has also been critized for not dealing explicitly in the first place with “minor” non-conformity cases. As it may be true that a more transparent and clear wording of Art. 12 CSDC may be advisable, yet the structure and encompassing of “minor” non-conformity cases seems to be clear, at least for a legal educated person.

As clarified by the Commission, the consumer’s right to terminate a contract also encompasses partial terminations. If a contract is entered over a period of time, the consumer is entitled to terminate only the part of the contract which corresponds to the time when the digital content was not in conformity (Art. 13(5), recital 42 CSDC). Though not explicitly mentioned, the right to partially terminate the contract should also apply to contracts or bundles of contracts with different digital content or additional services.

D. Full Harmonization and Additional National Requirements

The Commission has been very clear about the need for a fully harmonizing Directive that would allow consumers to assert their rights in the same manner irrespective of their Member States, precluding any additional national requirements with respect to the consumer’s remedies regarding contracts that deal with digital content. Thus, any formal or substantive provisions requiring the consumer to notify the supplier of the lack of conformity or pay for the use of the (non-conforming) digital content before termination could not be sustained or subjoined by state legislation (recital 9 CSDC).

VIII. Art. 13 CSDC - Legal Consequences of Termination

The proposal contains various well-known as well as a couple of interesting new approaches regarding the legal consequences of a termination by the consumer (due to the content’s non-conformity with the contract or for other reasons), some of which coincide with rules of the GDPR. First, Art. 13(1) CSDC states that the consumer may exercise the right to terminate the content by

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89 Contracts in exchange for (personal) data are again excluded from this right, since it is unfeasible to proportionally apportion a counter-performance other than money (recital 42 CSDC). Considering contracts or bundles of contracts with different digital content and services, this may of course not always be the case.

90 See Explanatory Memorandum CSDC (n. 2) infra, recitals 5-9 CSDC.

91 Again, the proposal explicitly incorporates former ECJ decision on the Consumer Sales Directive to avoid future uncertainties, see Quelle AG, C-404/06 , EU:C:2008:231 (no charge for the use of goods not in conformity).
notice to the supplier “given by any means”, e.g. via telephone, email, etc.\textsuperscript{92} Thus, neither Member States with a particular focus on formalities nor the supplier may force the consumer to use a particular form of their choice – although this probably does not preclude the supplier from demanding some kind of authentication by the consumer. Moreover, there is no need for the consumer to go to court and seek a judicial termination of the contract – as obviously is the case in french law.\textsuperscript{93}

Along the lines of other consumer protection laws, Art. 13(2)(a) CSDC states that the supplier has to reimburse the consumer no later than 14 days after the receipt of the notice.\textsuperscript{94} As a matter of course, the consumer has to refrain from using the digital content (and return any durable medium), while the supplier may prevent any further use (e.g. by deleting the consumer’s account) (Art. 13(2)(d), (e), Art. 12(3) CSDC). On the other hand, the consumer is neither obliged to pay for the prior use of the digital content, nor does he have to bear the costs of returning a durable medium (Art. 13(2), (e), (i), Art. 13(4) CSDC). Regarding the obligation to delete or render unusable the digital content it may be difficult for the supplier to ensure that the consumer really has deleted the digital content\textsuperscript{95} – the likewise discussion concerning the transfer of software is a good example how difficult it could be for the supplier (as well as for the consumer) to get reliable evidence that the digital content has been removed. DRM-Systems can be here of help. Some commentators plead for an obligation of consumer to pay for the non-deleted digital content after termination of the contract.\textsuperscript{96} However, this would enable the consumer to continue de facto the contract and make use of the digital content without consent of the supplier – what contradicts for instance intellectual property rights.

However, the CSDC does not specify like the consumer rights directive (Art. 13(1)) how the reimbursement should be carried out (like in the same way as the payment etc.). Moreover, Art. 13 CSDC does not provide any specifications concerning interests to be paid in case of late reimbursements.\textsuperscript{97}

\textsuperscript{92} Critized by \textit{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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 13: more detailed provisions of means necessary.


\textsuperscript{94} The only thing that might potentially cause problems for consumers here is proving that the supplier actually has (or could have) received the notice.


\textsuperscript{97} Cf. \textit{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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 14 referring to the Art. L 121-21-4 al.3 of the French Code de consommation which has a form of escalation of interests according to the delay of reimbursement.
While the supplier must of course reimburse the consumer any (monetary) price paid, things again become a little more complicated for counter-performance other than money that can not actually be “reimbursed”. The Commission seeks to solve this issue by requiring the supplier to refrain from using any personal or other data provided in exchange for the digital content once the consumer terminates the contract (Art. 13(2)(b) CSDC). While at first glance, Art. (2)(b) CSDC seems to apply only to “free” contracts, its second part states that any data collected during any contractual relationship for the supply of digital content may also not be used after the termination, thereby mimicking Art. 17(2)(b) GDPR. Only user-generated content jointly created by several consumers is exempt from this duty, if the other consumers are still using it. Since the proposal does not however cover copyright law, these other creators may still be subject to potential copyright remedies by the consumer if provided by national law.

