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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

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Petitions

**Remedies for buyers in
case of contracts for the
supply of digital content**

NOTE



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

LEGAL AFFAIRS

Remedies for buyers in case of contracts for the supply of digital content

BRIEFING NOTE

Abstract

The inclusion of provisions on digital content, including 'gratuitous' digital content, in the Common European Sales Law constitutes an improvement in respect to existing EU legislation on sales contracts. However, some amendments are necessary, given the fact that digital content differs from goods. This briefing note critically assesses the relevant provisions on conformity and remedies, and gives suggestions for tailoring them better to digital content.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

B2B Business-to-Business

B2C Business-to-Consumer

CESL Common European Sales Law (proposal)

CJEU Court of Justice of the European Union

EU European Union

FS Feasibility Study

EXECUTIVE SUMMARY

To our opinion, the European Commission has rightly included digital content contracts within the scope of the CESL. It is also to be applauded that the European Commission has chosen to include 'gratuitous' digital content contracts within the scope of the CESL, but the restriction of the buyer's remedies for failing digital content in the case of 'gratuitous' digital content contracts should be reconsidered.

However, some amendments are necessary in order to reflect that digital content is not 'just' like goods. Firstly, we suggest that Article 100 CESL (Criteria for conformity of the goods and digital content) is supplemented by an additional provision stating that with regard to digital content contracts, statements pertaining to the digital content made by the provider of the digital content or by a party for whom he/she is responsible may restrict the expectations the buyer may have of the digital content only insofar as this is reasonable in the circumstances of the case. Secondly, we suggest that the buyer should be entitled to make a private copy of the digital content, or else to require providers of digital content to specifically draw the attention of buyers to the absence of a possibility to make private copies and, in any case, to extend the current right to make a back-up copy to other digital content than just computer programs. Thirdly, Article 91 CESL should be amended to clarify that in the case of a digital content contract, the provider is required to transfer usage rights to the buyer as well as ownership of the tangible carrier if the digital content is provided on such a carrier, but – unless expressly agreed otherwise – not required to transfer the intellectual property rights associated with the digital content. Fourthly, with regard to long-term contracts for the provision of digital content, Article 105 paragraph (4) CESL ("Relevant time for establishing conformity") takes account of problems regarding updates, but neglects to regulate the problem of access, where the buyer originally had obtained access but at a later moment experiences problems. We suggest that this paragraph (4) be replaced or supplemented by a more general provision indicating that where the digital content is not provided on a one-time permanent basis, the trader must ensure that the digital content remains in conformity with the contract throughout the contract period.

With regard to the remedies for non-conformity, our conclusion is that these remedies to a large extent are fit to be applied also to digital content contracts. However, an exception must be made for the right to claim specific performance, in particular repair or replacement. Where the non-conformity consists of problems relating to the quality of the digital content, we suggest including a provision entitling the provider of the digital content to offer the buyer, where repair or replacement is not possible or available, alternative remedies, such as alternative digital content. In that case the buyer would, however, be free to decline the offer, in which case the buyer should be able to terminate the digital content contract. It is suggested to explicitly provide that the provider of the digital content would in such case be required to inform the buyer of his/her right to decline the offer and of the consequences thereof.

Where the problem is rather the access to digital content, the present right to repair or replacement seems unfit to remedy the buyer's problems in most cases. In these cases, the buyer will probably have to resort to price reduction, termination or damages.

In our view, the restriction of the buyer's remedies to damages in the case of a gratuitous digital content contract should be reconsidered. In particular, where the buyer has provided personal data to the provider of the digital content, he/she has a legitimate interest in having these data removed from the provider's data records. Moreover, we fail to see why the buyer should not be entitled to specific performance where this remedy is available.

1. BACKGROUND

1.1. Introduction

In October 2011, the European Commission proposed a regulation of the European Parliament and of the Council on a Common European Sales Law (CESL).¹ The proposal is now before the Legal Affairs Committee of the European Parliament. In this context, the Committee organises a series of Workshops. With a view to those workshops the European Parliament has requested a number of ad hoc briefing papers including the present one.²

This briefing note addresses the specific rules on digital content included in the CESL. In particular, it will respond to the following questions posed by the European Parliament:

- 1) Could you give a brief description of the content and scope of contracts for the supply of digital content, how is non-performance defined in these cases, notably in relation to the supply of goods, how will the general provisions regarding remedies apply to contracts for the supply of digital content, and what are the relevant conditions?
- 2) How do you assess them in terms of simplicity, legal certainty and effectiveness of remedies? Would you have any suggestions for improvement in these regards?

