

Statement of the European Law Institute on the European Commission's Proposed Directive in the Supply of Digital Content to Consumers



Statement
of the European Law Institute

**ON THE EUROPEAN COMMISSION'S PROPOSED DIRECTIVE
ON THE SUPPLY OF DIGITAL CONTENT TO CONSUMERS**

COM (2015) 634 final

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

President: Diana Wallis

Vice-President: Christiane Wendehorst

Treasurer: Johan Gernandt

Speaker of the Senate: Irmgard Griss

European Law Institute

Schottenring 16

1010 Vienna

Austria

Tel.: + 43 1 4277 22101

Mail: secretariat@europeanlawinstitute.eu

Website: www.europeanlawinstitute.eu

ISBN: 978-3-9503458-6-5

© European Law Institute 2016



**Supported by
the European Union**

ACKNOWLEDGEMENT

Working Group

Reporters:

JOHN THOMAS, LORD THOMAS OF CWMGIEDD, Lord Chief Justice of England and Wales, The United Kingdom (Chair)

JOHN SORABJI, Principal Legal Advisor to the Lord Chief Justice of England and Wales and the Master of the Rolls, The United Kingdom

CHRISTIANE WENDEHORST, professor of law, Austria

Drafting Committee:

HUGH BEALE, professor of law, The United Kingdom

AXEL METZGER, professor of law, Germany

REINER SCHULZE, professor of law, Germany

HANS SCHULTE-NÖLKE, professor of law, Germany

CHRISTIANE WENDEHORST, professor of law, Austria

FRYDERYK ZOLL, professor of law, Poland

Further Members of the Working Group:

FABRIZIO CAFAGGI, professor of law, Italy

BÉNÉDICTE FAUVARQUE-COSSON, professor of law, France

JOHAN GERNANDT, lawyer, Sweden

PAUL GILLIGAN, judge, Ireland

PAOLA IAMICELI, professor of law, Italy

RAFAEL ILLESCAS, CISG Advisory Council, professor of law, Spain

PETER LIMMER, civil law notary, Germany (acting also on behalf of the CNUE)

MARCO LOOS, professor of law, The Netherlands

MATTHIAS STORME, lawyer and professor of law, Belgium (acting also on behalf of the CCBE)

DIANA WALLIS, president of the ELI, The United Kingdom

FRIEDRICH GRAF VON WESTPHALEN, lawyer, Germany

ELI Advisory Committee

Special Advisor:

OLE LANDO, professor of law, Denmark

Further Members of the Advisory Committee:

CAROLE AUBERT DE VINCELLES, professor of law, France

REMO CAPONI, professor of law, Italy

SJEF VAN ERP, professor of law, The Netherlands

HANS MICKLITZ, professor of law, EUI, Italy/Germany

DENIS PHILIPPE, lawyer, Belgium

LAJOS VEKAS, professor of law, Hungary

The views set out in this Statement should not be taken as representing the views of those bodies, on whose behalf individual members of the working party and advisory group were also acting.

TABLE OF CONTENTS

ACKNOWLEDGEMENT.....	III
Working Group.....	III
ELI Advisory Committee	III
PRINCIPAL ABBREVIATIONS	VI
EXECUTIVE SUMMARY.....	1
Part A: Introduction	8
Background	8
Current situation.....	8
The ELI Statement and the Commission's general strategy	9
Plan of the ELI Statement	9
Part B: Explanation of the principal points raised on the DCD	10
1. Scope of application concerning embedded software needs to be reconsidered	10
2. Effects of mixed and linked contracts	14
3. DCD should apply in any case in which the trader exploits user data	15
4. Clarifications on who is the relevant supplier the consumer may address	16
5. Trader should not be allowed to impose his own minimum standards	18
6. Support should be provided as long as consumer may expect.....	22
7. Conformity requirements should include privacy by design and by default	23
8. EULAs must not reduce consumer rights	24
9. Consumer's immediate right to terminate for failure to supply is inappropriate in certain constellations	27
10. The consumer's remedies for lack of conformity need further clarification	28
11. Consumer's right to damages under national law remain unaffected	32
12. Minimum prescription period must be stated in the Directive	33
13. Restriction of supplier's right to modify unilaterally the features of digital content	33
Annex.....	35

PRINCIPAL ABBREVIATIONS

B2B	Business to business relationship
B2C	Business to consumer relationship
CESL	Proposal COM (2011) 635 for a Regulation on a Common European Sales Law (withdrawn)
CJEU	Court of Justice of the European Union
CRA	UK Consumer Rights Act 2015
CRD	Consumer Rights Directive 2011/83/EU
CSD	Consumer Sales Directive 1999/44/EC
DCD	Proposal for a directive on certain aspects concerning contracts for the supply of Digital Content of 9 December 2015, COM (2015) 634
OSD	Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods of 9 December 2015, COM (2015) 635

EXECUTIVE SUMMARY

Introduction

Following its withdrawal of the proposed Regulation on a Common European Sales Law ('the CESL'), the European Commission has proposed:

- A Directive on certain aspects concerning contracts for the supply of digital content (which we will refer to as the 'Digital Content Directive' or 'DCD') and
- A Directive on certain aspects concerning contracts for the online and other distance sales of goods ('Online Sales Directive' or 'OSD').

Both Directives contain elements which may be very useful for improving the level of consumer protection and the better functioning of the internal market. However, both Directives would require full harmonisation (with only a few exceptions). This means that on issues within the scope of the Directives, Member States would not be able to provide their consumers with higher levels of consumer protection. Although drafted with the best of intentions, the Directives would result in significant reduction in consumer protection in some Member States. Special care must be taken to ensure that the level of consumer protection— particularly the conformity obligations and remedies—is adequate.

The European Council is giving priority to the DCD. This Statement therefore concentrates on the DCD.

The ELI intends to produce a detailed statement on the OSD at a later stage. The provisional view of the ELI Working Group is that the OSD cannot be supported in its current form. Preliminary analysis suggests that the scope, the conformity requirements and the remedies for non-conformity of the OSD have very significant omissions. One of them is that the OSD does not adequately deal with digitalised goods. The OSD draft should be fundamentally changed, or replaced by a new draft that takes full account of the ongoing merger of the digital and the analogous worlds.

The ELI has also some doubts whether full harmonisation of such a limited range of topics, and dealing with only B2C contracts, is the best way for the Commission to achieve its goals of combining a high level of consumer protection with removing the hindrances to the Internal Market caused by differences between the laws of contract and mandatory rules of consumer protection in the different Member States. These issues will be explained in more detail, together with the statement on the OSD, at a later stage.

Principal comments on the DCD

The proposed DCD offers important clarity and protection to consumers, particularly to consumers in Member States (the vast majority) that do not have legislation dealing specifically with contracts for the supply of digital content. However, the ELI would like to take the opportunity to point out a number of issues where it believes the draft DCD still needs to be improved.

The ELI's main concerns fall into three groups, which in part overlap. They are:

- (1) A number of provisions of the DCD offer insufficient protection to consumers and would reduce the level of protection currently available under the national laws (see No. 5, 6, 12, 13). In brief, the provisions relating to the expectations of the consumer in relation to the digital content supplied need revision: the digital content must at the very least be fit for the purpose for which digital content of the same description would ordinarily be used, support should be provided as long as the consumer may expect. There must be a minimum prescription period and the trader's right to modify obligations should be restricted.
- (2) The DCD is not co-ordinated properly with other pieces of EU law, in particular the CSD, the OSD and the General Data Protection Regulation (see No. 1, 3, 7). In brief, the DCD should apply to software that is embedded in goods; it should apply whenever the trader collects personal data from the consumer in exchange for the digital content; and the conformity requirements should include "privacy by design and by default." The provisions relating to the protection of data raise important issues for the public.
- (3) The wording of the DCD needs essential clarification in order to avoid contradictions, ambiguities and legal uncertainty (see No. 2, 4, 8, 9, 10, 11). In brief, the problems related to mixed and linked contracts, the identification of the supplier and the relationship of the contract to end user licence agreements (EULAs) are complex and need very careful scrutiny and revision. The consumer's remedies must be made clearer and possibly expanded.

1. Scope of application concerning embedded software needs to be reconsidered

As the drafts currently stand, the DCD does not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods. The supply of goods with embedded digital content, such as satnavs or smartphones, only falls under the OSD and not under the DCD. This means that the minimum standards required for digital content (e.g. functionality and interoperability, and in addition the proposed additional requirements such as for privacy by design, continuing support and updating proposed below), and other DCD

provisions, will not apply to embedded software, which will lead to a serious gap in consumer protection. It may also lead to inconsistency and confusion, as any future updates or upgrades of the embedded digital content and any accessory digital content delivered together with the goods but to be installed elsewhere (e.g. as an app on the consumer's smartphone) fall under the DCD only. The same will be true of any digital content that is necessary for the functioning of the goods but stored in external locations (e.g. the Cloud), at least where it is supplied under a separate contract. This may lead to inconsistent results, and the consumer may have great difficulties finding out whether it is the digital content that was originally embedded or any additional component or a component stored in an external location that has caused a particular defect.

► *See below our suggestions on Article 3 (6) and Article 9 (1) DCD.*

2. Effects of mixed and linked contracts

A contract for the supply of digital content may be part of a mixed contract, which includes several discernible items of digital content or digital content and other elements not falling under the DCD, or a contract for the supply of digital content may be linked with or ancillary to another contract, be it a contract of sale or another contract for the supply of digital content (e.g. the consumer buys a games console and a computer game). If either element is defective the consumer may wish to terminate not only the (part of the) contract under which she acquired the non-conforming good or digital content, but also the other (part of the) contract. It should be clarified that the DCD does not prevent national courts from adapting, the rules, for example the rules on termination, on termination to such cases.

► *See below our suggestions on Article 3(9) and (10) DCD.*

3. DCD should apply in any case in which the trader exploits user data

The Directive recognises that digital content may be supplied not only in exchange for money but also in exchange for personal data. The ELI believes this is a major step forward. However, the Directive should not be limited to cases in which the consumer 'actively' provides personal or other data; it should apply in any case in which the trader collects personal data, or other user-generated data, for purposes other than those justifying the processing of personal data under Article 6(1)(b)-(f) of the General Data Protection Regulation. Quite apart from the fact that it is unclear whether active consent to a privacy notice or similar set of clauses amounts to 'active' provision, there is no reason why the consumer should have lesser rights where data are collected by unilateral activity on the part of the trader, or even clandestinely.

► *See below our suggestions on Article 3 (1) DCD.*

4. Clarifications on who is the relevant supplier the consumer should address

The DCD grants a consumer remedies against a person called the 'supplier' of digital content, but it is not always obvious which person is to be regarded as the 'supplier' to whom the consumer should address complaints. The consumer makes a contract for the supply of digital content with one trader, but essential components of the digital content may need to be downloaded from a second trader's server, and/or the digital content may require constant support from some cloud infrastructure provided by another trader. It must be made clear that the trader to whom the consumer pays the price or provides other counter-performance is responsible for the digital content 'package' as a whole, unless the description of the digital content indicates that it will be necessary for the consumer to obtain some of the necessary content or support under a separate contract with another trader.

A different issue arises from the many forms of distribution of digital content (e.g. via online intermediary platforms and online shops, or via vouchers sold in supermarkets or high street shops) in which it may not be clear to whom the consumer is making the payment or providing personal data as counter-performance: is the platform or shop contracting with the consumer in its own name, or is it merely acting as representative (agent) for another trader which will supply the consumer? This issue is not covered by the DCD. In order to create a fully operable system, the DCD must be supplemented by national laws, in particular the rules on formation and interpretation of contracts and on representation or agency, to determine which of the different traders is to be regarded as the 'supplier' in the meaning of the DCD. It should be clarified in the articles of the DCD that all these are matters of general contract law that are left to the Member States.

