

# The Directive Proposals on Online Sales and Supply of Digital Content (Part II): conformity and remedies for lack of conformity\*

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## Abstract

This article aims to critically analyse the two proposals for Directives that the European Commission launched on 9 December 2015: the Online Sales Directive and the Digital Content Directive. Both proposals are part of the Digital Single Market Strategy for Europe. Their main objective is to eliminate one of the barriers to cross-border trade: differences in contract law between Member States. This article is structured in two parts, published separately. This second part of the article highlights the most significant rules governing conformity and the remedies for lack of such conformity with regard to each proposed Directive. It also raises questions as to the justification of their particular format. It can be concluded that the Online Sales Directive introduces some improvements and clarifications to the Consumer Sales Directive that will either increase or maintain the current level of consumer protection in most Member States. Nevertheless, in some Member States the Online Sales Directive will undoubtedly lead to a reduction in the existing level of protection. The Digital Content Directive rules on conformity and the remedies for lack of conformity of digital content also raise some significant issues. It can be argued that some rules need to be clarified or revised. They include the rule under which contractual terms take precedence over objective criteria when assessing the conformity of digital content and the provision on damages that limits the consumer's right to seek compensation for damages incurred in their digital environment.

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**Keywords**

Digital Single Market, full harmonisation, consumer protection, online sales, supply of digital content, remedies for lack of conformity

**Topic**

consumer protection in online sales and supply of digital content

## *Las propuestas de directiva sobre compraventa en línea y sobre suministro de contenidos digitales (Parte II): conformidad y remedios por falta de conformidad*

**Resumen**

*El presente artículo tiene como objeto el análisis crítico de las dos propuestas de directiva que la Comisión Europea presentó el 9 de diciembre de 2015: la Directiva sobre compraventa en línea y la Directiva sobre contenidos digitales. Ambas propuestas forman parte de la Estrategia para un Mercado Único Digital para Europa. Su principal objetivo es eliminar una de las barreras del comercio transfronterizo: las diferencias entre el derecho contractual de los Estados miembros. Este artículo se estructura en dos partes, publicadas de forma separada. Esta segunda parte del artículo analiza las principales reglas por las que se rigen la conformidad y los remedios por falta de conformidad en cada una de las directivas propuestas. Además, plantea la cuestión de la justificación de la existencia de normas particulares para este tipo de contratos. Se puede concluir que la Directiva sobre compraventa en línea introduce algunas mejoras y aclaraciones respecto de la Directiva sobre venta de bienes de consumo, que incrementarán o mantendrán el nivel actual de protección de los consumidores en la mayoría de los Estados miembros. No obstante, en algunos Estados miembros, la Directiva sobre compraventa en línea, indudablemente, supondrá una reducción del nivel existente de protección. Las reglas de la Directiva sobre contenidos digitales relativas a la conformidad y los remedios por falta de conformidad de los contenidos digitales también plantean algunas cuestiones importantes. Se puede afirmar que algunas reglas necesitan ser aclaradas o revisadas. Entre otras, la regla según la cual prevalecerán los términos contractuales sobre los criterios objetivos en la evaluación de la conformidad de los contenidos digitales y la regla sobre daños y perjuicios que limita el derecho de los consumidores a solicitar una indemnización para aquellos daños causados a su entorno digital.*

**Palabras clave**

*Mercado Único Digital, armonización completa, protección del consumidor, compraventa en línea, suministro de contenidos digitales, subsanación en caso de falta de conformidad*

**Tema**

*protección del consumidor en la compraventa en línea y en el suministro de contenidos digitales*

## 1. Introduction

This paper aims to critically analyse the two proposed Directives that the European Commission launched on 9 December 2015, namely the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (the “Digital Content Directive” or “DCD”)<sup>1</sup> and the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (the “Online Sales Directive” or “OSD”).<sup>2</sup> Both proposals are part of the Digital Single Market Strategy for Europe adopted by the European Commission in May 2015. This strategy aims to transform the current 28 national digital markets into a EU digital single market by tackling all major obstacles to the development of cross-border e-commerce in Europe.<sup>3</sup> The Commission estimates that dismantling these barriers would increase European GDP by €4 billion per year.<sup>4</sup>

The Council has given priority to the consideration of the Digital Content Directive over the Online Sales Directive, which is being discussed in Council working group.<sup>5</sup> Both the Council working group and the Parliament have welcomed the proposal on Digital Content, with some reservations.<sup>6</sup>

This article is structured in two parts, which will be published separately.