The briefing note is structured as follows. First, it sets out the background to the rules on non-conformity and the buyers' remedies proposed in the Consumer Sales Directive and the CESL. Second, it looks into the criteria for non-conformity of digital content, paying attention to their relation to the rules for tangible goods. Third, the remedies for non-conforming digital content under the CESL are discussed. Fourth, simplicity, legal certainty and effectiveness of the proposed rules on remedies for digital content contracts are assessed.

¹ *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, Brussels, 11.10.2011 COM(2011) 635 final.

² JURI Request for three *ad hoc* briefing papers for a Workshop on the Proposal for a Regulation on a Common European Sales Law (Framework contract IP/C/JURI/FWC/2009-064/LOT1).

1.2. The Consumer Sales Directive

The provisions of the CESL on non-conformity and remedies to a large extent follow the rules laid down in Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive). The core provisions of this Directive are Article 2, which indicates that the goods delivered must be in conformity with the contract and which elaborates when this is the case, and Article 3, which provides the remedies the consumer has under the Directive when the goods are not in conformity with the contract at the time of delivery. These rights include the primary remedies of repair and replacement, and the secondary remedies of termination and price reduction. These secondary remedies may be invoked only when the consumer may not invoke the primary remedies or when the seller has not completed the primary remedy within a reasonable time or without causing significant inconvenience to the consumer ('hierarchy of remedies'). In addition, Article 5 provides for important time limits, indicating that

- (paragraph (1)) the seller is liable under the Directive for any non-conformity that becomes apparent within two years after delivery,
- (paragraph (2)) Member States may introduce or maintain a duty for the consumer to notify the seller of a lack of non-conformity, provided that the period for notification is at least two months and only starts from the date of (actual) discovery of the lack of conformity, and
- (paragraph (3)) a lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery, with minor exception.

The minimum harmonisation regime imposed by this Directive determines what remedies for non-performance of B2C sales contracts are available for consumer-buyers in all Member States. Given the fact that the Directive does not entail full harmonisation, however, Member States may still offer a higher level of consumer protection also in this regard. In all Member States, at least the remedy of damages is awarded to the consumer in case of lack of conformity, albeit that the conditions for invoking this remedy and the defences of the seller may differ considerably in the Member States.

General contract law in many Member States leaves the buyer the choice among available remedies in case the seller does not perform the contract.³ The provisions of the Consumer Sales Directive, however, stipulate that a consumer-buyer will first have to allow the seller to repair or replace a defective good before being able to terminate the contract or ask for a price reduction. This hierarchy has been implemented in the laws of most EU Member States.⁴

The Consumer Sales Directive only applies to tangible goods, not to digital content. If digital content was qualified as a service, Directive 2006/123/EC of 12 December 2006 on services in the internal market could apply. Since the Services Directive does not provide any substantive rules on the quality of services, there are no specific rules on digital content in EU law at this moment. National laws may, however, apply sales law to digital content contracts by analogy.⁵

³ It should be noted, however, that a hierarchy of remedies may enter through the backdoor, as in many legal systems both a claim for damages and termination of the contract require that the debtor (i.e. the seller) is in default. In order to put the debtor into default, often a notice of default (*mise-en-demeure*, *Nachfrist*) is required, allowing the debtor a final chance to perform.

⁴ H. Schulte-Nölke, C. Twigg-Flesner & M. Ebers (eds.), *Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008).

⁵ M.B.M. Loos, N. Helberger, L. Guibault, C. Mak, L. Pessers, K.J. Cseres, B. van der Sloot, R. Tigner, *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts, FINAL REPORT: Comparative analysis, Law & Economics analysis, assessment*

1.3. The proposal for a Common European Sales Law (CESL)

1.3.1. Differences between the CESL and the Consumer Sales Directive

Unlike the Consumer Sales Directive, the CESL governs both B2C and B2B contracts. While the Directive only regulated the sale of tangible goods to consumers, the CESL also covers contracts for the supply of digital content, and whether or not the buyer is a consumer. It further extends its scope to digital content that has not been supplied in exchange for a price ('gratuitous digital content'). Finally, the CESL has not copied the hierarchy of remedies of the Directive, but allows a free choice of remedies in B2C as well as in B2B contract.