► *See below our suggestions on Article 3 paragraphs (4) and (9) and Article 6 (2) DCD.*

5. Trader should not be allowed to impose his own minimum standards

The 'objective' conformity requirements (i.e. the minimum standards that the digital content is required to meet) apply only '[t]o the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content'. This would allow the trader to set its own minimum standard in the terms and conditions, provided that the terms are in plain and intelligible language. Consumers are most unlikely to read the terms and conditions before making the contract, so they may not notice that what is to be supplied may be of a much lower standard than the consumer reasonably expects. The words quoted are therefore dangerous, and also unnecessary. They should be deleted.

It should be possible for the consumer to agree that she will accept digital content of a lower standard than normal, but this should require her express acceptance.

Moreover, the conformity test of the DCD should be further strengthened by expressly stating that the digital content must comply with all pre-contractual information given by

the trader as well as with any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions.

► See below our suggestions on Article 6 DCD.

6. Support (such as updates) should be provided as long as consumer may expect

When digital content requires continuing support (e.g. provision of updates or connection to cloud services) in order to function fully, and the contract does not provide for a period during which support will be provided, the conformity requirements should require it to be maintained to the standard and for as long as the consumer may reasonably expect.

► See below our suggestions for new paragraphs 2B and 2C of Article 6 DCD.

7. Conformity requirements should include privacy by design and by default

The conformity requirements should explicitly mention 'privacy by design' and 'privacy by default', reflecting general requirements under Article 25 of the General Data Protection Regulation (GDPR). As Article 25 GDPR is addressed to controllers, and not to suppliers, an additional rule in contract law is required.

► See below our suggestion for a new paragraph 2A of Article 6 DCD.

8. EULAs must not reduce consumer rights

The supplier is under an obligation to supply the digital content and to put the consumer in a position that allows her to use the digital content lawfully in accordance with the contract. The supplier must ensure that the consumer is put into a legal position—be it based on the terms of a licence or a licence plus copyright legislation—that is effective vis-à-vis the holder of IP rights and that covers the full range of uses which the consumer could expect under the supply contract. It is essential to clarify what is the range of uses the consumer is entitled to expect, and to ensure that the terms of any end-user license do not fall short of these legitimate expectations.

► See below our suggestions on Article 8 DCD.

9. Consumer's immediate right to terminate for failure to supply is inappropriate in certain constellations

Under the wording of Article 11 DCD the consumer is entitled to terminate the contract immediately where the supplier has failed to supply the digital content on time. This remedy is inappropriate in certain constellations, e.g. for a contract for customised software, if it is applicable irrespective of the significance of and reason for the delay.

► See below our suggestion for a new paragraph (2) of Article 11 DCD.

10. The consumer's remedies for non-conformity need expansion and clarification

The consumer should have a right to withhold performance (i.e. to suspend making further payments) until the trader has brought the digital content into conformity with the contract.

The consumer who has received digital content that does not conform to the contract should have an immediate right to terminate, allowing the consumer to recover the price paid without any deduction for use, provided that the consumer exercises the right within a short period (which might be 14 days from delivery).

It should be stated in the Directive itself, and not merely in the Recitals, that where digital content is to be supplied for a period of time, temporary interruptions in the supply amount to a non-conformity; and be made clear that if the interruptions are sufficiently serious the consumer should have the right to terminate the contract as a whole.

► See below our suggestions on Articles 3 and 12 DCD.

11. Consumer's right to damages under national law remains unaffected

It must be clarified that the Directive's provision for damages for harm to the consumer's digital environment is without prejudice to the consumer's right to damages under national law for any other loss.

► See below our suggestions on Article 14 DCD.

12. Minimum prescription period must be stated in the Directive

The DCD as it currently stands refrains from defining a guarantee period, but Member States are free to apply their national rules on prescription. We believe that this reduces significantly the practical utility of the instrument and the potential benefit consumers and businesses could derive from it. It is to be expected that suppliers will be faced with a broad variety of different national prescription rules, which is again an obstacle to cross-border trade. Also consumers are likely to lose out, in particular if Member States set very short prescription periods in order to outweigh the effects of the DCD's burden-of-proof regime.

► See below our suggestions on a new Article 16A DCD.

13. Restriction of supplier's right to modify unilaterally the features of digital content

The supplier's right to modify unilaterally the features of digital content to the detriment of the consumer should be further restricted, and it should be clarified that a reservation made

by the supplier in the fine print should be irrelevant where that reservation was incompatible with the overall purpose of the agreement, such as where the trader had guaranteed the service for a fixed period, or where the supply of digital content is necessary for the functioning of connected goods and the lifespan of those goods has not expired.

► *See below our suggestions on Article 15 DCD.*

Part A: Introduction

Background

Following its withdrawal of the proposed Regulation on a Common European Sales Law ('the CESL')¹, the European Commission has proposed two new measures:

- A Directive on certain aspects concerning contracts for the supply of digital content (which we will refer to as the 'Digital Content Directive' or 'DCD') and
- A Directive on certain aspects concerning contracts for the online and other distance sales of goods ('Online Sales Directive' or 'OSD').

The new proposed measures are very different from the CESL in form, scope and content. In general their scope of application is much narrower than that of the CESL, but they cover some issues that the CESL did not cover, and in many respects they are more intrusive upon the laws of the Member States than the CESL would have been, in the sense that they will result in a larger change in the Member State's existing consumer protection.

The proposed DCD offers important clarity and protection to consumers, and the OSD also would provide significant improvements over the minimum level of consumer protection currently required by EU law. However, both proposed Directives are full harmonisation measures. The result is that in many Member States both the DCD and the OSD would result in significant reductions in existing consumer protection.

Current situation

Under the Presidency of The Netherlands, priority has been given to consideration of the DCD. We understand that in the Council Working Group discussions on the DCD are well-advanced. In particular, at its meeting on 9 and 10 June 2016 the Council approved the basic principles and political guidelines for future work (see document 9768/16), and a revised text proposal dated 15 June 2016 is being discussed (see document 10231/16 - at the time of writing, not available to the public). In contrast, there has to date been only limited discussion of the OSD. We also understand that at present many Member States and many

¹ Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final, withdrawn by Commission Work Programme 2015: A New Start, COM (2014) 910 final (16 December 2014), Annex II item 60, p12.

stakeholders are broadly content with the full harmonisation approach in relation to the DCD but have significant reservations about the OSD.

For these reasons, this Statement concentrates on the DCD; the ELI intends to produce a detailed statement on the OSD at a later stage. However, preliminary analysis suggests that the scope, the conformity requirements and the remedies for non-conformity of the OSD have very significant omissions. This is acutely evident in respect of embedded software, particularly where that software is intended to inter-connect with other devices or is intended to be supported by on-going digital services that will be provided by the trader or a third party. As under the proposed OSD conformity requirements would be subject to full harmonisation, so that Member States would not be permitted to provide adequate protection to their consumers, the provisional view of the ELI Working Group is that the OSD cannot be supported in its current form.

The ELI Statement and the Commission's general strategy

Given the apparently favourable response to the DCD, it seems most helpful for the ELI's Statement to proceed on the assumption that, at least in relation to digital content, there will be no change in the Commission's general policy of full harmonisation of a limited number of issues relating to B2C contracts only. Nonetheless the ELI has reservations as to whether the Commission's approach is the best one in the light of the Commission's apparent aims of (a) building consumer confidence in making cross-border purchases by increasing levels of consumer protection and (b) encouraging traders, and particularly SMEs, to offer their products across borders by reducing the apparent differences between the laws of the Member States. The ELI's reservations will be explained together with the statement on the OSD at a later stage.

Plan of the ELI Statement

This Statement is in four parts, namely

- Executive Summary
- Part A: Introduction
- Part B: Explanation of the principal points raised on the DCD
- Annex: Revised text for the DCD (covering both the issues discussed in Part B and a number of more detailed points of substance and drafting)

Part B: Explanation of the principal points raised on the DCD

1. Scope of application concerning embedded software needs to be reconsidered

According to Recital 11 and Article 3(3), the DCD should not apply to digital content which is embedded in goods in such a way that it 'operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods'. This means that the sale of 'smart' or 'connected' goods, such as connected cars, smartphones or smartTVs, only falls under the OSD and not under the DCD. However, the supply of any other digital content within a mixed contract that includes both the sale of goods and the supply of digital content would, according to Article 3(6) DCD and Article 1(2) OSD, fall under the DCD. This means that if the connected car, smartphone or smartTV is supplied together with separate digital content the supply of that separate digital content will fall under the DCD.

1. 1. Problems associated with the division between the DCD and the OSD

The first issue with the division between the DCD and the OSD in its current form is that it may not be clear in which cases the digital content is 'subordinate' to the main functionalities of the goods, and how to draw the line between the sale of goods with embedded digital content and a mixed contract including both the sale of goods and the supply of digital content. For example, if a consumer buys a satellite navigation unit ('satnav') which has road maps of Northern Europe pre-installed, whereas additional sets of maps can be bought separately, it is unclear whether the pre-installed maps are an integral part of the satnav or whether they come as part of a mixed contract. Also, it is not clear in which cases the digital content is 'subordinate' to the main functionalities of the goods; for example, the maps built into a satnav are not subordinate to the functionalities of the goods, they are essential.

Another issue associated with the current division between DCD and OSD is that, as the supply of goods with embedded digital content as such only falls under the OSD, the minimum standards required for digital content (e.g. functionality and interoperability, and in addition the proposed additional requirements such as for privacy by design, continuing support and updating proposed below), will not apply to embedded software. The same holds true for other DCD provisions that address specific challenges posed by digital content, such as the rules concerning the effects of termination in relation to consumer data provided to the supplier. This will lead to a serious gap in consumer protection.

More importantly, the way the scopes of application are currently drafted, they may lead to inconsistent results. While digital content that is embedded in goods at the time the goods are delivered is only governed by the OSD,

- any future updates or upgrades of that digital content;
- any accessory digital content delivered together with the goods but to be installed, e.g., as an app on the consumer's smartphone; and
- any digital content that is necessary for the functioning of the goods but stored in external locations, e.g. the Cloud,

fall under the DCD only. This may lead to inconsistencies, e.g. different conformity criteria, different rules on burden of proof, and possibly different guarantee and prescription periods apply concerning digital content that is embedded when the goods are delivered and concerning digital content updating the embedded content shortly after delivery. Furthermore the consumer may have great difficulties finding out whether it is the digital content that was originally embedded or any additional component or a component stored in an external location that has caused a particular defect.

Provided one takes the Commission's policy decision to present one draft on the sale of tangible goods and a separate draft on the supply of digital content as given there are arguably two possible ways to avoid these inconsistencies:

1. 2. Combined application of DCD and OSD to the supply of goods with embedded digital content

One possible solution would be to apply both the OSD and the DCD to the sale of goods with embedded digital content, with the conformity criteria of the OSD applying to the hardware, and the conformity criteria of the DCD applying to the software, plus a clause clarifying that any non-conformity of the digital content automatically also means non-conformity of the goods. This is the solution adopted by Section 16 of the UK Consumer Rights Act 2015. It can be extended to encompass not only initial conformity but also the requirements for continuing support of digital content and other aspects.

This solution is very simple to draft, and it would ensure that the same conformity criteria apply to digital content irrespective of the fact at what point in time it is supplied and where it is stored.

However, a second order question then arises, because the Directives differ over matters such as the burden of proof, the remedies for non-conformity and the time periods. One possible solution is to apply only or primarily the rules of the OSD (or the national law implementing the CSD); another is to accept that there are different rules on burden of proof and different remedies depending on whether it is the hardware or the software of smart goods that is defective. We believe the latter could be acceptable where the rights and remedies under the DCD are afforded to the consumer in addition to the rights and remedies she would have under the OSD (or the national law implementing the CSD) with

regard to the goods and without having to show whether the defect lies in the hardware or in the software. The consumer should be entitled to treat the whole contract as one falling under the OSD (or the national law implementing the CSD), and exercise the appropriate rights under sale of goods law, but she could equally choose to make a claim on the basis that the problem lies in the digital content, in which case the consumer should be entitled to proceed under the DCD. . If the consumer claims that the problem lies in the digital content the burden of proof that the problem really lies in the hardware should be on the supplier.