- Part I, entitled “Will the new rules attain their objective of reducing legal complexity?”, was published in the last issue of the journal. It aims at answering the question of whether the new rules will attain their objective of reducing the legal complexity of online sales and supply of digital content in Europe. Firstly, it briefly introduces the purpose of the Directives and their precedents. And

secondly, with regard to each Directive, it discusses what kind of contracts are covered by the Directives, how these contracts are currently regulated in Europe and what the implications of the new Directives are, if adopted, for the contract law of Member States.

- Part II, entitled “Conformity and remedies for lack of conformity”, is published in this issue of the journal. It highlights the most significant rules governing conformity and remedies for lack of such conformity with regard to each proposed Directive. It also raises questions as to the justification of their particular format. These will include suggestions that I consider need to be clarified or revised.

## 2. Online Sales Directive: new elements and clarifications as introduced compared to the Consumer Sales Directive 1999/44/EC

The Online Sales Directive takes as its basis the existing Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees<sup>7</sup> (the “Consumer Sales Directive 1999/44/EC” or “CSD”). However, the proposal introduces some improvements and clarifications to the latter that are to be welcomed because they will either increase or maintain the current level of protection in most Member States, albeit only in relation to online sales and other distance sales of goods.<sup>8</sup> In this section I discuss the most important changes that

1. Brussels, 9.12.2015, COM (2015) 634 final.

2. Brussels, 9.12.2015, COM (2015) 635 final.

3. European Commission (2014, p. 3). According to this communication, fragmentation and barriers in the European digital market prevent Europe from making the most of its capabilities to lead the global digital economy. A Digital Single Market is “one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence”.

4. Explanatory memorandum OSD, p. 12.

5. See Council of the European Union (2016, p. 2). The European Economic and Social Committee also considers that “the rules on sales of digital content [are] the priority” [see European Economic and Social Committee (2016, conclusions and recommendations no. 1.10)].

6. H. Beale (2016b, p. 11). See Council of the European Union (2017) and European Parliament (2016a) and (2016b).

7. Official Journal L 171, 07/07/1999, Pp.

8. The Online Sales Directive only applies to sales contracts for tangible movable goods that are concluded online or through any other means of distance communication, such as telephone or postal mail [Arts. 1 and 2.e) OSD].

the approval of the Online Sales Directive would entail for the law of the Member States.

## 2.1. Conformity criteria of the goods with the contract

Under the Online Sales Directive, the conformity criteria of the goods with the contract are fully harmonised by applying a combination of subjective and objective requirements,<sup>9</sup> primarily following the rules laid down in the Consumer Sales Directive (Art. 2 CSD).<sup>10</sup>

In any case, the conformity of the goods should be assessed *with regard to the relevant contract terms*, including any pre-contractual statement which forms an integral part of the contract.

According to Article 4.1 OSD, goods shall be: a) "of the quantity, quality and description required by the contract [...]";<sup>11</sup> and b) "fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted".

Additionally, the conformity standards as set forth in the contract can be raised taking into account certain objective requirements which constitute the *standards normally expected for goods* (Art. 4.2 OSD).<sup>12</sup> These objective requirements as laid down in Articles 5, 6 and 7 OSD apply unless the parties have agreed otherwise. In particular, the goods shall, where relevant:

a) *Be fit for the standards normally expected for the goods* (Art. 5 OSD). In particular, their fitness shall be "for all the purposes for which goods of the same description would ordinarily be used" [Art. 5.a) OSD]; accessories will be deemed to include, "packaging, installation instructions or other instructions as the consumer may expect to receive"

[Art. 5.b) OSD]; and the normal qualities and performance capabilities of the goods shall meet the standard of "goods of the same type and which the consumer may expect given the nature of the goods" [Art. 5.c) OSD].<sup>13</sup>

b) *The goods in question shall be properly installed* (Art. 6 OSD). Any lack of conformity resulting from incorrect installation of the goods must be considered as constituting a lack of conformity with the contract if the reason for the incorrect installation is within the seller's area of responsibility, either because the goods were installed by the seller or under his responsibility [Art. 6.a) OSD] or because the goods were installed by the consumer but the incorrect installation is due to incorrect instructions [Art. 6.b) OSD].<sup>14</sup>

c) *Be free from any third-party rights, including those based on intellectual property* (Art. 7 OSD). Thus the Online Sales Directive explicitly establishes that conformity covers not only material defects but also legal defects.