1.3.2. Digital content contracts – content and scope

The CESL covers contracts for 'the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price' (Article 5(b) Regulation on CESL). Accordingly, it may apply to digital content provided in exchange for a price, as well as to gratuitous digital content. Moreover, the CESL rules are neutral as far as the medium through which the digital content is supplied is concerned: they do not distinguish between digital content supplied on a tangible medium, such as a CD or DVD and digital content made available through mobile or internet connections. In line with this approach, Article 2 of the Regulation on CESL defines 'digital content' as 'data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software'.

The following types of digital content are excluded from the CESL's scope (Article 2(j) Regulation on CESL):

- (i) financial services, including online banking services;
- (ii) legal or financial advice provided in electronic form;
- (iii) electronic healthcare services;
- (iv) electronic communications services and networks, and associated facilities and services;
- (v) gambling;
- (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users.

1.3.3. Differences between the CESL and the Feasibility Study and the 2011 Report by *Loos et al.*

The European Commission's drafting was informed by the work of an Expert Group whose task was to develop a Feasibility Study (FS) on a possible future European contract law instrument. However, the text of the FS does not contain any provisions on digital content. The provisions on digital content were prepared in the course of a separate study

and development of recommendations for possible future rules on digital content contracts, report for the European Commission, 2011, p. 102-103 (available online with permission of the European Commission at <http://www.jur.uva.nl/csecl/news.cfm/F6D160E3-0898-4FD1-AF52AD4412D7BD43>, last visited on 15 May 2012). This report is referred to hereinafter as: Loos et al. 2011 (Report), or: our Report; see also M.B.M. Loos, N. Helberger, L. Guibault, C. Mak, 'The regulation of digital content contracts in the Optional Instrument of contract law', *European Review of Private Law* 2011/6, p. 740-741; this paper is referred to hereinafter as: Loos/Helberger/Guibault/Mak, *ERPL* 2011.

conducted on behalf of the European Commission. The authors of this briefing note were among this report's authors.⁶

The main differences between the 2011 Report by *Loos et al.* and the Commission's proposal regarding digital content include the following:

- In our Report (p. 218) it is made clear that a specific provision must be included indicating that unless expressly agreed otherwise, in the case of a digital content contract, the seller is not required to transfer the intellectual property rights pertaining to the digital content, but merely a right to use the digital content and, in so far as relevant, the ownership of the tangible medium on which the digital content is stored. This suggestion is not taken over in the CESL. We will come back to this in section 4.1.
- In our Report it is further suggested that, with regard to digital content contracts, statements made by the business or by a party for whom business is responsible pertaining to the digital content restrict the expectations the buyer may have of the digital content only insofar as this is reasonable in the circumstances of the case (p. 223). A specific provision to this extent has also not been included in the CESL. We will address this matter in section 2.1.3.
- We have suggested in our Report (p. 224) that a specific provision regarding the right of buyers to make a restricted number of private copies and a specific provision extending the right and possibility to make a back-up copy for software to other digital content contracts is needed. No such provisions have been introduced in the CESL. We will also comment on this below (section 2.1.4).
- Under Article 173 paragraphs (1) and (4) CESL, the obligation for the buyer to pay the monetary value of the digital content in case of termination of the contract pertains to all digital content contracts, whether or not the digital content was supplied on a tangible medium, and is equalled to the amount saved by the buyer by making use of the digital content. In our Report (p. 230) we suggested including a provision saying that the buyer has to pay the value (at the time of performance) of the digital content, if its nature makes it impossible for the business to determine whether the consumer has retained the possibility to use it. It seems, however, that in most cases the effects of the two approaches would be similar. We will come back to this in section 3.3.
- In our Report (p. 235-236) a specific provision was suggested regulating the effects of the termination of a digital content contract on linked digital content contracts. Such a provision is missing in the CESL.