Besides being obliged to refrain from using the consumer’s data, the supplier also has to provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer’s use of the digital content (Art. 13(2)(c) CSDC). This consumer right is designed as one of the most important portability provisions in European law and may thus facilitate and encourage enhanced competition among different suppliers of similar services. Unlike Art. 18 GDPR, the proposal does not clearly state if “any other data” also includes personal data. However, the provision is phrased in such a broad way that it should encompass not just personal data, but any kind of user- and supplier-generated content as well as usage data. This also becomes apparent when looking at recital 37 CSDC, which follows a broad understanding of consumer data similar to the GDPR, and states that “the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used either by the supplier or by any other person”.

Again similar to the GDPR, the proposal does not however require the supplier to make sure that all consumer data which the supplier has provided to third parties is deleted. By the same token, the consumer cannot require the supplier to delete or retrieve anonymized or aggregated data, since identifying the consumer as the origin of such data is no longer possible.

98 Those technical means have to be provided free of charge, excluding internet costs (recital 40 CSDC).


100 Compare with Art. 17 GDPR.

101 See Art. 17(2)(a) (which does however require giving third parties notice of the consumer’s effort to delete the data)

Unlike Art. 17(3) GDPR, the proposal does allow for balancing the interests of the supplier or third parties to legitimately keep and use the data even after termination with the conflicting interests of the consumer. Hence, there is no chance for either of those parties to successfully claim that deleting the consumer’s data would render their own data useless – which might be the case even if the data was not generated in cooperation with the consumer. One example of such a scenario would be deleting communication data or online discussions, where the discussion itself can not be properly understood without the consumer’s questions or answers.103

IX. Art. 14 CSDC – Right to Damages

Finally, the proposed Directive also provides for damages as a remedy for the consumer (Art. 14 CSDC). Because of the broad scope and fully harmonizing character of the Directive, the precise requirements for holding the supplier are however somewhat nebulous. The supplier is “liable to the consumer for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.”104 Apparently, the Commission wants to restrict the supplier’s liability to damages to the digital environment, which seems to indicate that the consumer cannot assert consequential damages. This view may find support in the the fully harmonizing nature of the Directive as well as Art. 14(2) CSDC, which leaves the precise rules regarding the exercise of the right to the Member States,105 but not the subject and scope of the right itself. However, such an interpretation would of course have harsh consequences for consumers that were probably not intended by the Commission’s proposal.106 While suppliers could be held liable if his or her digital content contained for example viruses or malware and thereby caused damages to the consumer’s other software, consequential damages like those arising from third parties retrieving the consumer’s online banking passwords would not (and could not) be covered, even if those were foreseeable for the supplier.107

There are, however, other parts of the proposal that can be interpreted in a way that the Member States – despite its fully harmonizing character - may nonetheless provide additional remedies for the consumer. First, recital 16 CSDC states that while the Directive does cover visual modelling files for 3D printers, it should not regulate goods produced with the use of 3D printing technology

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103 This problem of tripolarity does however also occur under Art. 17(3)(a) GDPR.
104 Art. 14(1) CSDC.
105 See also recital 10 CSDC.
or the damage caused to them – which implies that the Member States may of course still provide corresponding remedies for such (consequential) damages. Apart from that, Art 14(1) CSDC offers a particular strong remedy without requiring the supplier to be at fault and thus imposing strict liability on the supplier even without the slightest degree of negligence. While this may be appropriate for damages to the consumer’s digital environment (which the supplier has the opportunity to analyze in advance), it would be too harsh to hold the supplier liable for any kind of distant event based on the non-conformity of the digital content. Though this principle does not apply to every kind of consequential damage, e.g. for damages resulting from a failure to meet particular purpose the parties agreed upon,\(^\text{108}\) the proposal should thus be interpreted (or modified) in the way that it seeks to confine strict liability to direct damages to the digital environment while not precluding further rights to (consequential) damages based on national law.\(^\text{109}\)

On the other hand, there is little reason to assume that the Member States would also be allowed to add a negligence requirement to those damages covered by the proposal. Since the proposal explicitly states that other Union acts take precedent over the CSDC, the new Directive would also not preclude any rights to damages based on other Directives. For example, the aforementioned liability for visual modelling files for 3D printers does not preclude additional rights to damages under the Product Liability Directive,\(^\text{110}\) e.g. for damages caused by the use of a defective instruction manual.