The Online Sales Directive grants to the parties freedom of contract regarding the objective conformity criteria.<sup>15</sup> Standards normally expected for the goods can be lowered by agreements excluding or limiting the effects of Articles 5 and 6 to the detriment of the consumer, for instance if the goods sold are faulty.<sup>16</sup> This agreement is only valid if "at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract" (Art. 4.3 OSD).

## 2.2. The consumer's remedies for lack of conformity with the contract

2.2.1. Hierarchy of the consumer's remedies for lack of conformity  
In relation to the consumer's remedies for lack of conformity, the Online Sales Directive fully harmonises the hierarchy

9. Recital 19 OSD.

10. J. Smits (2016, p. 9). For in-depth analysis of the conformity criteria of the goods with the contract in Spanish, see E. Arroyo Amayuelas (2016, pp. 7-11).

11. "[...] which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model" [Art. 4.1.a) OSD].

12. J. Smits (2016, p. 9).

13. Recital 19 OSD.

14. Recital 20 OSD.

15. Recital 22 OSD.

16. J. Smits (2016, p. 9).

of the consumer's remedies for lack of conformity, following the two-step remedy system laid down in the Consumer Sales Directive 1999/44/EC. At present national provisions transposing the latter are subject to minimum harmonisation, so there is notable divergence in this matter. Most Member States, such as Spain,<sup>17</sup> have come to recognise a hierarchy of remedies.<sup>18</sup> However, a few Member States grant consumers a free choice of remedies or add some additional ones.<sup>19</sup> These differences are considered by the Online Sales Directive to constitute one of the main inhibiting obstacles impeding the achievement of a Digital Single Market.<sup>20</sup>

Article 9 OSD lists the consumer's remedies for lack of conformity with the contract and fully harmonises the order in which consumer is entitled to have the goods brought into conformity by the seller:

- a) *As a first step, the consumer is entitled to choose between repair and replacement of the goods* (Art. 9.1 OSD), unless the option chosen cannot be achieved or is unlawful or disproportionate compared to the other option (Art. 11 OSD). The seller shall complete the repair or replacement within a reasonable time and without any significant inconvenience to the consumer (Art. 9.2 OSD). The nature of the goods and the purpose for which the consumer required the goods have to be taken into account in determining what constitutes reasonable time (Art. 9.2 OSD).
- b) *As a second step, the consumer is entitled to a price reduction or to terminate the contract*, where the lack of conformity is not or cannot be remedied through repair or replacement (Art. 9.3 OSD). This article clarifies the current Consumer Sales Directive 1999/44/EC, stipulating

that the consumer shall also be entitled to termination or price reduction if "the seller has not completed repair and replacement within a reasonable time" [Art. 9.3.b) OSD].

- c) Another clarification introduced by the Online Sales Directive in comparison with the Consumer Sales Directive 1999/44/EC is that the former expressly recognises the consumer's right "*to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract*" (Art. OSD 9.4). Currently this right can be found in the national laws of all Member States.<sup>21</sup>
- d) However, the proposal fails to recognise "*the consumer's right to immediately return the goods and to have their payment reimbursed if the goods delivered are not in conformity with the contract.*" With some variations, this right is currently regulated in six Member States (Greece, Portugal, Ireland, the United Kingdom, Denmark and Lithuania).<sup>22</sup> The eventual approval of the Online Sales Directive would have as a consequence what amounts to a reduction in consumer protection in those Member States.

#### 2.2.2. Introduction of the consumer's right to terminate the contract also in the case of minor defects

One important new feature introduced by the Online Sales Directive, compared to the current position under the Consumer Sales Directive 1999/44/EC, is recognition of the consumer's right to terminate the contract for minor breach where repair or replacement are not possible or have failed. The Consumer Sales Directive 1999/44/EC excludes the consumer's right to terminate the contract "if the lack of conformity is minor" (Art. 3.6 CSD). According

17. See Arts. 118 and following of the Spanish Consumer Protection Act introduced by Royal Decree 1/2007, 16 November (BOE no. 287, 30.11.2007).
18. According to the explanatory memorandum OSD, p. 6, "20 Member States have followed this approach (Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Latvia, Luxemburg, Malta, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden)".
19. For instance, some Member States currently recognise "the right to reject non-conforming goods within a short deadline" (Explanatory memorandum OSD, p. 6).
20. Recitals 5 and 26 OSD.
21. J. Smits (2016, p. 12).
22. The European Economic and Social Committee (2016, comment 4.2.5.7) has noted this point of criticism. H. Beale (2016a, p. 19) points out that this right is recognised in the UK under the Consumer Rights Act 2015 (ss. 19 and 20), according to which the consumer has an immediate "'short term right to reject' the goods and terminate the contract without first having to seek repair or replacement and with no deduction for use or decrease in value of the goods".