The other main differences between our Report and the CESL do not relate to conformity issues and the remedies for non-conformity. For the purpose of completeness, we list them in the order of our Report:

- In our Report, specific provisions on pre-contractual information (p. 185-186, 193) and on clarity and form of information in digital content contracts (p. 189) were suggested. Such provisions are missing in the CESL.
- In our Report, a specific remedy for the breach of duty of transparency in digital content contracts was suggested (p. 194). Such a provision has not been included in the CESL.
- Specific provisions on the incorporation of standard terms in digital content contracts concluded by way of click-wrap or browse-wrap or other electronic

⁶ This report is Loos et al. 2011 (Report), mentioned in the previous footnote.

means were suggested (our Report, p. 196-197). These suggestions have not been taken over by the European Commission.

- In our Report it was suggested that a number of terms would be added to the black and grey lists of unfair terms. These terms relate to terms that eliminate or impede the exercise of the exceptions or limitations on copyright and the possibilities for making a private copy of a work (p. 199, grey list), to terms infringing the consumer's rights governing the protection of his/her personal data or privacy (p. 200, black list), and to terms requiring the consumer to conclude an additional digital content contract or a contract pertaining to hardware with the business or a third party (p. 202, grey list). The last of these suggestions has been taken over in the CESL, but is extended to cover also other contracts within the scope of the CESL (see Article 85(u) CESL). The other suggestions have not been taken over.

2. NON-CONFORMITY OF DIGITAL CONTENT

2.1. Legitimate expectations of buyers

This section will discuss the CESL provisions on non-performance of the seller's obligations, focusing on non-conformity of digital content. The main rules on non-conformity can be found in Articles 99 and 100 CESL. Although these provisions to a large extent correspond to the existing provisions on non-conformity of tangible goods, their application to digital content poses some questions.

2.1.1. Conformity with the contract

The conformity test proposed in the CESL (Article 99 CESL) corresponds to the existing standard of the Consumer Sales Directive. In order to assess whether the digital content supplied to the buyer is in conformity with the contract, it has to be established whether the digital content meets the buyer's legitimate expectations.

The burden of proof of non-conformity rests on the buyer. For consumer sales contracts, the CESL copies the Consumer Sales Directive to the extent that it stipulates that in these contracts any non-conformity that becomes apparent in the first six months after the risk passes to the consumer-buyer, the non-conformity will be presumed to have already existed at that time (Article 105(2) CESL).

The conformity test in principle seems flexible enough to accommodate digital content contracts. Still, its application raises questions. The problem with digital content is that for many types of digital content it is as yet unclear what buyers may expect from it. We will further develop this in section 2.1.3.

2.1.2. Relation to non-conformity of goods

Article 100 CESL gives some guidance as to the legitimate expectations that buyers may have. Again, the structure of the provision is similar to the Consumer Sales Directive. Article 100(a) CESL stipulates that goods and digital content must 'be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement'. In case of digital content, a buyer could for instance indicate to the seller that he/she would like to use the digital content on multiple devices, e.g. be able to play mp3 music files both on a computer and an mp3 player. This would be comparable to a buyer of a tangible good, for instance a watch, enquiring whether the watch is waterproof so it can be used when swimming.

In any case, and again similar to the Consumer Sales Directive, the CESL stipulates that 'the goods or digital content must be fit for the purposes for which goods or digital content of the same description would ordinarily be used' (Article 100(b) CESL). This criterion seems more difficult to apply to digital content than to goods. An important difference between goods and digital content is that the quality of goods can usually be assessed before the sales contract is concluded, whereas the quality of digital content often only becomes apparent upon use. Moreover, given the rapid technological developments in the market for digital content, for many types of digital content the 'ordinary purpose' standard has not yet been defined.

2.1.3. Applying rules on non-conformity to digital content

According to a recent empirical study, the main problems that buyers encounter when using digital content concern 1) accessibility, functionality and compatibility; 2) bad or substandard quality; and 3) flaws, bugs and other security and safety matters.⁷ As long as no clear standards are defined regarding these aspects of digital content, it should be noted that consumer expectations are to a large extent influenced by statements made by the industry.⁸ On the one hand, this permits the industry to clarify the features of digital content and thus inform buyers of what they may expect of the digital content. On the other hand, however, it gives the industry the power to manipulate consumer expectations and this way set the standard for conformity of digital content.