We believe that the same solution could then be applied, for the sake of consistency, to digital content supplied on a tangible medium, i.e. in those exceptional cases where the problem lies in the tangible carrier (e.g. there is a scratch on the DVD, or the jewel case is broken) the consumer should have the option to proceed under the OSD (or the national law implementing the CSD).

1. 3. 'Digitalisation' of the OSD and consumer sales law in general

The alternative is that there should be a 'digitalisation' of sales law, taking account of the fact that many tangible consumer goods will, in the near future, be embedded with software, sensors and network connectivity, connecting these goods with other goods and people in what is often called the 'Internet of Things' (IoT). We believe this has a profound impact on sales law in various respects, not least because it means that the sale of goods may no longer be analysed as a one-time exchange of performance and counter-performance, but as a one-time exchange of goods and money combined with various long-term relationships the consumers enters into with the seller, with the producer or with third parties cooperating with the producer or the seller. As the consumer has paid in advance an amount that should pay for the hardware, software and any long-term supply of digital content during the whole lifespan of the goods, the consumer is in a structurally weak position. This may call for a re-thinking of the very structure of a sales contract, including the notion of what is 'ownership', but also for a re-thinking of who should be liable to the consumer if something goes wrong with the long-term supply of digital content.

This is one of the reasons why the ELI feels unable to support the OSD in its current form. The ELI plans to produce a more detailed analysis of the proposed sales law regime if and when the OSD is considered by the Council Working Group.

1. 4. Conclusions

On balance, the ELI recommends proceeding in two steps. As a first step, and still during the legislative process concerning the DCD, the division clause between the DCD and the OSD for goods with embedded digital content should be amended. As a second step the ELI recommends re-thinking sale of goods in the IoT age and working on the 'digitalisation of sales law'. In this context, the OSD draft should be fundamentally changed, or replaced by a

new draft that takes full account of the ongoing merger of the digital and the analogous world. The first step would mean amending Article 3 DCD as follows:

Article 3

Scope

3. *[delete] ...*
6. ***Where a contract includes elements in addition to the supply of digital content, such as where goods are supplied with embedded or ancillary digital content or digital content is supplied together with a tangible medium, this Directive shall only apply to the obligations and remedies of the parties as supplier and consumer of the digital content. This shall be without prejudice to any obligations and remedies the parties may have under the rules of law applicable to the other elements, such as rules on conformity and remedies for non-conformity of goods in which digital content is embedded.***

In order to make sure it is not the consumer who has to prove which element of a mixed contract, or of a contract including two or more discernable items of digital content, is affected by a non-conformity, further clarification in a new second sentence of Article 9 (1) DCD is advisable:²

Article 9

Burden of proof

1. ***If it is shown that the digital content does not conform to the contract the burden of proof with respect to the conformity with the contract at the time indicated in Article 10 shall be on the supplier. The same applies with respect to the question which element of a contract is affected where a contract includes the supply of different items of digital content, or of digital content and elements not falling under this Directive.***
2. ...

In accordance with the suggested amendments the last sentence of Recital 11 DCD should be deleted and a new Recital along the following lines should be inserted:

(11A) This Directive also applies to digital content which is embedded in goods, but it only applies to the obligations and remedies of the parties as supplier and consumer of the digital content. However, this is without prejudice to any obligations and remedies the parties may have under applicable rules of law concerning the sale of goods. In the case of a contract for the sale of a good with

² For the suggested amendment of paragraph (1) shown in bold see the explanation in the Annex

embedded digital content the consumer may therefore have two sets of remedies for non-conformity. To the extent the embedded digital content is not in non-conformity with the contract, this Directive applies. But as any non-conformity of embedded digital content will normally also result in a non-conformity of the good the consumer may equally exercise remedies under the applicable law on the sale of goods. If the consumer chooses to claim that embedded digital content is not in conformity with the contract and relies on this Directive the burden of proof that the digital content is not affected shall be on the supplier.

These amendments could potentially be re-enforced by a corresponding rule in the OSD, or in national sales law, along the lines of Section 16 of the UK Consumer Rights Act, stating, e.g., that ‘Goods, whether or not they conform otherwise to the sales contract, do not conform to it if the goods are an item that includes digital content, and the digital content does not conform to the contract to supply that content, which forms an integral part of the sales contract, ...’

2. Effects of mixed and linked contracts

Irrespective of whether or not our suggested amendment to Article 3(6) DCD is accepted there would need to be clarity about the effects that termination, in particular, of one element of a mixed or linked contract has on the other elements.

A contract for the supply of digital content may be part of a mixed contract, which includes several discernible items of digital content (e.g. a computer game on a DVD with a multiplayer app to be accessed online) or digital content and other elements not falling under the DCD (e.g. a games console with a set of pre-installed computer games), or a contract for the supply of digital content may be linked with or ancillary to another contract, be it a contract of sale or another contract for the supply of digital content (e.g. the consumer buys a games console and a computer game). If either element is defective the consumer may wish to terminate not only the (part of the) contract under which she acquired the non-conforming good or digital content, but also the other (part of the) contract.

Issues of mixed, linked or ancillary contracts are not regulated in the DCD, but the rules might be understood as preventing national courts from adapting the rules on termination

to such cases. The DCD should therefore clarify that this is left to the laws of the Member States.

We would therefore suggest further clarifications to that end in Article 3(9):³

9. In so far as not regulated in this Directive, this Directive shall not affect

- *national general contract laws such as rules on formation, **the interpretation**, the validity or effects of contracts **and on representation or agency**;*
- ***provisions of national laws concerning** the consequences of the termination of a contract, **including where only part of a contract is terminated under this Directive**;*
- ***provisions of national laws governing the conditions under which a contract for the supply of digital content is considered to be linked with or ancillary to another contract the consumer has concluded with the supplier or another trader, and the effect this has on either contract or on the remedies to be exercised under either contract.***

3. DCD should apply in any case in which the trader exploits user data

Article 3 currently states:

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.

The ELI very much welcomes the fact that the Commission has decided to take account of the fact that data are a new kind of currency in the digital world. However, it will be extremely difficult to draw a line between ‘active’ and ‘passive’ provision of in-kind payment, in particular where data are produced through active use of the digital product but transferred automatically and without any further action on the part of the consumer. More importantly, it is difficult to see why the consumer should not be protected where the information is collected by means of a cookie (which Recital (14) states does not amount to active provision of data) or where the supplier's collection and use of the consumer's data for commercial purposes is more or less clandestine. We would therefore recommend

³ On the reasons for the insertion of “the interpretation” and “on representation or agency” into paragraph (9) see the explanation below (under No. 4).

deleting the term 'actively' and referring to the supplier's collection of data rather than the consumer's provision of it.

It should be clarified that 'price' or any other kind of counter-performance includes data supplied to or collected by a third party.

We also consider that as the only kind of counter-performance other than money recognised by the Directive is the supply of personal or other data, it would be better to eliminate the phrase "counter-performance other than money" from the text, replacing it simply with "personal or other data."

Thus Article 3(1) would read:

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or, by way of counter-performance other than money, the supplier or a third party collects personal or other data.

Furthermore, we would like to point out that **some of the rules under the DCD**, such as the right to retrieve user-generated content, should also apply in cases where products are supplied **entirely for free**, i.e. even without in-kind payment. However, as this would extend the scope of application of the Directive, we have not added the necessary provisions to the draft.

We understand that consideration is being given to wider issues relating to data protection and in particular the relationship between the DCD and the General Data Protection Regulation (GDPR). At this stage we do not think it appropriate to say more, but it may be necessary for us to deal with this subject later.

4. Clarifications on who is the relevant supplier the consumer may address

The supply of digital content frequently involves a complexity that is rare in sale of goods scenarios, namely that it involves at least two agreements and often at least three parties. When consumers buy digital content, they are normally acquiring a licence to use intellectual property (IP) rights that belong to the supplier or a third party: the consumer acquires an 'end-user licence', which may appear to be a separate agreement. In other words, the supplier to whom the consumer pays the price (or to whom the consumer supplies personal data as a counter-performance) promises both 'delivery' of the digital content (which may take the form of, e.g., a download of data or a provision of continuing access to cloud-based content, e.g. for the multiplayer version of a digital game) and to put the consumer in a legal position that makes the consumer's use of the digital content in accordance with the contract lawful vis-à-vis the holder of the IP rights; but one or both the

factual delivery and the grant of IP rights may be carried out by a third party, typically by the holder of the IP rights.

We assume that the 'contract for the supply of digital content' that is to be dealt with by the Directive is only the contract concluded by the consumer with the person which has promised to 'deliver' the digital content and the right to use it, and to whom the consumer has paid the price or provides personal data as counter-performance. That supplier will be responsible to the consumer for the delivery and conformity of the whole of the digital content that the consumer is buying; while conversely the other trader who actually delivers the content and/or transfers the IPR may require the consumer to enter an end-user license agreement but will not be directly responsible to the consumer under the Directive. If this assumption is correct it should be stated more clearly.

See our suggested amendment to Article 3(4) in the Annex

The analysis above would not apply where the trader with whom the consumer first contracts agrees only to provide only part of what the consumer requires and informs the consumer that the consumer will need to make separate agreements with other traders – for example, to pay a subscription to a third party who will provide access to the cloud. Any such requirement must be stated in the description of the digital content; otherwise the trader with whom the consumer first contracts should be responsible for the whole.

See, in the Annex, our suggested amendments to Articles 6(2) and additional Articles 8(3) and (4) DCD, which are intended to make it clear that the trader to whom the consumer pays the price or supplies personal data will be responsible for the package as a whole unless the description of the digital content clearly states otherwise.

A different problem is that a consumer may purchase digital content via online intermediary platforms, online shops or via vouchers sold in supermarkets or high street shops and be provided with a voucher or an access code by which to obtain digital content from another trader's website. In this case also it may not be clear to the consumer who is the trader against whom the consumer may exercise the remedies provided under the Directive. The online platform or the shop may be contracting on its own behalf, or it may be acting merely as representative (or agent) of the other trader. It should be made clearer that this question is outside the scope of the DCD and is a matter of general contract law that is left to the rules on the formation and interpretation of contracts and of representation (or agency) of the Member States.

See our suggested amendment to Article 3(9) DCD in the Annex

5. Trader should not be allowed to impose his own minimum standards

5.1 'Objective' conformity requirements

Digital content, like goods under both the CSD and the proposed OSD, is required to meet certain 'objective' requirements, for example, being

'fit for the purposes for which digital content of the same description would normally be used, including...'

However, the protection provided by DCD Article 6(2) is substantially weaker than that of OSD Article 5. This is because Article 6(2) applies only

'[t]o the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1 ...'

In contrast, under the OSD, as under the CSD, both the subjective and the objective criteria must be met: they are cumulative, unless the consumer explicitly agrees to buy sub-standard goods, e.g. a car 'for spare parts only' (see below). It is submitted that DCD's additional qualification of the trader's obligations is quite unnecessary and may be dangerous to consumers.

Of course the trader must be free to define what is being supplied and any 'objective' standards imposed should not require the trader to deliver digital content that will perform functions, or perform to higher standards, than it was reasonable for the consumer to expect in the light of what the consumer was told. But exactly the same is true with goods; and the problem is dealt with by providing that the goods must

'be fit for all the purposes for which goods of the same description would ordinarily be used.'

The words underlined mean that the consumer cannot demand more than the trader indicated that it would supply. This formula (which in any event is repeated in DCD Article 6(2)) has worked perfectly well for the supply of goods, including digital content that is supplied on a durable medium, and there is no necessity to add the words '[t]o the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content ...'.