to the recitals of the Online Sales Directive: "this would provide a strong incentive to remedy all cases of lack of conformity at an early stage".<sup>23</sup> Certainly, this rule would reinforce the consumer's right to terminate the contract and lead to a higher level of consumer protection in distance contracts.<sup>24</sup>

### 2.2.3. Termination by notice and the legal consequences of termination by the consumer

Concerning the right to terminate the contract, the Online Sales Directive also clarifies that the exercise of this right must be by way of notice to the seller given by any means (Art. 13.1 OSD). Even though the Consumer Sales Directive 1999/44/EC does not have any provision on this matter, in most Member States termination is currently exercised by way of notice and in some EU jurisdictions must be by way of a court order.<sup>25</sup>

The proposed Directive also introduces new rules about partial termination. In case of acquisition of multiple goods in a single contract, if the lack of conformity affects only some of the goods, the Directive specifies that, as a rule, the termination must be partial, unless some goods were an accessory to the main item which the consumer would not have acquired without the main item (Art. 13.2 OSD).<sup>26</sup>

As for the main effects of the termination, unlike the Consumer Sales Directive 1999/44/EC, the Online Sales Directive expressly regulates - in Art. 13.3 - the obligation imposed on the parties to return what they have received: on the one hand, the seller shall be obliged to refund the price received from the consumer within a maximum period of 14 days and on the other the consumer in turn shall

return the non-conforming goods, at the seller's expense, also within a maximum period of 14 days. Finally, Article 13.3.c) and d) stipulates that the consumer has an obligation to pay for the decrease in value of the goods though this is limited to those situations where the decrease arises over and above normal use. The payment for decrease in value shall not exceed the price paid for the goods. If the return of the goods is impossible due to their destruction or loss, the consumer should pay the monetary value of the goods unless the destruction or loss is caused by the lack of conformity.<sup>27</sup>

### 2.2.4. Developments in time limits

The Online Sales Directive introduces the following important developments with regard to time limits compared to the current position under the Consumer Sales Directive 1999/44/EC. The Online Sales Directive:

a) *Retains the two-year legal period during which the seller can be held liable for the lack of conformity* (Art. 14 OSD).<sup>28</sup> Although the Consumer Sales Directive 1999/44/EC for its part also provides the same period (Art. 5.1 CSD),<sup>29</sup> currently national transposing legislation differs in this point. Most Member States have established a two-year period, but in some EU jurisdictions this period is longer or even unlimited.<sup>30</sup> If accepted, the Online Sales Directive would fully harmonise the two-year period only for online sales and other distance sales of goods. This change would not affect the Spanish legal system which has implemented the two-year period.<sup>31</sup> However, in some Member States the Online Sales Directive will undoubtedly lead to a reduction in the existing level of protection.<sup>32</sup>

23. Recital 29 OSD.

24. J. Smits (2016, p. 13) and H. Beale (2016a, pp. 16-17).

25. H. Beale (2016a, p. 17).

26. Recital 29 OSD.

27. Recital 31 OSD.

28. See Art. 8 OSD, regarding the relevant time for establishing conformity with the contract.

29. E. Arroyo Amayuelas (2016, pp. 14-15) points out that now the two-year legal period is also applicable in case of non-conformity of second-hand goods and for legal defects.

30. See Explanatory Memorandum OSD, which adds that in two other Member States (Ireland and the United Kingdom) "there is no specific legal guarantee period, but consumer rights are limited by the prescription period" and recital 32 OSD.

31. Art. 123.1 Spanish Consumer Protection Act.

32. See European Economic and Social Committee (2016, comment 4.2.5.10), that points out that "the period should take into account the existing guarantee periods in some Member States (Finland, Netherlands, Sweden and the United Kingdom) which take into account the durability and built-in obsolescence of products".

b) *Extends the period of the presumption of non-conformity of the goods to two years* (Art. 8.3 OSD).<sup>33</sup> In effect, the seller shall only be liable if the lack of conformity of the goods with the contract existed at the time when the consumer acquired physical possession over the goods in question (Art. 8.1 OSD). During a certain period, the burden of proof shifts to the seller, who has to prove the absence of lack of conformity at that time. Under the Consumer Sales Directive 1999/44/EC, the minimum period of reversal of proof is six months (Art. 5.3 CSD). This provision has been implemented differently by the Member States: some have followed the minimum period of the Directive, such as Spain,<sup>34</sup> whereas others have extended it. The Online Sales Directive fully harmonises the two-year period of reversal of burden of proof, but only for online sales and other distance sales of goods. This rule will lead to a higher level of consumer protection in distance contracts.<sup>35</sup>