As a result, the conformity test's sub-rule that the digital content must be fit for its ordinary (or: normal) purpose is often of little use and the legitimate expectations the buyer may have of the digital content to a large degree is determined by the information the provider of the digital content has provided to the buyer. This may incite providers of digital content to describe the expectations the buyer may have of the digital content in an abusive way by indicating only limited performance capabilities, thus in practice restricting their liability. It is important to realize that statements made by the provider of the digital content can and do influence the legitimate expectations that the buyer may have of the digital content. However, it is equally important that such statements cannot set aside legitimate expectations the buyer could otherwise have of the digital content, if this is unreasonable in the circumstances of the case. In this respect, we feel that leaving the matter entirely to the discretion of the courts would not provide sufficient guidance to practice.

2.1.4. Private copying and back-up copies

In the CESL no specific account is given of the fact that provisions developed for (consumer) sales law are to be applied to contracts that relate to intellectual property rights. In section 4.1 we will discuss the question to what extent the 'normal' sales rules, including the obligation to transfer ownership rights, are fit to be applied to digital content contracts. Here, we focus on another aspect: to what extent may (consumer-)buyers expect to be able to make private copies or back-up copies of the digital content? The question whether or not (consumer-)buyers are allowed to make one or more copies of the digital content for private use is one of the battlegrounds with regard to digital content. Article 5 paragraph (2) under (b) of the 2001 Information Society Directive⁹ does not provide buyers with such a right, but merely allows (but by no means requires) Member States to allow buyers to make a copy for private use, provided that the right-holders receive a fair compensation. As a consequence, the rules on private copying have remained largely not harmonised in the European Union. One exception is the right of the lawful purchaser of a computer programme to make a back-up copy of the programme if this is necessary for its use and in accordance with its purpose, as recognised by Article 5(2) and 8 of the 2009 Computer Programs Directive.¹⁰ This right may not be set aside by contract. Insofar as in a given Member State the private copying exception or limitation is accepted under copyright law, the question arises whether in such a legal system the exception or limitation is mandatory or may be overcome by an agreement between the producer or the provider of the digital content and a buyer. The Information Society Directive does not

⁷ Europe Economics, *Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 4: Final Report*, London: 2011, p. 82 ff.

⁸ Loos/Helberger/Guibault/Mak, *ERPL* 2011, p. 741. See also M. Schmidt-Kessel, L. Young, S. Benninghof, C. Langhanke, G. Russek, 'Should the Consumer Rights Directive apply to digital content?', *Zeitschrift für Gemeinschaftsprivatrecht* 2011/1, p. 13.

⁹ Directive 2001/29/EC, OJ 2001, L 167/10.

¹⁰ Directive 2009/24/EC, OJ 2009, L 111/16.

provide an answer to this question.¹¹ This implies that even in a legal system where a private copy exception or limitation is accepted, the possibility exists that the producer or provider of the digital content contractually excludes such a possibility in part or even in full. Moreover, the private copy exception or limitation cannot be enforced insofar as the protected works are offered on-demand under contractual terms to which the buyer has agreed.¹² Furthermore, the Information Society Directive provides that, where the copyright holder voluntarily designs a technical protection measure that allows some private copying, the buyer's right to private copying is exhausted with that voluntary scheme, thus preventing the Member States to further protect buyers against technical protection measures.¹³ The buyer's right to make a private copy, insofar as such a right exists at all under national copyright law, can therefore easily be undermined by the copyright holder.