Moreover, these additional words at the start of Article 6(2) are potentially dangerous. The way that digital content or goods are described refers to the general nature of what the trader offered to sell, as this reasonably appeared to the consumer, whereas the additional words quoted refer to the detailed terms of the contract. It is true that under DCD Article 6(2), the express terms of the contract will be relevant only if they are stated 'in a clear and comprehensive manner', but there is no requirement that they be prominent, so they may be just part of the trader's general terms and conditions. We all know from our own

experience that consumers are very unlikely to even to look at lengthy terms and conditions before they conclude the contract.⁴ At the very least the consumer should be able to require that the digital content is fit for all the purposes for which digital content of the same description would ordinarily be used, and complies with relevant industry standards, without being expected to read the small print of the contract to see if the express terms qualify or restrict the trader's 'objective' obligations.

Therefore **the words 'To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1 ...' should be deleted.**

5.2 Agreement on a lower standard

It should be possible for the parties to agree on the supply of digital content that does not meet the standards normally required, such as on a beta-version of a new online game, or where the licensor imposes unusually harsh restrictions on the end user; compare Article 4(3) of the OSD. Therefore there should be, e.g. in a new Article after Article 6 DCD, a provision such as:

Digital content is treated as conforming to Articles 6, 7 and 8 to the extent that the consumer knew of the specific condition or use of the digital content and at the time of concluding the contract the consumer expressly accepted the digital content as nonetheless conforming.

We note that the phrase 'expressly accepted' would mean that a non-individually negotiated term in the contract to the effect that the consumer knew of the condition, etc of the digital content would not be sufficient to prevent the normal conformity requirements applying.

5.3 Pre-contractual information

The reference in Article 6(1)(a) DCD to pre-contractual information that forms an integral part of the contract refers to CRD Article 6(5), which states that all information that the trader is required to provide under Article 6(1) CRD shall form an integral part of the contract. This is right in principle but it will be very confusing to both traders and consumers, who will have to work out which bits of information are within Article 6(1) CRD

⁴ A recent report for the European Commission with experiments conducted under consumers has again confirmed this, see M. Elsen, M. Elshout, J. Leenheer, M.B.M. Loos, J.A. Luzak, *Study on Consumers' attitudes towards Terms and Conditions (T&Cs), Final report*, February 2016, No. Chafea/FWC/2014 85 12 (not yet available on the European Commission's website).

and therefore come under Article 6(5) CRD and Article 6(1)(a) DCD. It would be much simpler, and make little practical difference, to state that the goods or the digital content must comply with ALL information given by the trader. Article 6 (1) DCD should therefore have a new letter (c) which reads:

“comply with any pre-contractual information which was given by the trader”

5.4 Unnecessary or inappropriate differences between conformity requirements in DCD and OSD

The differences between the provisions on conformity for digital content and for goods should be as slight as possible. Moreover certain elements are missing from each provision without any apparent justification for the differences. In particular, the conformity requirements should take into account that goods may come along with digital content which needs to fulfil certain requirements as to functionality, interoperability and other digital performance features such as accessibility, continuity and security, and which usually needs to be updated.

5.5. Conclusions

In the light of these considerations Article 6(1) DCD should therefore have additional provisions, shown below on **bold**:

1. *In order to conform with the contract, the digital content shall, where relevant:*
 - (a) be of the quantity, quality, **description**, duration and version and shall possess **the functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract;***
 - (b) where the trader provides the consumer with access to a trial or sample version, possess the quality of and correspond to the description of this trial or sample version;***
 - (c) comply with any pre-contractual information which was given by the trader***
 - (d) 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;*
 - (e) be supplied along with any instructions and customer assistance as stipulated by the contract; and*
 - (f) be updated as stipulated by the contract.⁵*

⁵ The corresponding OSD Article (Article 4) could correspondingly be re-worded along the following lines:

[...] **In order to conform with the contract, the goods shall, where relevant:**

- (a) be of the quantity, quality, description, **and version and possess the functionality, interoperability and other performance features such as accessibility, continuity and security,** required by the contract

In order to avoid the unnecessary and inappropriate differences between the objective tests used by the DCD and the OSD, and by the subjective and objective tests respectively, Article 6 (2) DCD should be amended as follows:

(2) [...] The digital content shall, where relevant:

(a) possess qualities and performance capabilities, including functionality, interoperability and other performance features such as accessibility, continuity and security, which are normal in digital content of the same type and which the consumer may expect given the nature of the digital content and any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that

(i) he was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the contract the statement had been corrected;

(iii) the decision to acquire the digital content could not have been influenced by the statement;

(b) be fit for the purposes for which digital content of the same description would normally be used, [...] taking into account, [...] where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices;

(c) be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive.

(b) where the seller shows a sample or a model to the consumer, possess the quality of and correspond to the description of this sample or model;

(c) comply with any pre-contractual information which was given by the trader ntract;

(d) be 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;

(e) **be supplied along with any instructions and customer assistance as stipulated by the contract;** and

(f) **be maintained, including by updating embedded digital content and providing access to a necessary digital infrastructure, as stipulated by the contract.**

6. Support should be provided as long as consumer may expect

6.1 Continuing support

Frequently digital content can only be used fully (or sometimes at all) when it is able to connect to and interoperate with a supporting digital infrastructure operated by or on behalf of the trader or third party licensor. If this support is no longer available, the digital content purchased by the consumer may become useless; and depending on when this happens and the other circumstances, this may well defeat the consumer's legitimate expectations. So where, the consumer buys costly navigation software there will be a legitimate expectation that the navigation software will not outdated after a couple of months; where, on the other hand, the consumer buys an app at 0.99 euro the consumer can hardly expect that the app will ever be updated unless there would be a serious security concern.

The problem is that the contract for the digital content will not always refer to the support that is needed, let alone require the trader or third party to provide it for any period of time. Even if it could be argued that the contract implicitly imposed an obligation on the trader to ensure the support is provided, that obligation might well be construed to be to provide support for an indefinite period, which as matter of general principle would entitle the trader to cease to provide the support after giving the consumer a reasonable period of notice (cf *Principles of European Contract Law*, Article 6:109.) The effect would be to undermine the consumer's legitimate expectation that the digital content would be useable for a reasonable period of time. There is nothing explicit in the Directive, as proposed by the Commission, to deal with this.

The same argument applies to other forms of support, such as providing helplines. (It also applies to providing patches or updates in order to fix security issues or other problems, but we take the view that patches and updates are of such importance that it would be better to deal with these separately, see below.)

We therefore suggest that the objective criteria for conformity under DCD Article 6(2) should state explicitly that the trader must ensure that the digital content is supported as and for the period that the consumer may reasonably expect. This should take the form of a new paragraph (2B):

***(2B):** The digital content shall be updated and maintained, including by providing a necessary digital infrastructure, to the standard and for as long as the consumer may expect given the nature of the digital content, the counter-performance provided by the consumer, potential security risks and taking into account any public statement within the meaning of paragraph 6(2) point (a).*

6.2 Patches and updates to fix problems

Even where the contract does not require digital content to be supplied over a period of time (Article 6(3)), nor expressly provide for updates (Article 6(1)(d) DCD), consumers will reasonably expect to be supplied with updates issued by the trader or a third party end-use licensor in order to fix security issues or other problems that arise. Where the problem means that the digital content was not in conformity with the contract, the consumer will have the right to be supplied with the patch or update in order to bring the digital content into conformity; but consumers will reasonably expect also to be supplied with any updates that are issued by the trader or a third party end-use licensor in order to fix security issues or other problems, whether or not these amounted to a non-conformity. The Directive should state that consumers must have a right to be notified of and supplied with such updates, provided that the consumer has requested this. A new paragraph should be added to Article 6:

(2C) The trader must ensure that any consumer is notified of and, if that consumer has so requested, supplied with
(a) updates to digital content (whether in the form of a new version or a patch to the digital content already supplied) that are necessary to bring the digital content into conformity with the contract, and
(b) any other patches or updates that are issued by the trader or a third party end-use licensor in order to fix security issues or other problems that did not cause non-conformity of the digital content.

There should be a debate whether the consumer should have a **right to a 'roll-back'**, i.e. to maintain a previous version of digital content where an update causes a degree of inconvenience to him. For the time being, such issues should be left to Member States.

7. Conformity requirements should include privacy by design and by default

'Privacy by design' and 'privacy by default' are two requirements that follow from the data minimisation principle enshrined in EU data protection law, which is reflected in Article 25 of the General Data Protection Regulation (GDPR). As yet, there is no sufficient link between data protection law and contract law. In particular, it is not sufficient to simply refer to legal requirements under EU law, i.e. to assume that digital content is not in conformity with the contract if it is not in conformity with the law, because Article 25 GDPR is addressed to controllers and does not directly deal with contractual standards. The ELI therefore recommends listing both 'privacy by design' and 'privacy by default' as relevant criteria for establishing conformity of digital content and goods with the contract. Needless to say, these criteria would be subject to qualified derogation by way of express consent, see above at 5.2.

Thus we would **add a new paragraph (2A) to Article 6 DCD on the 'objective' criteria**

(2A) The digital content shall be designed so as not to process more personal data generated by the use of the digital content than is strictly necessary, and programmed so as to have non-disclosure of personal data as the default setting where the consumer can choose among several options.

8. EULAs must not reduce consumer rights

Article 8 currently reads:

*Article 8
Third party rights*

- 1. At the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract.*
- 2. Where the digital content is supplied over a period of time, the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including that based on intellectual property, so that the digital content can be used in accordance with the contract.*

8.1. Clarification of 'use in accordance with the contract'

The supplier is under an obligation to put the consumer in a position that allows the consumer to use the digital content lawfully in accordance with the supply contract. As more or less all digital content is, at least, protected by copyright under the Software Directive or the InfoSoc Directive the consumer needs a legal position—be it based on the terms of the licence or a licence plus the copyright legislation --that takes effect vis-à-vis the respective holder of IP rights. Unlike ownership in goods, a license is not a question of Yes or No, but a question of How Much, in particular as far as the right to reproduce the digital content is concerned: The license defines, e.g., on how many devices the digital content may be installed, or how many persons may use it, or whether it may also be used for business purposes.

This is why there need to be rules in the DCD on how to determine the range of lawful types of use which the consumer may expect under the supply contract. As Article 8 is currently phrased it leaves open what is exactly included in 'use in accordance with the contract'. It should be clear that the user may expect not only those types of use that are guaranteed under the applicable copyright Directives and their national implementations, including the right to use a lawfully acquired copy of a digital content, the right to make private copies, the right to make a safety copy of software, etc; but also that the consumer may have wider

rights if that was what the consumer could reasonably expect. Arguably, the same rules should apply as for conformity in the more factual sense, which is why there should be an explicit reference in Article 8 to the conformity test in Article 6.

8.2. EULAs must not reduce consumer rights

Where the supplier is identical with the holder of the IP rights the supplier himself will grant the consumer a license. Where the trader with whom the consumer deals is different from the holder of the IP rights that trader must nevertheless put the consumer in a position that allows the consumer lawfully to use the digital content in accordance with the contract. This can be done by way of (i) transfer of a license that had been granted, possibly through a chain of transactions, to the trader by the holder of the IP rights; (ii) granting of a sub-license by the trader to the consumer, with the consent, possibly through a hierarchy of sub-licenses, of the holder of the IP rights; or (iii) conclusion of an end-user license agreement (EULA) directly between the holder of the IP rights and the consumer.

For a variety of reasons, the parties will normally choose the third option and offer to the consumer only the conclusion of a EULA. Apart from defining the range of lawful types of use the consumer may make of the digital content, EULAs frequently impose a variety of duties and restrictions on the consumer, such as *ex ante* consent in the installation of future updates, restrictions limiting the use of the digital content to only specific hardware or a specific technical environment or a prohibition on re-selling software. Normally, the consumer's consent to the processing of personal data has to be given separately under a 'privacy notice' or similar document, but this document is usually linked with the EULA and the consumer has to accept both in order to be able to use the digital content.