#### 2.2.5 Elimination of the consumer's duty to notify the lack of conformity

Finally, the Online Sales Directive eliminates the optional requirement, recognised under the Consumer Sales Directive 1999/44/EC, to introduce or maintain the consumer's duty to notify the lack of conformity to the seller within a certain period of time from its discovery. Currently, some national legislation, transposing the Consumer Sales Directive 1999/44/EC, contain such provisions, as is the case with Article 123.5 of the Spanish Consumer Act. The recitals to the Directive point out that the elimination of this notice requirement for online sales is justified particularly with regard to cross-border transactions, where the consumer might very well not be aware of this duty and could easily lose otherwise well-substantiated claims where notification is delayed or

absent.<sup>36</sup> This rule effectively reinforces the consumer's rights and will lead to a higher level of consumer protection in distance contracts.<sup>37</sup>

### 3. Digital Content Directive: the main differences in relation to the Online Sales Directive

The Digital Content Directive also takes as its basis the current Consumer Sales Directive 1999/44/EC, but in addition it introduces new rules concerning contracts for the supply of digital content. Some of the new rules have already been mentioned in relation to the Online Sales Directive.<sup>38</sup> This section examines the specific rules on conformity and remedies for lack of conformity that the Digital Content Directive will introduce to deal with the problems that consumers face in this kind of contracts and the justification for their particular format.

#### 3.1. Conformity criteria of digital content with the contract

As with the Online Sales Directive, the Digital Content Directive fully harmonises the conformity criteria of digital content with the contract, applying a combination of subjective and objective criteria (Art. 6 DCD). However, the latter differs from the former in two aspects:

Firstly, the conformity provision includes special requirements specifically relevant to the digital environment, namely the functionality<sup>39</sup> and interoperability<sup>40</sup> of the digital content, and other performance features, such as accessibility, continuity and security.<sup>41</sup>

33. Recital 32 OSD notes that "in order to ensure higher awareness of consumers and easier enforcement of the Union rules on consumer's rights in relation to non-conforming goods, this Directive should align the period of time during which the burden of proof is reversed in favour with the period during which the seller is held liable for any lack of conformity".

34. Art. 123.1 Spanish Consumer Protection Act.

35. J. Smits (2016, p. 10).

36. Recital 25 OSD.

37. J. Smits (2016, pp. 15-16).

38. H. Beale (2016a, p. 17).

39. "Functionality" refers to the ways in which digital content can be used including "the absence or presence of any technical restrictions" (Recital 26 DCD).

40. "Interoperability" refers to "the ability of digital content to perform all its functionalities in interaction with" the consumer's hardware and software (Art. 2.9 DCD).

41. R. Maňko (2016, p. 5); H. Beale (2016a, p. 20).

Secondly, whereas under the Online Sales Directive the subjective and objective criteria are cumulative, in contrast under the Digital Content Directive the contractual terms take precedence over the objective criteria.<sup>42</sup> In other words, the digital content:

a) Must primarily conform to *what was promised in the contract*.

In particular, according to Article 6.1 DCD, the contractual requirements might refer to “quantity, quality, duration and version and [...] functionality, interoperability and other performance features such as accessibility, continuity, and security [...]” [Art. 6.1.a) DCD]. Additionally, digital content must be fit for “any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted” [Art. 6.1.b) DCD]. And, when the contract so stipulates, digital content must “be supplied along with any instructions and customer assistance” [Art. 6.1.c) DCD] and “be updated” [Art. 6.1.d) DCD].

b) Only in the absence of clear benchmarks in the contract must the conformity of the digital content be assessed according to objective criterion. That is to say, it must *be fit for the purposes for which digital content of the same description would normally be used*.<sup>43</sup>

Including, according to Article 6.2 DCD: “[...] its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account: a) whether the digital content is supplied in exchange for a price or counter-performance other than money; b) any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices;<sup>44</sup> and c) any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions” (Art. 6.2 DCD).

The Digital Content Directive recitals justify this rule on the basis that it is necessary “to promote innovation in the Digital Single Market and cater for technological developments reflected in the fast changing characteristics of digital content”.<sup>45</sup> However, this rule has been the subject of much criticism because it would effectively weaken the protection available to the consumer.