Though the Art. 14 CSDC generally provides consumers with a strong remedy for non-conforming digital content, it falls short with respect to the consumer’s burden of proof. The Directive neither contains a burden shift with respect to causation, nor does it effectively protect the consumer if the supplier tries to avoid liability by claiming contributory negligence on behalf of the consumer – e.g. due to installing non-compatible software by a third party developer or other digital content. While both scenarios are of practical importance and may place considerable obstacles on claims for damages, consumers might at least be able to rely on a potential burden shift regarding a (mutual) obligation to cooperate, Art. 9(3) CSDC.

X. Defects Liability Period and Statute of Limitation

Probably the most surprising aspect of the CSDC proposal (at least at first glance) is the Directive’s determination of the period during which the supplier can be held liable for digital content not conforming with the contract – or more precisely: the lack thereof. While the Consumer Sales Directive establishes a liability period of two years,\(^\text{111}\) the Commission now simply states that since digital content is not subject to wear and tear, it will not provide any liability period whatsoever and

\(^{108}\) Unfortunately, the Commission has not included such damages in Art. 14 CSDC, even though they are part of the conformity with the contract, Art. 6(1)(b) CSDC. Under German law, this idea can be found in § 443 Abs. 1 BGB. See Matusche-Beckmann, in: Staudinger, Neubearb. 2013, § 443 Rn. 1, 2 ff.; Faust, in: BeckOKBGB, (o. Fußn. 6), § 443 Rn. 1 ff.

\(^{109}\) See also the criticism of 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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 17; Mak, The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content, Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.494 p. 27.


\(^{111}\) Art. 5(1) Consumer Sales Directive.
that Member States should refrain from introducing such a period themselves.\textsuperscript{112} However, what may at first seem like infinite liability proves to be not much more than a different legislative technique: though the Member States are preempted from establishing a period of liability, they can still rely on limitation periods instead.\textsuperscript{113}

Thus, the Member States are free to limit consumer rights by virtue of a statute of limitation for digital content.\textsuperscript{114} Even though the principle of \textit{effet utile} should hinder states in choosing an all too short period of time, this approach is not only quite a liberal one for purposes of a fully harmonizing Directive, but may even thwart the Commission’s intentions by ultimately creating a diverse landscape of national rules on a central issue of consumer protection. It is finally up to the member states to define the end of the liability period – which is quite the opposite of a european harmonization.

\section*{XI. Art. 15 CSDC - Modification of the Digital Content}

Since the proposal covers all kinds of contracts that deal with digital content – including recurring obligations over a period of time – it has also had to deal with potential changes to the contractual content. Art. 15(1) CSDC gives the supplier a right to alter the digital content’s functions, interoperability and other features, e.g. to adapt to changes in the digital environment such as new operating systems, but sets up a couple of conditions: the right to modify the contract has to be stipulated in the contract, the consumer has to be notified reasonably in advance and the consumer has to be allowed to terminate the contract within 30 days of the receipt of said notice.\textsuperscript{115} While the consumer may exercise his right to terminate the contract by any given means (Art. 13(1) CSDC), the supplier has to submit his notification on a durable medium (Art. 15(1)(b) CSDC). Just like in other consumer protections laws, this requirement is meant to prevent the supplier from altering the notification \textit{ex post}.\textsuperscript{116} However, Art. 15 CSDC does not provide a test if the changes to the digital content adversely affects the consumer; given the wording of Art. 15 CSDC the right to terminate the contract even would apply in situations of a reasonable modification of the digital content.\textsuperscript{117}

On the other hand, Art. 15 CSDC lowers considerably the requirements for modification which already has been developped by national courts as well as the ECJ, for instance modifications of price in energy or power contracts.

Art. 15(2) CSDC provides for simliar consequences to the consumer’s termination of the contract as Art. 13 CSDC, also requiring that the supplier refrain from using any (personal and non-personal)