From the above it follows that the 'non-functioning' of the digital content – in this case, the absence of the possibility to make a private copy – may be the result of perfectly legitimate licensing under copyright law. However, this still does not mean that buyers do not, and may not expect that digital content cannot be copied.¹⁴ In this respect it should be noted that where copyright law centres on the position and the rights of the copyright-holder, consumer law focuses on the position and rights of buyers.¹⁵ Under the conformity test, it is not the legal rights of the copyright-holder, but the legitimate expectations the buyer may have of the digital content that determine whether or not the digital content is in conformity with the contract. Once it is established that the buyer could reasonably expect that he/she could make a private copy of the digital content, the digital content does not conform to the contract if such a copy cannot be made. The question remains, therefore, whether and when buyers, in particular consumers, may reasonably expect that they can make a private copy. A study conducted in 2005 shows that in the case of music content stored on a CD, consumers generally do expect to be able to make a private copy, and actually do make such copies.¹⁶ Moreover, a large majority of no less than 80% of all interviewed consumers had made a private copy of CDs they owned themselves in the 6 months prior to the interview, and 73 % perceived this to be legal under all circumstances, with 7 % thinking that this is legal under certain circumstances and only 11 % believing this is illegal.¹⁷ That same study showed that 86% of internet users who have experience with digital music have almost no knowledge about Digital Rights Management, and between 70-80 % of the interviewed consumers that had purchased digital music in the 6 months prior to the interview indicated that they did not know whether the music they purchased was protected by Digital Rights Management and/or whether any usage restrictions applied. Of the persons that did know that usage was restricted, more than half were not well informed about the details of the restrictions.¹⁸

The above shows that, notwithstanding the fact that traders had made use of technical protection measures preventing private copies for several years and had informed their customers thereof, this information has neither 'sunken in' with consumers, nor has it

¹¹ Cf. L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague: Kluwer Law International 2002, p. 252 ff.

¹² Cf. Art. 6 (4), fourth subparagraph Information Society Directive.

¹³ Cf. Art. 6 (4) third subparagraph Information Society Directive.

¹⁴ N. Helberger, and P.B. Hugenholtz, 'No place like home for making a copy: private copying in European copyright law and consumer Law', *Berkeley Technology Law Journal* 2007, p. 1085, in this regard remark that the reasonable consumer expectation standard counterweighs the copyright-holder-centred norms on private copying that prevail in a copyright law analysis.

¹⁵ Cf. Helberger and Hugenholtz 2007, p. 1078.

¹⁶ N. Dufft et al., INDICARE, *Digital Music Usage and DRM, Results from a European Consumer Survey 26-28* (2005), p. 16, 23, available online at http://www.indicare.org/tiki-download_file.php?fileId=110 (last visited on 15 May 2012).

¹⁷ Dufft et al. 2005, p. 41-42.

¹⁸ Dufft et al. 2005, p. 36-38.

affected the expectations that consumers generally have of digital content – in this case, of music files. This points in the direction that – in particular with regard to digital music content – consumer-buyers may reasonably expect to be able to make private copies (if need be: against additional payment). In this respect, it should be noted that when such information is somewhat hidden in standard contract terms or in a document containing a lot of other information, the consumer has not become aware of that information and her legitimate expectations have not been altered before the contract was concluded. The provider of the digital content therefore needs to specifically draw the consumer's attention to that information, in order to change the consumer's legitimate expectations as to the possibility to make private copies. Obviously, this would not stand in the way of a business model under which the consumer is given the (clearly indicated) choice to download a music or video file for a low price but without the possibility to make a private copy, or to download the same file for a higher price but with such possibilities.¹⁹

The differing approaches between copyright law and consumer protection legislation towards private copying suggest that this matter is in dire need of proper legislation, in particular because the matter is regulated very differently from one country to the next. For this reason, in our Report (p. 224 ff.) to the European Commission we have suggested that a specific provision should be introduced indicating that a consumer may make a limited number of private copies of the digital content under certain conditions – in particular by requiring the parties to provide sufficient compensation to the copyright-holders and to not allow private copies as long as the consumer may still withdraw from the contract, and to allow for the parties to expressly agree to a more limited right to make private copies. Alternatively, the European legislator could introduce an obligation for providers of digital content to specifically draw the attention of consumers to the absence of a possibility to make private copies. Moreover, in any case the current right to make a back-up copy should be extended to other digital content than just computer programs. Unfortunately, in the CESL these suggestions have not been taken over. In our view, in doing so the European Commission has lost out on a true possibility to finally introduce coherent legislation in this area, balancing the interests of consumers, providers of digital content and copyright-holders. The uncertain situation as to the existence or non-existence of a right to make private copies will, therefore, continue to exist.