Such a rule may imply that suppliers of digital content could impose on consumers very weak conformity requirements in the contract, generally under standard terms and conditions, in order to avoid liability for non-conformity. Besides, this rule places the onus on consumers to carefully read the contract terms. However, empirical studies show that consumers do not read the contract terms, and even if they read them, it is very unlikely that, due to the complexity of digital content, the average consumer would fully understand the legal and technological terms used in the contract. For these reasons, it is my considered view that the Digital Content Directive should follow the Online Sales Directive on this point, thereby re-establishing the right balance between consumer’s and supplier’s interests.<sup>46</sup>

c) In addition, and in any case, in order to conform with the contract, *the digital content must meet two additional requirements* (Arts. 7 and 8 DCD). Firstly, the digital content must be properly integrated in the consumer’s hardware or software. Incorrect integration will be considered a lack of conformity if the reasons for the incorrect integration come under the scope of the supplier’s responsibility (Art. 7 DCD). Secondly, as well as in the Online Sales Directive, likewise in the Digital Content Directive *conformity covers not only material defects, but also legal defects*. The latter being especially important for digital content, which by its very nature is subject to intellectual property rights.

d) Finally, the Digital Content Directive contains two clarifications: firstly, where according to the contract the

42. V. Mak (2016, p. 15); H. Beale (2016a, pp. 20-21).

43. Recital 25 DCD.

44. Recital 28 DCD points out that “the Commission may consider the promotion of the development of international and European standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of the Directive”.

45. Recital 24 DCD.

46. This viewpoint has been put forward by the Council of the European Union (2016, p. 10), the European Law Institute (2016, pp. 18-19) and the most prominent scholars: see H. Beale (2016a, p. 21), V. Mak (2016, p. 15) and S. Cámara Lapuente (2016, pp. 28-30).



digital content shall be supplied over a period of time (for instance in cases involving access to cloud services over a period of time), the digital content must be in conformity with the contract throughout the duration of the contract (Art. 6.3 DCD)<sup>47</sup>. Secondly, unless the parties have agreed otherwise, the supplier must provide “the most recent version of the digital content which was available at the time of the conclusion of the contract” (Art. 6.4 DCD).

### 3.2. Consumer remedies for failure to supply and for lack of conformity of the digital content

#### 3.2.1. The consumer’s remedy of immediate termination for failure to supply

Unless otherwise agreed, the supplier must supply the digital content “immediately after the conclusion of the contract” (Art. 5.2 DCD). Unlike the Online Sales Directive, the Digital Content Directive expressly sets forth the supplier’s liability when that party has failed to supply the digital content on time (Art. 10 DCD).<sup>48</sup> In this case the consumer is entitled to terminate the contract immediately (Art. 11 DCD) and to claim for damages (Art. 14 DCD).<sup>49</sup>

The failure of the supplier to supply the digital content is a serious breach of its main contractual obligations that might well justify the termination of the contract in most cases. However, as the European Law Institute Statement on the proposed Directive has pointed out, this remedy might not be appropriate if the digital content has been developed according to the consumer’s specifications, irrespective of the reasons for the delay.<sup>50</sup>

#### 3.2.2. The hierarchy of consumer remedies for lack of conformity

As regards the consumer’s remedies for lack of conformity, the Digital Content Directive follows the two-step remedy system laid down in the Online Sales Directive (Art. 12 DCD). However, it introduces some variations that take into account the specific features of digital content.

- a) As a first step, *the consumer is entitled to have the digital content brought into conformity with the contract* within a reasonable time, without any significant inconvenience to the consumer and free of charge, unless this is impossible, disproportionate or unlawful (Art. 12.1 DCD). Unlike the Online Sales Directive, the Digital Content Directive does not refer to repair or replacement and gives the supplier the right to select the specific way in which the digital content is to be brought into conformity with the contract, depending on its technical characteristics.<sup>51</sup> As Prof. Vanessa Mak suggests, this rule makes sense, since the large variety of possible formats of digital content makes it more difficult to distinguish between the sub-forms of bringing the digital content into conformity with the contract. For instance, a movie file might be replaced, but repairing it is harder to imagine.<sup>52</sup>
- b) As a second step, *the consumer is entitled to a price reduction or to terminate the contract* where the digital content is not or cannot be brought into conformity with the contract (Art. 12.2 DCD). The remedy of a proportional price reduction is only available if the digital content was supplied in exchange for payment of a price (Art. 12.3 DCD).
- c) Nonetheless, the Digital Content Directive *does not recognise the consumer’s right to withhold the payment of the price until the supplier has brought the digital content into conformity with the contract*. This rule, as laid down in the Online Sales Directive, should also be recognised for the supply of digital content, mainly in cases where the digital content is supplied over a period of time in exchange for payment of a price.<sup>53</sup>