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} Recital 43 CSDC.
\item \textsuperscript{113} Recital 43 CSDC (“prescription rules”).
\item \textsuperscript{114} cf. also \textit{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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 12.
\item \textsuperscript{115} Art. 15(1)(a)-(c) CSDC. Of course, the right to terminate entails all termination related rights as provided by Art. 13 CSDC (and specified by Art. 15(2) CSDC), which also includes the right to retrieve one’s digital content (Art. 13(1)(d) CSDC).
\item \textsuperscript{116} Hence, a notification on websites, social networks or other non-durable media does not suffice. Content Services Ltd/Bundesarbeitskammer, C-49/1, EU:C:2012:419; furthermore Wendehorst, in: Schulze (Ed.), Common European Sales Law, 2012, Art. 2 Rn. 54 with regard to the comparable article in the CESL, see Art. 8 (2) CESL.
\item \textsuperscript{117} Cf. \textit{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), Workshop of JURI-Committee of the European Parliament, Jan. 2016, PE 536.495 p. 18/19.
\end{itemize}
\end{footnotesize}
data of the consumer. While the proposal appears to specifically (and exclusively) determine the consequences for an Art. 15-termination, it fails to include several necessary provisions, such as the consumer’s obligation to refrain from using the digital content after termination or the means by which the consumer may exercise his or her right. One is thus left to assume that all provisions of Art. 13 CSDC are nonetheless supposed to apply to Art. 15-terminations – as long as the article itself does not explicitly specify them for its purposes.

XII. Art. 16 CSDC – Right to terminate long term contracts

Art. 16 CSDC provides for another consumer right to terminate the contract in cases where this is stipulated to last for an indeterminate period or a period of time that exceeds 12 months. Since provisions like this are always prone to be circumvented by contractual agreements designed to have similar effects (e.g. by automatic extensions, a line subsequent agreements, etc.), the Commission has made clear that Art. 16 CSDC should cover all kinds of contracts that effectively bind the consumer for more than 12 months, irrespective of their particular design (recital 46 CSDC).

The consequences of terminating the contract under Art. 16 CSDC reflect those set out by Art. 13 CSDC. However, there are some differences in detail: As the supplier may immediately restrict the access of the consumer to the digital content the consumer may be confronted with difficulties in order to retrieve his data; Art. 16(4) CSDC just refers to a “reasonable time” without specifying it. The period (and limitation to) of 12 months seems to be arbitrarily chosen – investments may be also worthwhile to protect at a longer level or vice versa. Hence, a case-by-case approach and a more flexible regime has been proposed by some commentators. However, even if may be arbitrarily to fix the threshold at 12 months the right to terminate long term contracts has also to take into account legal certainty and reliability.

XIII. Miscellaneous Provisions

A. Art. 17 CSDC - Right of Redress

Similar to the Consumer Sales Directive, the proposed Directive would encompass an independent right to redress for a supplier against other persons in the chain of transactions. The details are to be determined by national law.

B. Semi-Compulsory Nature

As a matter of course for a consumer protection Directive, the Member States may only deviate from the Directive’s rules for the benefit of the consumer. This comes along with the well known

118 The clause thereby also entails the same problems as discussed above.
119 One argument for the article’s exclusiveness may be seen in Art. 13(1)(d) CSDC, which only refers to a specific provision of Art. 13 CSDC, seemingly leaving out the rest intentionally.
122 Art. 4 CSD.
problem of determining whether the effect of deviating national rules is actually beneficial for the consumer or not.\textsuperscript{123}

C. Actions by Consumer Interests Organizations

Finally, Art. 20(3) CSDC would amend Directive 2009/22/EC\textsuperscript{124} to allow public interest organizations and independent public bodies to help protect consumer rights under the CSDC by way of action.

XIV. Conclusion

The Commission’s proposal for a Directive on contracts for the supply of digital content (CSDC) is a bold step in the right direction, which unlike the CESL proposal dares to break away from the traditional model of typological distinctions between different kinds of contracts and contractual obligations regarding the supply of digital content. The Commission is right in choosing a new path of regulating such contracts, making regulatory use of a high level of abstraction as the only way to keep pace with the industry’s high level of technical innovation and the continuous appearance of new business models.

On the other hand, the proposal comes with multiple different problems and legal uncertainties – some of which are less inevitable due to its broad scope and abstract nature, while others call for changes of the Commission’s current version of the Directive. Among them are several issues regarding the precise scope of and exception to the Directive, the objective and subjective criteria by which the digital contents’ conformity with the contract is determined, and the level of transparency required stipulating the parties’ contractual obligations - by both general terms and conditions and individual agreements.

Furthermore, several aspects of the Commission’s proposed framework for the consumer’s rights to damages should be reconsidered or clarified, particularly with respect to the scope of the Directive’s concept of strict liability. As a major contradiction and threat to the proposal’s intention to fully harmonize national laws, the statute of limitations for contracts that deal with digital content should not be left unregulated since it serves as the only actual period of limitation and thus as a pivotal element to the consumers’ rights and remedies. If the Commission is however successful in solving these issues in the final version of the CSDC, the benefits for the consumers as well as for the Single Market as a whole should very well outweigh the challenges it entails.

\textsuperscript{123} Assessments of this kind always have to take into account the individual consequences of the contractual agreement, not the overall effect.