2.1.5. Non-conformity in the case of long-term contracts

Whereas there is much experience in the Member States with the application of the conformity test of the Consumer Sales Directive and the general rules on defective goods in sales law to digital content contracts, most case law pertains to digital content – in particular: software – which is permanently transferred, e.g. cases where the digital content is stored on a tangible carrier, or sent by the business or downloaded by the consumer for permanent use by the latter. There is certainly much less experience with the application of the conformity test to digital content that is not permanently transferred but only on a temporary basis (e.g. by allowing access for only a limited number of times or a limited period) or merely made accessible to the buyer – either by way of streaming or by way of access to a database. Where the obligation of the provider of the digital content is of a continuous or recurring nature, the buyer may reasonably expect the provider to keep the digital content in conformity with the contract. With regard to a digital content contract allowing the buyer access to an online database, this implies for instance that new entries in the database take place when this may reasonably be expected. This will for example be the case with an online subscription to an e-newspaper.

¹⁹ Helberger and Hugenholtz 2007, p. 1094.

Article 105 paragraph (4) CESL ("Relevant time for establishing conformity") at first glance appears to meet this end: whereas paragraph (1) of that Article determines that the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, paragraph (4) adds:

'4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.'

Whereas this provision probably suffices for digital content contracts pertaining to, for instance, online subscriptions to databases, e-papers and e-magazines, satellite navigations systems and antivirus-programs, it is doubtful, whether this also suffices for *access problems* where the buyer originally had obtained access but at a later moment experiences problems. In this case, it is not the absence or defectiveness of updates, which causes problems, but the mere access to the digital content itself. For instance, what about the subscription to an online game that can no longer be accessed by a consumer? As the problem did not exist at the moment when the digital content was first delivered, one could argue that this does not fall within the conformity provision of Article 105(1) (Relevant time for establishing conformity). And as the problem has nothing to do with updates – the parties may not even have agreed to the provision of updates in their contract – paragraph (4) does not help either. It is therefore suggested that paragraph (4) be replaced by a more general provision indicating that where the digital content is not provided on a one-time permanent basis, the trader must ensure that the digital content remains in conformity with the contract throughout the contract period. Such a provision would be applicable to all digital content contracts that do not consist in a one-time performance on a permanent basis – i.e. both to subscription contracts and to streaming – and irrespective of the nature of the problem – i.e. problems regarding updates or access.

2.2. Digital content not supplied in exchange for a price

The provisions of the CESL are available not only where the digital content is provided in exchange for a price, but also where no price is charged.²⁰ This is explained, in recital (18) by the fact that such digital content is in such case often provided in exchange for non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the buyer will purchase additional or more sophisticated digital content products at a later stage. In our view, this is a convincing reason to include also 'gratuitous' digital content contracts within the scope of the CESL. This does not mean that the quasi-gratuitous nature of the contract is not of influence. On a general note, the price the buyer is required to pay for the digital content will influence the reasonable expectations the buyer may have of the digital content. In particular when the provider's business model provides for different versions of the same product – with more or less performance capabilities depending on the price to be paid – it will be clear that additional performance capabilities come at an additional price. In this sense it is not an absolute necessity to spell this out in the text of the CESL. By extending the scope of the CESL to include also such quasi-gratuitous contracts it becomes possible for the providers of digital content to opt for the same set of rules to both gratuitous and remunerated digital content contracts. By enumerating the rules that are not applicable to gratuitous contracts or have to be interpreted differently, legal certainty is provided to both the buyer and the business. It may even be attractive for businesses to have a uniform but flexible set of rules applicable to all digital content contracts – in particular when the business model offers

²⁰ See Article 5 under (b) of the proposed Regulation.

gratuitous contracts with limited performance capabilities and remunerated contracts with additional performance capabilities. In our view, the choices of the European Commission in this regard are therefore the correct ones.

Article 100(g) CESL provides that '[w]hen determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for a price'. This implies that for 'gratuitous' digital content a lower standard is set than for paid digital content: in case a buyer can use digital content for free, he/she may not expect it to be of the same quality as when a payment is made for the digital content.

The provision balances the interests of suppliers and consumers of digital content. If a buyer could invoke the same legal protection in case of gratuitously provided digital content as in case of remunerated digital content, the supply of digital products and services would decrease because of increasing costs for the sellers.