#### 3.2.3. The consumer’s right to damages

In any case, the Digital Content Directive establishes the consumer’s right to seek compensation for any economic damage caused by a lack of conformity or the failure to supply (Art. 14 DCD). The detailed conditions for the exercise

47. Recital 29 DCD.

48. H. Beale (2016a, p. 22).

49. Recital 35 DCD clarifies that in long-term contracts, if the supply of the digital content is interrupted, but only over a short period of time, remedies for non-conformity with the contract should apply.

50. European Law Institute (2016, p. 5).

51. Recital 36 DCD.

52. V. Mak (2016, p. 24).

53. European Law Institute (2016, p. 6).

of the right to damages are up to the Member States themselves (Art. 14.2 DCD). The provision on damages is remarkable for two reasons.

- a) Firstly, because it establishes rules with regard to the remedy of damages when as a general rule consumer law Directives do not provide for this remedy, whose regulation is left to national laws.<sup>54</sup> For instance, the Online Sales Directive leaves the provisions on the consumer's right to receive compensation for damages due to lack of conformity entirely up to the Member States' domestic legislation (Art. 1.4 OSD).
- b) Furthermore, and more importantly, because the provision on damages in the Directive limits the right to damages to those incurred in the consumer's digital environment<sup>55</sup> (Art. 14.1 DCD). The interpretation of this provision raises serious doubts due to the full harmonisation approach of the Directive. Does this rule prevent Member States from enacting or maintaining rules on the right to damages that provided compensation for other kinds of loss, such as damages to other property, personal injuries and pain and suffering?; for instance, if the consumer is injured in an accident due to a defective navigation cloud service, is he or she entitled to claim for the compensation for those injuries?;<sup>56</sup> Or are the damages to the digital consumer's hardware and digital content the only ones that can be compensated?

Limiting the consumer's right to damages weakens his or her protection. For this reason, it may be argued that the most appropriate interpretation would be the one that does not affect the ability of Member States to enact or maintain rules on the right to damages under their own national laws.<sup>57</sup> And more importantly because this "right [...] must already exist in one form or another in almost

every Member State".<sup>58</sup> Consequently, the Directive should clarify that claims for damages under national law are not in any way curtailed or limited.<sup>59</sup>

#### 3.2.4. Exclusion of the consumer's right to terminate the contract for minor defects

In contrast to the Online Sales Directive, the Digital Content Directive does not recognise the consumer's right to terminate the contract for minor defects. Instead, the right to terminate the contract is limited to those cases where bringing the digital content to conformity is not possible or has failed and the non-conformity impairs the main performance features of the digital content.<sup>60</sup> They comprise – pursuant to Article 12.5 DCD – its: "functionality, interoperability and other main performance features [...] such as its accessibility, continuity and security." In such instance the burden of proof is on the supplier (Art. 12.5 DCD).

#### 3.2.5. Legal consequences of termination by the consumer

With regard to the legal consequences arising from the termination of the contract, the Digital Content Directive lays down specific rules that regulate the restitutionary effects taking into account the special features of the digital content in the contract; thus some digital content cannot be returned (for instance, a movie downloaded from internet), nor can counter-performance other than money.<sup>61</sup> The proposed Directive imposes on the parties the following duties upon termination:

- a) With respect to the supplier, it must reimburse the price within a maximum period of 14 days [Art. 13.2.a) DCD] or if the counter-performance consisted of data, the supplier must refrain from using it [Art. 13.2.b) DCD].<sup>62</sup> Additionally, the supplier should ensure the exportability of the data provided by the consumer and any data

54. V. Mak (2016, p. 27).

55. "Digital environment" means, according to Art. 2.8 DCD, "hardware, digital content and any network connection to the extent that they are within the control of the user".