Technically speaking, the EULA is normally concluded by way of a so-called 'click wrap' agreement, i.e. the consumer will see a screen with the terms of the EULA and has to tick a box labelled 'I agree'. The terms of the EULA should be disclosed to the consumer before the conclusion of the supply contract so that they form an integral part of that contract. Quite often, however, the consumer is confronted with the EULA only after she has concluded the supply contract, when she tries to access the digital content for the first time. Sometimes, the terms of the EULA are in the box and the consumer is considered to have agreed to them by opening the packaging ('shrink wrap'), or they are simply displayed on the screen and the consumer is considered to have agreed by continuing to use the digital content ('browse wrap').

When the terms of the EULA are thus disclosed to the consumer only after the conclusion of the supply contract the courts in some Member States would hold the terms of the EULA to be unenforceable against the consumer. Yet, there is a lot of uncertainty, and in any case the consumer will understandably feel intimidated, in particular as many EULA terms are backed by forfeiture clauses, stating that the rightholder may block user accounts and prevent any further access of digital content by the consumer in case the consumer is in breach of any of the EULA terms. Also, the EULA may give the consumer fewer rights (for

example, in relation to the right to re-sell software when the consumer no longer wants it) or not provide for continued access to or support of the digital content for the period the consumer legitimately expected. If the EULA does reduce or undercut the consumer's rights or her reasonable expectations under the supply contract, then the consumer must have a remedy against the supplier. This could be made much clearer in Article 8 dealing with third party rights.

Moreover, the words '*... so that the digital content can be used in accordance with the contract*' are ambiguous: does the consumer have a remedy if the right might interfere, or only if the third party in fact seeks to prevent or restrict the consumer's use? The former seems more appropriate. We think that it should be made explicit that if a term in a EULA, if it were enforceable, would have the effect of undermining the consumer's legitimate expectations under the contract for digital content, then there will be a non-conformity.

8.3. Restrictions equivalent to third party rights in the traditional sense

Obvious cases where the supplier should be liable for non-conformity according to Article 8 DCD because the digital content is not free from adverse rights of a third party are

- when the consumer receives a license that fails to have effect vis-à-vis a rightholder (e.g. the copy sold is an illegal copy, or the digital content includes components of open-source software in violation of the open-source license); or
- when the consumer receives a license that falls short of what was agreed under the supply contract (on which see above, 2.2).

Apart from these rather obvious cases it is, however, not clear what else could be included. There may be a range of constellations where third parties are in a position that gives them some sort of control over the digital content and where that control may jeopardise the consumer's use of the digital content in accordance with the contract, but does not directly affect the license. For example,

- the digital content turns out not to be accessible unless the consumer concludes another agreement with a particular third party that was not mentioned by or arranged by the supplier; or
- the functionalities of the digital content depend on the continuous access to other digital content (e.g. some cloud infrastructure), and the supplier of that other digital content has reserved the right to discontinue supply to the detriment of the consumer under Article 15 DCD.

Generally speaking we believe that it would be premature to introduce an exhaustive rule under a full harmonisation scheme as far as third party rights are concerned. This is why we would advise to leave Member States some leeway concerning restrictions that have the same effect as a third party right in the traditional sense.

8.4. Conclusions

In the light of these considerations we would advise rephrasing Article 8 as follows:

Article 8

*Third party rights **and equivalent restrictions***

1. *At the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including **rights following from the terms of a license, that may prevent the consumer using** the digital content in accordance with the contract.*
2. *Where the digital content is supplied over a period of time, the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including **rights following from the terms of a license, that may prevent the consumer using** the digital content [...] in accordance with the contract*
3. ***In determining to what extent the consumer may use the digital content in accordance with the contract, Article 6 shall apply accordingly.***
4. ***Member States may decide to apply this Article also to restrictions that have the same effect as a third party right within the meaning of paragraphs 1 and 2.***

9. Consumer's immediate right to terminate for failure to supply is inappropriate in certain constellations

Article 11 DCD currently states:

Remedy for the failure to supply

Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract immediately under Article 13.

Unless the parties have agreed that the trader will supply or will commence supplying the digital content at some later date, the trader must supply or commence supplying the digital content as soon as the contract has been made; and if the trader does not do so, the consumer has an immediate right to terminate the contract.

The DCD applies where a digital product is developed to the consumer's specification (Article 3(2)). This is akin to a services contract and termination for any delay would be excessive unless explicitly agreed by the parties. It would potentially mean that where the supplier develops sophisticated software, worth a four digit amount of euros (e.g. a web site design for the consumer's private homepage or an individual control system for the consumer's smart home solution) the consumer could terminate the contract if the supplier was a few days late, irrespective of the reason for the delay and of whether or not the delay

was significant in the context. A new paragraph should be added to the Article 11 DCD, applying the same rules as apply to the delivery of goods under Article 18 of the CRD:

2. Where the digital content has been developed according to the consumer's specifications, the consumer may terminate the contract under Article 13 where the parties have so agreed or where delivery on or by the agreed date is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In other cases, the consumer may terminate only if he has fixed an adequate period and the supplier has failed to supply the digital content within that period.

We note that it is not clear whether the consumer's right to terminate the contract (and then to claim damages for non-performance under national law) is meant to be exhaustive, so that (this being a full harmonisation Directive) Member States may not provide additional remedies, or whether those Member States that permit the consumer to enforce a claim to be supplied with the digital content (e.g. by obtaining an order for 'specific' performance) may continue to do so.

10. The consumer's remedies for lack of conformity need further clarification

10.1 Withholding performance

The consumer **should have a right to withhold performance** (typically, to suspend making further payments) until the trader has brought the digital content into conformity with the contract as under OSD Article 9(4). The right to withhold performance is particularly useful when digital content is to be supplied over a period of time, as the consumer may also be paying on a periodic basis. (In most cases of 'one-off' supply of digital content or goods, the consumer will have paid in advance.) However, if the non-conformity is only minor the consumer should only have the right to withhold an appropriate proportion of the payment due. Therefore, a new paragraph 2A should be inserted after Article 12(2) DCD:

2A. The consumer shall be entitled to withhold the payment of any outstanding part of the price, or where the non-conformity is minor, an appropriate proportion of the outstanding amount of the price, until the supplier has brought the digital content into conformity with the contract.

10.2 'Minor' defects

We accept that, as under Article 13(2)(a) DCD the consumer who terminates may recover the price paid in full, with no deduction for any use or enjoyment the consumer may have derived from the digital content before termination, it is fair not to permit termination for non-conformity that is only slight. However, we have reservations about Article 12 (5) DCD as it may lead to unnecessary litigation about whether or not a defect impairs 'main performance features'. It might be read as preventing the consumer terminating if the digital content works but, despite the trader's attempts at cure, does so in a very unsatisfactory way, e.g. music is distorted or the picture is fuzzy. If there is to be a restriction to prevent the consumer from terminating on account of a relatively minor defect, we think it would be better to refer to whether the non-conformity has a substantial effect on the consumer's use or enjoyment of the digital content or puts the consumer at risk in some way. Therefore, Article 12 (5) DCD should be replaced by the following provision:

5. The consumer is not entitled to terminate the contract if the lack of conformity is only minor.

10.3 Temporary non-conformity

A more fundamental concern is the role termination is supposed to play where digital content is to be supplied over a period of time, e.g. there are repeated problems with the picture quality of a movie streaming service, or the consumer's emails are temporarily inaccessible.

We think it should be made clear that in such cases the fact that the temporary problem has been brought into conformity for the future by the supplier (or more realistically, the producer) does not deprive the consumer of a remedy. The temporary problem is in the past and to that extent the non-conformity cannot be 'cured'.

We think the Commission may intend to treat this as a case of partial termination under Article 13 (5) and (6) DCD, with termination being restricted to the period of time during which the digital content was not in conformity. However, we believe that this is suboptimal in two respects:

First, we argue below (under No. 10.4.) that termination should apply only where the consumer no longer wants to continue with the contract. If the contract is to continue, it should not be regarded as 'partially terminated'. If the consumer is to have a remedy, it should be the right to a price reduction. Where emails were inaccessible for 10% of the relevant time it would seem natural that the price can be reduced by (at least) 10%.

Secondly, we do not believe that the consumer should always have a right to terminate the contract because of a temporary non-conformity that has been 'fixed'. However, if the non-conformity had a very substantial effect on the consumer's use or enjoyment, or gives the

consumer reasonable doubt about the future performance, and the consumer no longer wishes to continue with the contract (e.g. because an email service that is inaccessible for 10% of the time causes too much inconvenience), the consumer should have a right to terminate the contract as a whole. This possibility is so far missing in the DCD. Therefore, the following new paragraph should be inserted after Article 12(5) DCD:

(6). Where digital content is to be supplied over a period of time, and for a temporary period the digital content did not conform to the contract, the consumer may reduce the price by an appropriate amount. The consumer may terminate the contract only if the lack of conformity with the contract causes or may have a substantial effect on the consumer's use or enjoyment of the digital content, makes it clear that the supplier's performance cannot be relied on or compromises the consumer's security where required by Article 6 paragraphs (1) and (2). The burden of proof that the lack of conformity with the contract does not have a substantial effect on the consumer's use or enjoyment of the digital content or compromise the consumer's security shall be on the supplier.

10.4 'Partial' termination from the date at which the digital content ceased to be in conformity with the contract

Article 13 paragraphs (5) and (6) DCD should make it clear that termination of the contract is appropriate only when the non-conformity is such that the consumer no longer wishes to continue with the contract. In cases in which the digital content was not in conformity (e.g. was faulty or inaccessible) for a temporary period, but the non-conformity has been cured and the consumer wishes to continue with the contract even if there is a ground for termination, the consumer should have a right to withhold performance or reduce the price, see above No. 10.1 and 10.3. The situation should not be dealt with by a notion of (partial) termination. Article 13 paragraphs (5) and (6) should be redrafted to make this clear.

(5) Where the digital content has been supplied [...] in exchange for a payment of a price and over a period of time stipulated in the contract, the consumer may terminate the contract only from the date at which the digital content ceased to be in conformity with the contract.

(6) Where the consumer terminates the contract in accordance with paragraph 5, paragraph 2 shall apply in regard to the period after the digital content ceased to be in conformity with the contract. The supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after the digital content ceased to be in conformity with the contract.

10.5 An immediate right to terminate for non-conformity

In contrast to the situation in case of delay of supply under Article 11 DCD, there is no immediate right to terminate for lack of conformity under Article 12 DCD; the hierarchy of remedies applies. We urge the Commission to give the consumer who has received digital content that does not conform to the contract an immediate right to terminate, allowing the consumer to recover the price paid without any deduction for use, provided that the consumer exercises the right within a short period (which might be 14 days from delivery, the normal period for withdrawal from a distance contract). First, we believe that consumers would find this right valuable - not only is it often easier simply to go to another trader rather than to demand that the first trader brings the digital content into conformity with the contract (which may involve delay, particularly if the digital content is on a tangible medium and the trader has to obtain another copy) but also the right can be a useful bargaining tool.⁶ Moreover, if the right is not granted we suspect that if the digital content is not in conformity with the contract in a fundamental way (e.g. the wrong item has been delivered) many courts will be tempted to hold that the trader has not supplied in accordance with Article 5 so as to give the consumer an immediate right to terminate under Article 11 DCD. To avoid opportunistic behaviour on the part of consumers, there should not be an immediate right to terminate if the non-conformity is only minor. Therefore Articles 12 (1) and 12 (5) DCD should be amended in the following way:

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to;

(a) terminate the contract, provided the consumer exercises this right within 14 days of being given access to the digital content; or

(b) have the digital content brought into conformity with the contract free of charge, unless this is impossible, disproportionate or unlawful.