56. European Law Institute (2016, p. 32).

57. V. Mak (2016, p. 28).

58. H. Beale (2016a, p. 24).

59. In this vein see Council of the European Union (2016, p. 9) and European Law Institute (2016, p. 6).

60. Recital 37 DCD.

61. V. Mak (2016, p. 25).

62. This means, according to Recital 37 DCD, 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".

produced or generated through the consumer's use of the digital content.<sup>63</sup>

- b) In relation to the consumer, he or she shall agree to refrain from using the digital content following termination by deleting the digital content or rendering it otherwise unintelligible [Art. 13.2.d) and e) DCD]. If the digital content was supplied on a durable medium, upon the request of the supplier the consumer shall return the durable medium at the supplier's expense within a maximum period of 14 days [Arts. 13.2. d) and e) DCD].

3.2.6. Lack of time limits with regard to the supplier's liability for non-conformity and for the reversal of the burden of proof  
 Finally, also worthy of note are the lack of time limits for the supplier's liability for non-conformity of the digital content and for the reversal of burden of proof:

- a) Unlike the Online Sales Directive, the Digital Content Directive *does not provide for a period during which the supplier shall be held liable for any lack of conformity* that exists at the time of the supply of the digital content. The justification of this being that digital content is not subject to wear and tear and is often supplied over a period of time.<sup>64</sup> Nevertheless, claims based on the lack of conformity of digital content might be limited under the relevant Statute of Limitations periods as laid down in the domestic law of each Member State.
- b) Concerning the presumption of the pre-existence of the lack of conformity, the Digital Content Directive *imposes the burden of proof for the absence of a lack of conformity on the supplier, without subjecting it to any time limit* (Art. 9.1 DCD). The Directive takes into consideration that the supplier is in a better position than the consumer to know the reasons for the lack of conformity given the specific and highly complex nature of digital content.<sup>65</sup> Exceptionally, the burden of proof of the pre-existence of the lack of conformity lies with the consumer, namely when the consumer's digital environment is not compatible with interoperability and

other technical requirements of the digital content and where the supplier had previously informed the consumer of such requirements (Art. 9.2 DCD).

The lack of time limits governing the supplier's liability has been criticised. It has been suggested that although at first this rule might seem to be in interest of consumers, it might in practice end up effectively restricting the utility of the Directive for them. Member States can limit claims based on lack of conformity of digital content by establishing very short limitation periods. Besides, the existence of different limitation periods within Member States would create a barrier to cross-border trade which goes entirely against the stated purpose of the Directive. Therefore, it would appear highly advisable to modify the proposal on this point and set down a minimum limitation period governing the supplier's liability for lack of conformity.<sup>66</sup>

## 4. Conclusions

The main findings of the second part of this article are the following:

- a) The Online Sales Directive introduces some improvements and clarifications to the Consumer Sales Directive that will either increase or maintain the current level of protection in most Member States:
- It fully harmonises the conformity criteria of the goods and the hierarchy of the consumer's remedies for lack of conformity;
  - It expressly recognises the consumer's right to withhold payment for any outstanding part of the price;
  - It introduces the consumer's right to terminate the contract also in the case of minor defects and clarifies some rules regarding the consequences of such termination;
  - The period of the presumption of non-conformity is extended to two years; and

63. "The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format" [Art. 13.2.c) DCD].

64. Recital 43 DCD.

65. Recital 32 DCD.

66. In this vein, see European Law Institute (2016, p. 33), V. Mak (2016, pp. 19 and 28) and S. Cámara Lapuente (2016, pp. 44-47).

- The option to introduce the consumer's duty to notify the lack of conformity within a certain period of time from its discovery has been eliminated.
- b) Nevertheless, in some Member States the Online Sales Directive will undoubtedly lead to a reduction in the existing level of protection, mainly because the proposal fails to recognise the right to immediately terminate the contract without first having to seek repair and replacement, and because it fully harmonises the two-year legal period during which the seller can be held liable for the lack of conformity.
- c) The Digital Content Directive rules on conformity and the remedies for failure to supply and for lack of conformity of the digital content also raise some significant issues:
  - The rule according to which the contractual terms take precedence over the objective criteria when assessing the conformity of the digital content needs to be reconsidered. Such a rule would weaken consumer protection as it may well end up allowing suppliers of digital content to impose very weak contractual conformity requirements on consumers;
  - The consumer's right to withhold payment of the price until the supplier has brought the digital content into conformity with the contract needs to be recognised, in line with the Online Sales Directive;
  - It should be clarified that claims for damages under national laws are not limited to damages in the digital consumer's environment; and
  - Finally, it would be highly advisable to lay down a minimum limitation period for the supplier's liability for lack of conformity in order to avoid very short limitation of action periods which will be to the detriment of consumers and to avoid creating barriers to cross-border trade.

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