...

5. The consumer is not entitled to terminate the contract under paragraphs (1) or (3) if the lack of conformity is only minor.

⁶ Empirical research (in relation to goods) by the Law Commissions in Britain showed that consumers valued this right, which is simple and easy to understand and inspires consumer confidence, making them more prepared to try unknown brands or new retailers as well as providing consumers with an effective remedy when they have lost confidence in a product or retailer. See *Consumer Remedies for Faulty Goods*, Consultation Paper (Law Com CP 188; Scot Law Com DP 139), esp paragraphs 4.1-4.13; Report (Law Com No 317, Scot Law Com no 216, 2009), paragraphs 3.1 – 3.35 and 6.9 – 6.12.

11. Consumer's right to damages under national law remain unaffected

Several commentators have read Article 14 DCD as seeking to lay down the only circumstances in which the consumer may recover damages from the trader and therefore (because this is a full harmonisation directive) excluding any right to damages under national law. This interpretation seems to be supported by the Explanatory Memorandum, p 13, which states:

Article 14 establishes a right to damages restricted to cases where damage has been done to the digital content and hardware of the consumer. However, it provides that Member States should lay down the detailed conditions for the exercise of the right to damages

We have been assured by Commission officials that this is not the intention and that claims for damages under national law should not be affected. A consumer who has justifiably terminated the contract because of a non-conformity should have a right to damages for non-performance (e.g. any higher price the consumer has to pay in order to obtain digital content that conforms to the contract from another supplier), as well as damages for any harm done to the consumer's digital environment. Apparently the intention of Article 14 DCD is merely to ensure that the consumer may recover compensation for any harm caused to the consumer's digital environment by the non-conformity. If this is so, then the reference to failure to supply seems redundant (it is hard to see how an initial failure to supply can cause harm to the consumer's digital environment; subsequent failures to supply are treated as non-conformity, see above); and the second sentence of paragraph (1) appears to be redundant. Article 14 should therefore be redrafted as follows:

(1) The supplier shall be liable to the consumer for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. 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.

*(2) The Member States shall lay down detailed rules for the exercise of the right to damages **under paragraph 1.***

(3) The consumer's right to damages under (1) shall be without prejudice to any right to damages under the applicable national law (whether for non-performance, delay in supply, non-conformity or any other failure to perform by the trader).

We would add that we would be fundamentally opposed to treating Article 14 as setting out the ONLY circumstances in which the consumer can recover damages for non-conformity, i.e. as excluding damages under national law. Where, for instance, the consumer's home burns down due to defective smart home software or the consumer is killed in a car accident due to defective navigation cloud service the DCD should not possibly have the effect of barring a claim for damages.

12. Minimum prescription period must be stated in the Directive

According to its Recital (43) the DCD refrains from defining a guarantee period. Member States, however, remain free to maintain their national rules on prescription. This may significantly reduce the practical utility of the DCD and the potential benefit consumers and businesses could derive from it. It is to be expected that suppliers will be faced with a broad variety of different national prescription rules, which is again an obstacle to cross-border trade. Also consumers are likely to lose out, in particular if Member States set very short prescription periods in order to outweigh the effects of the DCD's burden-of-proof regime. We believe that the DCD should state a minimum prescription period in order to avoid that consumers are deprived from the remedies granted to them under the DCD by (present or future) prescription rules of the national laws. Given the differences of the national laws, the length of such period is somewhat arbitrary and requires a political decision. The ELI therefore does not make a proposal regarding the appropriate minimum period.

Therefore a new Article should be inserted after Article 16

Article 16a **Minimum time limit**

If, under national legislation, the remedies for a failure to supply or a lack of conformity laid down in this Directive are subject to a prescription period or other time limit, that period or time limit shall not expire within a period of XX years from the time the failure to supply or the lack of conformity occurred.

The last sentence of Recital (43) would have to amended accordingly as follows:

(43) ... Member States should remain free to rely on national prescription rules in order to ensure legal certainty in relation to claims based on a failure to supply or a lack of conformity of digital content. Such periods must, however, not be shorter than XX years.

13. Restriction of supplier's right to modify unilaterally the features of digital content

Article 15 DCD on modification of the digital content lays down the conditions under which the supplier may alter the functionality, interoperability and other main performance features, such as its accessibility, continuity and security, of digital content that is to be supplied over a period of time. The basic principle is that the supplier is free to modify the digital content if 'the contract so stipulates'. The supplier's right to modify unilaterally the

features of digital content to the detriment of the consumer should be further restricted, and it should be clarified that a reservation made by the supplier in the fine print should be irrelevant where that reservation was incompatible with the overall purpose of the agreement, such as where the supplier had guaranteed the service for a fixed period, or where the supply of digital content is necessary for the functioning of connected goods and the lifespan of those goods has not expired.

Therefore, a new paragraph (1A) should be inserted in Article 15 DCD:⁷

*1. Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract, the supplier may **not** alter the functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security, to the extent those alternations adversely affect access to or use of the digital content by the consumer, **unless**:*

- (a) the contract so stipulates;*
- (b) the consumer is notified reasonably in advance of the modification by an explicit notice on a durable medium;*
- (c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice **or from the time the digital content is altered by the supplier, whichever is the later**; and*
- (d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Article 13(2)(c).*

1A. The supplier may not alter the functionality, interoperability and other main performance features of the digital content in accordance with paragraph 1 where the supplier had promised particular performance features for a fixed period or where this would be incompatible with the 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.

2. Where the consumer terminates the contract in accordance with paragraph 1, where relevant,

- (a) the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content;*
- (b) the supplier shall refrain from the use of **data** which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.*

⁷ For the suggestions in paragraph (1) and paragraph (3) shown in bold see the explanation in the Annex.

Annex

Original text	Suggested Wording	Explanation/Reference to ELI Statement
---------------	-------------------	--

Bold = insertion

(...) = deletions

******* = issues and details yet to be finalized

[] = more than one solution is offered

Recitals

Recitals

(11) The Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between

(11) The Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between

See Part B No. 1.4

suppliers. A level-playing field between suppliers of different categories of digital content should be ensured. However this Directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods..

suppliers. A level-playing field between suppliers of different categories of digital content should be ensured. (...)

(11a) This Directive also applies to digital content which is embedded in goods, but it only applies to the obligations and remedies of the parties as supplier and consumer of the digital content. However, this is without prejudice to any obligations and remedies the parties may have under applicable rules of law concerning the sale of goods. In the case of a contract for the sale of a good with embedded digital content the consumer may therefore have two sets of remedies for non-conformity. To the extent the embedded digital content is not in non-conformity with the contract, this Directive applies. But as any non-conformity of embedded digital content will normally also result in non-conformity of the good the consumer may equally exercise remedies under the applicable law on the sale of goods. If the consumer chooses to claim that embedded digital content is not in conformity with the contract and relies on this Directive the burden of proof that the digital content is not affected shall be on the supplier.

See Part B No. 1.4

(43) Due to its nature the digital content is not subject to wear and tear while being used and it

(43) Due to its nature the digital content is not subject to wear and tear while being used and it

See Part B No. 12

is often supplied over a period of time rather than as a one-off supply. It is, therefore, justified not to provide a period during which the supplier should be held liable for any lack of conformity which exists at the time of the supply of the digital content. Consequently Member States should refrain from maintaining or introducing such a period. Member States should remain free to rely on national prescription rules in order to ensure legal certainty in relation to claims based on the lack of conformity of digital content.

is often supplied over a period of time rather than as a one-off supply. It is, therefore, justified not to provide a period during which the supplier should be held liable for any lack of conformity which exists at the time of the supply of the digital content. Consequently Member States should refrain from maintaining or introducing such a period. Member States should remain free to rely on national prescription rules in order to ensure legal certainty in relation to claims based on the lack of conformity of digital content. **Such periods must, however not be shorter than *** years.**

Article 1

Subject matter

This Directive lays down certain requirements concerning contracts for the supply of digital content to consumers, in particular rules on conformity of digital content with the contract, remedies in case of the lack of such conformity and the modalities for the exercise of those remedies as well as on modification and termination of such contracts.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. 'digital content' means

- (a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and

any other software,

(b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and

(c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service;

2. 'integration' means linking together different components of a digital environment to act as a coordinated whole in conformity with its intended purpose;

3. 'supplier' means any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession;

4. 'consumer' means any natural person who in contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession;

5. 'damages' means a sum of money to which consumers may be entitled as compensation for economic damage to their digital environment;

(...)

It is necessary to clarify whether Recital (17) CRD on mixed purpose contracts marks a departure from the approach of the CJEU in *Gruber* (Case C-464/01). The position should be stated in the Articles of the Directive.

It is essential to state the consumer's right to damages for other losses is not affected by the Directive, see our suggestions on Article 14 DCD and Part B No. 11. This means that this definition of damages will no longer be appropriate. Quite apart from that, the Article 2 definition is redundant, as the only reference to damages in the Directive is in Article 14 which gives its own definition of the loss

6. 'price' means money that is due in exchange for digital content supplied;

6. 'price' means money that is due

(a) in exchange for digital content supplied; and

(b) in exchange for goods, services or other digital content with which the digital content is supplied without additional payment when it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content;

that Article 14 covers.

Consumers often acquire the right to obtain digital content without further payment when they buy some other product (such as when the purchase of a computer entitles the consumer to 'free' software or purchase of a magazine entitles the consumer to download music 'for free'). In reality the price paid is for both the physical item and the digital content, but it may not be evident to the consumer that she is paying a price. It should be stated in the Article that this situation is covered. Cf CRA 2015 s. 33

7. 'contract' means an agreement intended to give rise to obligations or other legal effects;

8. 'contract' means an agreement intended to give rise to obligations or other legal effects;

9. 'interoperability' means the ability of digital content to perform all its functionalities in interaction with a concrete digital environment;

10. 'supply' means providing access to digital content or making digital content available;

11. 'durable medium' means any instrument which enables the consumer or the supplier to store information addressed personally to that person in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

Article 3

Scope

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.

2. This Directive shall apply to any contract for the supply of digital product developed according to consumer's specifications.

3. With the exception of Articles 5 and 11, this Directive shall apply to any durable medium incorporating digital content where the durable medium has been used exclusively as carrier of digital content.

4. This Directive shall not apply to digital content provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or (...) **by way of counter-performance** other than money (...), **the supplier or a third party collects personal or other data.**

(...)

4. This Directive shall not apply to digital content (...) **for which a price is not paid by the consumer to the supplier provided that the supplier requests the consumer to provide or collects only personal data** which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the

The word 'actively' should be deleted, see Part B No. 3. (Also amend Recital (14))

It should be clarified that 'price' or any other kind of counter-performance includes data supplied to or collected by to a third party.

What the DCD here calls a 'durable medium' is referred to as 'tangible medium' in various articles of the CRD, cf. CRD Recital 19, Articles 5(2), 6(2), 9(2)(c), 14(4)(b), 16(m) and 17(1); 'durable medium' in the CRD refers to information addressed personally to the other party.

Recitals 11, 12 and 50 also require the same amendment

It is confusing and unnecessary to refer to data that is only collected in order to perform the contract or to comply with legal requirements as a 'counter-performance'. Paragraph 4 has been re-drafted in a clearer fashion.

See also Part B No. 3 and No. 4

consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.

consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.

5. This Directive shall not apply to contracts regarding:

(a) services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier;

(b) electronic communication services as defined in Directive 2002/21/EC;

(c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU;

(d) gambling services meaning services which involve wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service;

(e) financial services.

(e) services of a banking, credit, insurance, personal pension, investment or payment nature (financial services) where the supply of digital content is an integral part of the service and is available to consumers only within the framework of the provision of the wider financial service.

We assume that the Commission intends to apply the definition provided in CRD Article 2(12) and other places, i.e. "financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature." This may lead to uncertainty that might be used to defeat legitimate consumer claims: a trader who has supplied, say, an accounting package or a

package for evaluating the performance of investments might claim that it is supplying a form of financial service. We suggest clarification

6. Where a contract includes elements in addition to the supply of digital content, this Directive shall only apply to the obligations and remedies of the parties as supplier and consumer of the digital content.

6. Where a contract includes elements in addition to the supply of digital content, **such as where goods are supplied with embedded or ancillary digital content or digital content is supplied together with a tangible medium**, this Directive shall only apply to the obligations and remedies of the parties as supplier and consumer of the digital content. **This shall be without prejudice to any obligations and remedies the parties may have under the rules of law applicable to the other elements, such as rules on conformity and remedies for non-conformity of goods in which digital content is embedded.**

See Part B No. 1.4.

7. If any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall take precedence over this Directive.

8. This Directive is without prejudice to the protection of individuals with regard to the processing of personal data.

9. In so far as not regulated in this Directive, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.

9. In so far as not regulated in this Directive, this Directive shall not affect

- national general contract laws such as rules on formation, **the interpretation**, the validity or effects of contracts **and on representation or agency;**
- **the provisions of national laws concerning the**

To make clear that, in a case where digital content is distributed in various forms (e.g. via online intermediary platforms, online shops or via vouchers sold in supermarkets), the national laws, in particular the rules on formation and interpretation of contracts and on representation or

consequences of the termination of a contract, **including where only part of a contract is terminated under this Directive;**

- **the provisions of the national laws governing the conditions under which a contract for the supply of digital content is considered to be linked with or ancillary to another contract the consumer has concluded with the supplier or another trader, and the effect this has on either contract or on the remedies to be exercised under either contract.**

agency, determine which of the different traders is to be regarded as the 'supplier' in the meaning of the DCD.

See Part B No. 2 and No. 4

Article 4

Level of harmonisation

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

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

To clarify that the DCD is a targeted harmonisation directive, i.e. that there may be instances where Member States are allowed to go beyond what is stipulated in the DCD, e.g. concerning damages

Article 5

Supply of the digital content

1. When performing the contract for the supply of digital content, the supplier shall supply the digital content to

(a) the consumer; or

(b) a third party which operates a physical or virtual facility making the digital content available to the consumer or

allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content.

(c) another third party designated by the consumer.

To cover the case where a consumer purchases digital content as a gift for someone else.

2. The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise. The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier.

2. The supplier shall supply the digital content, **or in the case of digital content to be supplied over a period of time, shall commence the supply**, immediately after the conclusion of the contract, unless the parties have agreed otherwise **and without prejudice to Article 8 of Directive 2011/83/EU**. The supply (...) **takes place** when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier.

To make it clear (1) that where digital content that is to be supplied over a period of time, a temporary interruption in the supply amounts to a non-conformity, not a failure to supply within Article 5 (and therefore there is no immediate right to terminate under Article 11); and

(2) that the provision does not affect the requirements of CRD Article 8(8), under which the consumer who asks for performance of services to begin within the normal withdrawal period must be asked to make an express request.

3. For digital content supplied on a tangible medium, or embedded in or ancillary to goods sold by the supplier to the consumer, Article 18 of Directive 2011/83/EU shall apply instead of the preceding paragraphs.

As it is suggested to delete Article 3(3) and to amend Article 3(6) so that the Directive covers digital content embedded in goods it is necessary to exclude the application of Article 5 in these cases to avoid overlap and inconsistencies with the CRD.

Article 6

Conformity of the digital content with the contract

1. In order to conform with the contract, the digital content shall, where relevant:

- | | | |
|--|--|--|
| <p>(a) be of the quantity, quality, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract including in any pre-contractual information which forms integral part of the contract;</p> | <p>(a) be of the quantity, quality, description, duration and version and shall possess the functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract (...);</p> | <p>See Part B No. 5.5</p> |
| | <p>(b) where the trader provides the consumer with access to a trial or sample version, possess the quality of and correspond to the description of this trial or sample version;</p> | <p>See Part B No. 5.5</p> |
| | <p>(c) comply with any pre-contractual information which was given by the trader;</p> | <p>See Part B No. 5.5</p> |
| <p>(b) 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;</p> | <p>(d) 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;</p> | <p>Former letters (b) – (d) now letters (d)-(f)</p> |
| <p>(c) be supplied along with any instructions and customer assistance as stipulated by the contract; and</p> | <p>(e) be supplied along with any instructions and customer assistance as stipulated by the contract; and</p> | |
| <p>(d) be updated as stipulated by the contract.</p> | <p>(f) be updated as stipulated by the contract.</p> | |
| <p>2. To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1, the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and</p> | <p>2. (...) The digital content shall, where relevant,</p> <p>(a) possess qualities and performance capabilities, including functionality, interoperability and other performance features such as accessibility, continuity and security, (...) which are normal in digital content of the same type and which the consumer may expect given the nature of</p> | <p>See Part B No. 5.5; the order of the criteria has also been changed so as to reflect better the order of the subjective criteria.</p> |

security, taking into account:

the digital content and any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that

(i) he was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the contract the statement had been corrected;

(iii) the decision to acquire the digital content could not have been influenced by the statement;

(a) whether the digital content is supplied in exchange for a price or other counter-performance than money;

(b) be fit for the purposes for which digital content of the same description would normally be used, taking into account,

(i) the amount or value of the counter-performance charged for the digital content;

It is not generally justified to assume that counter-performance other than money (i.e. usually data) is less valuable than money. This should therefore be phrased in a more neutral way.

(b) where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

(ii) where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; (...)

(c) any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that

(c) be supplied with such installation instructions or other instructions as the consumer may expect to receive.

(i) he was not, and could not reasonably have been,

aware of the statement in question;

- (ii) by the time of conclusion of the contract the statement had been corrected;
- (iii) the decision to acquire the digital content could not have been influenced by the statement.

2A. The digital content shall be designed so as not to process more personal data generated by the use of the digital content than is strictly necessary, and programmed so as to have non-disclosure of personal data as the default setting where the consumer can choose among several options.

See Part B No. 6 (on paragraphs 2B and 2C) and No. 7 (on paragraph 2A)

2B. The digital content shall be updated and maintained, including by providing a necessary digital infrastructure, to the standard and for as long as the consumer may expect given the nature of the digital content, the counter-performance provided by the consumer, potential security risks and taking into account any public statement within the meaning of Paragraph 6(2) point (a).

2C. The trader must ensure that any consumer who has so requested is notified of and supplied with

(a) updates to digital content (whether in the form of a new version or a patch to the digital content already supplied) that are necessary to bring the digital content into conformity with the contract, and

(b) any other patches or updates that are issued by the trader or a third party end-use licensor in order to fix security issues or

other problems that did not cause non-conformity of the digital content.

3. Where the contract stipulates that the digital content shall be supplied over a period of time, the digital content shall be in conformity with the contract throughout the duration of that period.
3. Where the contract stipulates that the digital content shall be supplied over a period of time, the digital content shall be in conformity with the contract throughout the duration of that period. **Temporary interruptions to the supply of the digital content shall be treated as a non-conformity.**
- New second sentence to make clear a point that in the proposal is mentioned only in recital (35).
4. Unless otherwise agreed, digital content shall be supplied in conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract.
5. In order to conform with the contract the digital content must also meet the requirements of Articles 7 and 8.

- 6A. Digital content is treated as conforming to Articles 6, 7 and 8 to the extent that the consumer knew of the specific condition or use of the digital content and at the time of concluding the contract the consumer expressly accepted the digital content as nonetheless conforming.**
- See Part B No. 4.2

Article 7

Integration of the digital content

Where the digital content is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity of the digital content if:

There is a linguistic confusion in this Article because the word 'integration' is used in two senses: (1) to mean the outcome that the digital content is properly integrated into the

consumer's digital environment, i.e. it works properly there, and (2) to mean the process by which that is to be achieved. It would be much clearer to refer to the process by the normal term for it, 'installation'.

(a) the digital content was integrated by the supplier or under the supplier's responsibility; or

(b) the digital content was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were supplied in accordance with point (c) of Article 6(1) or should have been supplied in accordance with Article 6(2).

(a) the digital content was (...) **installed** by the supplier or under the supplier's responsibility; or

(b) the digital content was intended to be (...) **installed** by the consumer and the incorrect (...) **installation** was due to (...) **failure to supply or shortcomings in (...) installation instructions that were required in accordance with point (...) (d) of Article 6(1) (...) or point (c) of Article 6(2)**

Article 8

Third party rights

1. At the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract.
2. Where the digital content is supplied over a period of time, the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including that based on intellectual property, so that the digital

Third party rights and equivalent restrictions

1. At the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including (...) **rights following from the terms of a license, that may prevent the consumer using the digital content (...) in accordance with the contract.** See Part B No. 8.4.
2. Where the digital content is supplied over a period of time, the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including (...) **rights following from** See Part B No. 8.4.

content can be used in accordance with the contract.

the terms of a license, that may prevent the consumer using the digital content (...) in accordance with the contract.

3. In determining to what extent the consumer may use the digital content in accordance with the contract, Article 6 shall apply accordingly.

See Part B No. 8.4 and No. 4,

4. Member States may decide to apply this Article also to restrictions that have the same effect as a third party right within the meaning of paragraphs 1 and 2

Article 9

Burden of proof

1. The burden of proof with respect to the conformity with the contract at the time indicated in Article 10 shall be on the supplier.

1. If it is shown that the digital content does not conform to the contract the burden of proof with respect to the conformity with the contract at the time indicated in Article 10 shall be on the supplier. The same applies with respect to the question which element of a contract is affected where a contract includes the supply of different items of digital content, or of digital content and elements not falling under this Directive.

The intention of the amendment in the first sentence is to clarify that it is not that the supplier will always have to prove that the digital content conformed to the contract (which is how many commentators have understood the article), but that if the consumer shows that it does not conform now, the supplier will have the burden of showing that it did conform at the relevant time.

On the new second sentence see Part B No. 1.4

2. Paragraph 1 shall not apply where the supplier shows that the digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content and where the supplier informed the consumer of such

requirements before the conclusion of the contract.

3. The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer.

Article 10

Liability of the supplier

The supplier shall be liable to the consumer for: (...)

- (a) any failure to supply the digital content; (...)
- (b) any lack of conformity which exists at the time the digital content is supplied; and (...)
- (c) where the contract provides that the digital content shall be supplied over a period of time, any lack of conformity which occurs during the duration of that period. (...)

The purpose of this Article is not clear. Paragraph (a) refers only to initial supply and initial failure to supply is already dealt with by Article 5. Paragraph (c) is already dealt with by Article 6(3). Paragraph (b) seems self-evident; if it is needed at all, then it should introduce Article 6.

Article 11

Remedy for the failure to supply

Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract immediately under Article 13.

1. Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract immediately under Article 13.

2. Where the digital content has been developed according to the consumer's specifications, the consumer may terminate the contract under Article 13 where the parties have so agreed or where delivery on or by the agreed date is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In other cases, the consumer may terminate only if he has fixed an adequate period and the supplier has failed to supply the digital content within that period.

See Part B No. 9

3. For digital content supplied on a tangible medium, or embedded in or ancillary to goods sold by the supplier to the consumer, Article 18 of Directive 2011/83/EU shall apply instead of the preceding paragraphs.

As it is suggested to delete Article 3(3) and to amend Article 3(6) so that the Directive covers digital content embedded in goods it is necessary to exclude the application of Article 11 in these cases to avoid overlap and inconsistencies with the CRD.

Article 12

Remedies for the lack of conformity with the contract

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the digital content brought into conformity

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to:

See Part B No. 10.5

(a) terminate the contract,

with the contract free of charge, unless this is impossible, disproportionate or unlawful.

provided the consumer exercises this right within 14 days of being given access to the digital content; or

(b) have the digital content brought into conformity with the contract free of charge, unless this is impossible, disproportionate or unlawful.

Bringing the digital content into conformity with the contract shall be deemed to be disproportionate where the costs it imposes on the supplier are unreasonable. The following shall be taken into account when deciding whether the costs are unreasonable:

(a) the value the digital content would have if it were in conformity with the contract; and

(b) the significance of the lack of conformity with the contract for attaining the purpose for which the digital content of the same description would normally be used.

2. The supplier shall bring the digital content in conformity with the contract pursuant to paragraph 1 within a reasonable time from the time the supplier has been informed by the consumer about the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required this digital content.

2A. The consumer shall be entitled to withhold the payment of any outstanding part of the price, or where the non-conformity is minor, an appropriate proportion of the outstanding amount of the price, until the supplier has

See Part B No. 10.1.

brought the digital content into conformity with the contract.

3. The consumer shall be entitled to either a proportionate reduction of the price in the manner set out in paragraph 4 where the digital content is supplied in exchange for a payment of a price, or terminate the contract under paragraph 5 and Article 13, where
 - (a) the remedy to bring the digital content in conformity is impossible, disproportionate or unlawful;
 - (b) the supplier has not completed the remedy within the time specified in paragraph 2;
 - (c) the remedy to bring the digital content in conformity would cause significant inconvenience to the consumer; or
 - (d) the supplier has declared, or it is equally clear from the circumstances, that the supplier will not bring the digital content in conformity with the contract.
4. The reduction in price shall be proportionate to the decrease in the value of the digital content which was received by the consumer compared to the value of the digital content that is in conformity with the contract.
5. The consumer may terminate the contract only if the lack of conformity with the contract impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security where required by Article 6 paragraphs (1) and (2). The burden of proof that the lack of conformity with the contract does not impair
5. The consumer (...) **is not entitled to terminate the contract (...) under paragraphs (1) or (3) if the lack of conformity is only minor.** See Part B No. 10.2 and No. 10.5

functionality, interoperability and other main performance features of the digital content shall be on the supplier.

6. **Where digital content is to be supplied over a period of time, and for a temporary period the digital content did not conform to the contract, the consumer may reduce the price by an appropriate amount. The consumer may terminate the contract only if the lack of conformity with the contract causes or may have a substantial effect on the consumer's use or enjoyment of the digital content, makes it clear that the supplier's performance cannot be relied on or compromises the consumer's security where required by Article 6 paragraphs (1) and (2). The burden of proof that the lack of conformity with the contract does not have a substantial effect on the consumer's use or enjoyment of the digital content or compromise the consumer's security shall be on the supplier.** See Part B No. 10.3.

Article 13

Termination

1. The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means.
2. Where the consumer terminates the contract:
 - (a) the supplier shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice;

(b) the supplier shall take all

(b) the supplier shall take all It is unnecessary to refer

measures which could be expected in order to refrain from the use of the counter-performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer with the exception of the content which has been generated jointly by the consumer and others who continue to make use of the content;

(c) the supplier shall 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 to the extent that data has been retained by the supplier. 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;

(d) where the digital content was not supplied on a durable medium, the consumer shall refrain from using the digital content or making it available to third parties, in particular by deleting the digital content or rendering it otherwise unintelligible;

(e) where the digital content was supplied on a durable medium, the consumer shall:

(i) upon the request of the supplier, return, at the supplier's expense, the durable medium to the

measures which could be expected in order to refrain from the use of (...) **data** which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer with the exception of the content which has been generated jointly by the consumer and others who continue to make use of the content;

(d) where the digital content was not supplied on a (...) **tangible** medium, the consumer shall refrain from using the digital content or making it available to third parties, in particular by deleting the digital content or rendering it otherwise unintelligible;

(e) where the digital content was supplied on a (...) **tangible** medium, the consumer shall:

(i) upon the request of the supplier, return, at the supplier's expense, the (...) **tangible** medium to the

here to counter-performance other than money; to refer simply to 'data' is clearer.

See Article 2(11) above

supplier without undue delay, and in any event not later than 14 days from the receipt of the supplier's request; and

supplier without undue delay, and in any event not later than 14 days from the receipt of the supplier's request; and

(ii) delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it or making it available to third parties.

3. Upon termination, the supplier may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, without prejudice to point (c) of paragraph 2.

4. The consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract.

5. Where the digital content has been supplied in exchange for a payment of a price and over the period of time stipulated in the contract, the consumer may terminate the contract only in relation to that part of the period of time where the digital content has not been in conformity with the contract.

6. Where the consumer terminates a part of the contract in accordance with paragraph 5, paragraph 2 shall apply, with the exception of point (b) in regards to the period during which the digital content was in conformity with the contract. The supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time when the digital content was not in conformity with the contract.

5. Where the digital content has been supplied in exchange for a payment of a price and over (...) a period of time stipulated in the contract, the consumer may terminate the contract only (...) **from the date at which** the digital content (...) **ceased to be** in conformity with the contract.

6. Where the consumer terminates the contract in accordance with paragraph 5, paragraph 2 shall apply (...) **in regard** to the period (...) **after the digital content ceased to be** in conformity with the contract. The supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time (...) **after the** digital content (...) **ceased to be** in conformity with the contract.

See Part B No. 10.4.

See Part B No. 10.4.

Article 14

Right to damages

1. The supplier shall be liable to the consumer for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. 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.
2. The Member States shall lay down detailed rules for the exercise of the right to damages.
2. The Member States shall lay down detailed rules for the exercise of the right to damages **under paragraph 1.** See Part B No. 11
3. **The consumer's right to damages under (1) shall be without prejudice to any right to damages under the applicable national law (whether for non-performance, delay in supply, non-conformity or any other failure to perform by the trader).** See Part B No. 11

Article 15

Modification of the digital content

1. Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract, the supplier may alter functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security, to the extent those alternations adversely affect access to or use of the digital
1. Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract, the supplier may **not** alter **the** functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security, to the extent those alternations adversely affect access to or use of the digital See Part B No. 13.

content by the consumer, only if:

content by the consumer, (...) **unless:**

(a) the contract so stipulates;

(b) the consumer is notified reasonably in advance of the modification by an explicit notice on a durable medium;

(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice; and

(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice **or from the time the digital content is altered by the supplier, whichever is the later;** and

To make clear that the consumer has either a full explanation in advance or a right to terminate within a trial period after the changes have been made. The latter seems more practical - the average consumer will seldom read technical descriptions given in advance, and will very seldom be able to assess the impact on her use or enjoyment of the digital content by reading a technical description.

(d) upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Article 13(2)(c).

1A. The supplier may not alter the functionality, interoperability and other main performance features of the digital content in accordance with paragraph 1 where the supplier had promised particular performance features for a fixed period or where this would be incompatible with the 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.

See Part B No. 13

2. Where the consumer terminates the contract in accordance with paragraph 1, where relevant,

(a) the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content;

(b) the supplier shall refrain from the use of the counter-performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.

(b) the supplier shall refrain from the use of (...)data which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer

See Article 13(2)(b) above

Article 16

Right to terminate long term contracts

Article 13 refers to the consumer's right to terminate the contract for non-conformity. Article 16 refers to a quite different right, namely to bring a contract that is to be performed over a period of time to an end by giving notice: no ground for termination is needed. It is unfortunate that the same word is used to describe these quite different rights. Although both the DCFR and the CESL referred to both rights as 'termination', this was highly contested. The PECL referred to 'ending the contract' when this was by notice (PECL Article 6:109; Fr '*résilier*'). The difference between the two rights would be much clearer if

different words were used; we suggest reverting to the PECL formula.

1. Where the contract provides for the supply of the digital content for an indeterminate period or where the initial contract duration or any combination of renewal periods exceed 12 months, the consumer shall be entitled to terminate the contract any time after the expiration of the first 12 months period.

1. Where

- (i) the contract provides for the supply of the digital content for an indeterminate period, or
- (ii) where the initial contract duration, (...) **or the initial period plus any period for which the contract has been renewed (whether automatically or by agreement), has exceeded 12 months,**

the consumer shall be entitled to (...) **end** the contract any time (...).

2. The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means. The termination shall become effective 14 days after the receipt of the notice.

2. The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means. The termination shall become effective **on the date specified by the consumer or 14 days after the receipt of the notice, whichever is the later.**

Under paragraph (2) the contract will end 14 days after the consumer's notice even if the consumer asks for termination at a later date. This is unnecessarily restrictive.

3. Where the digital content is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content supplied corresponding to the period of time before the termination becomes effective.

3. Where the digital content is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content supplied corresponding to the period of time before (...) **the contract ended.**

4. Where the consumer terminates the contract in accordance with this Article:

4. Where the consumer (...) **ends** the contract in accordance with this Article:

(a) the supplier shall take all measures which could be expected in order to refrain from the use of other counter-performance than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the

(a) the supplier shall take all measures which could be expected in order to refrain from the use of (...) **data** which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.

See Article 13(2)(b) above.

supply of the digital content including any content provided by the consumer;

(b) the supplier shall provide the consumer with technical means to retrieve all any content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent this data has been retained by the supplier. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format; and

(c) where applicable, the consumer shall delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it including by making it available to a third party.

5. Upon termination, the supplier may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph (4) point (b).

5. (...) **When the contract ends**, the supplier may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph (4) point (b).

Article 16A

Minimum time limit

If, under national legislation, the remedies for a failure to supply or a lack of conformity laid down in this Directive are subject to a prescription period or other time limit, that period or time limit shall not expire within a period of XX years from the time the

See Part B No. 12

failure to supply or the lack of conformity occurred.

Article 17

Right of redress

Where the supplier is liable to the consumer because of any failure to supply the digital content or a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions, the supplier shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the supplier may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Where the supplier is liable to the consumer because of any failure to supply the digital content or a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions **or a third party who has granted an end-use license to the consumer**, the supplier shall be entitled to pursue remedies against the person or persons liable in the chain of transactions **or the third party who has granted an end-use license**. The person against whom the supplier may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

To clarify

(1) that also an end-user-licensor may be liable to the supplier

(2) that all details of redress are left to the national laws

Article 18

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:

- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting.

Article 19

Mandatory nature

Unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them or varies their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer, shall not be binding on the consumer.

Article 20

Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004, Directive 2009/22/EC

1. In Article 1 (2) of Directive 1999/44/EC, point (b) is replaced by the following:

"(b) consumer goods: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,*
- water and gas where they are not put up for sale in a limited volume or set*

quantity,

– electricity,

– a durable medium incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer as referred to in Directive (EU) N/XXX39."

– a (...) **tangible** medium See Article 2(11) above incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer as referred to in Directive (EU) N/XXX39."

39 Directive (EU) N/XXX of the European Parliament and of the Council of on contracts for the supply of digital content (OJ ...)

2. In the Annex to Regulation (EC) No 2006/2004, the following point is added:

"21. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

3. In Annex I to Directive 2009/22/EC the following point is added:

"16. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

Article 21 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [the date of two years after the entry into force] at the latest.

2. When Member States adopt those provisions, they shall contain a reference to this Directive or be

accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 22

Review

The Commission shall, not later than on *[the date of five years after entry into force]* review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against counter-performance other than that covered by this Directive, in particular supplied against advertisement or indirect collection of data.

The Commission shall, not later than on *[the date of five years after entry into force]* review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against **data as a** counter-performance other than **money** that **is** covered by this Directive, in particular supplied against advertisement (...).

Missing word ('money') added to second sentence
Insertion of "data" for clarification

Deletion of "or indirect collection of data" follows from the suggested amendment of Article 3 (1).

Article 23

Entering into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 24

Addressees

This Directive is addressed to the Member States.

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.



ELI

EUROPEAN
LAW
INSTITUTE