On the other hand, as argued above, even if no payment is made, digital content is often not supplied for free, but in exchange for personal data. In order to be able to listen to music or watch movies online, for example, users of these digital content services will often have to register on the website offering the music or films. Buyers thus effectively pay for the use of digital content with their personal data.

3. REMEDIES

This section will address the remedies for non-performance of a contract offered to the buyer under the CESL and assess how they may be applied to digital content contracts. As mentioned above, an important general difference between the current regime of the Consumer Sales Directive and the proposed CESL is that the latter does not establish a hierarchy among the available remedies. The buyer is in principle free to choose which remedy to invoke (Article 106 CESL).

3.1. Specific performance, repair and replacement

Article 110 CESL gives the buyer a right to require performance of the seller's obligations. This remedy could be applied in case digital content is not delivered. A more problematic situation concerns cases where digital content is of substandard quality or contains bugs or flaws. In that case specific performance will be difficult, since the defective file cannot be easily substituted for a conforming one. In practice, suppliers might get around this problem by offering alternative remedies, such as a choice to download two or three other songs in case of a defective mp3 file.

For B2C contracts, Article 111 CESL provides that a consumer has a free choice between repair and replacement. This is a novelty in comparison to the Consumer Sales Directive, since that Directive, apart from establishing a hierarchy of remedies, left the choice between repair and replacement to the seller. On this point, the CESL thus offers consumers a higher level of protection than the existing minimum level of the Directive. For digital content, however, repair and replacement may again prove difficult in case of substandard quality or bugs and other technical flaws.

In light of the empirical data on consumers' experiences with digital content, moreover, one may wonder whether repair and replacement actually provide an adequate remedy to all problems that consumers encounter. Most problems reported by consumers are related to access.²¹ It is doubtful whether repair or replacement of digital content can fully resolve these particular problems. Rather, remedies would have to address the manners in which to make sure digital content is compatible to the medium through which it is accessed. Furthermore, it might be investigated how to incorporate possibilities to 'repair' unclear information, or a lack of information, in the legal framework for digital content, for instance by requiring traders to provide clearer instructions.²²

3.2. Withholding performance

In case of non-performance by the seller, the buyer may withhold performance of his/her own obligations until the seller has tendered performance or has performed (Article 113 CESL). This remedy may be applied also in digital content contracts, both where the buyer has purchased digital content but has failed to pay the required price and where the provider of the digital content has not yet provided the digital content or has provided non-conforming digital content.

²¹ See Europe Economics 2010, p. 80.

²² In this context, it is of importance that some legal systems include information about system requirements in the concept of 'essential characteristics' of the digital content, which means that a lack of information or unclear information may imply non-conformity of the digital content.

3.3. Termination of the contract and restitution

Article 114 CESL stipulates that a buyer may terminate the contract in case of fundamental non-performance by the seller. Non-performance is fundamental if 'it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result' or if non-performance 'is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on' (Article 87 CESL). In case of non-performance of a B2C contract because of non-conformity of digital content to the contract, the consumer may terminate the contract only if the lack of conformity is not insignificant.

Although termination of the contract in principle provides an adequate remedy in case of non-performance, the application of the CESL provisions to digital content contracts may pose problems insofar as it is not clear what legitimate expectations buyers may have of digital content. In this context, the question also arises as to when a lack of conformity of the contract is considered to be sufficiently significant to justify the termination of the contract.

Another point of attention concerns the consequences of termination of the contract. When a contract is terminated, each party has an obligation to return what she has already received from the other party (Article 172 CESL). However, with regard to digital content, the obligation to return the digital content is replaced by an obligation to pay the monetary value of the digital content, whether or not the digital content was supplied on a tangible medium (Article 173 paragraph (1) CESL). The monetary value is considered to be equal to the amount the consumer saved by making use of the digital content (Article 173 paragraph (4) CESL). The CESL thus makes a rigorous distinction between 'ordinary goods' and digital content that in our view is unnecessary. In our view, there is no need to oblige the consumer to pay the monetary value of the digital content in case the digital content can easily be returned and there is no risk that the consumer can retain a usable copy of the digital content. If, for instance, the digital content was provided on a tangible carrier (e.g. music files on a CD or DVD) that was sealed and the seal has not yet been broken by the consumer, a mere duty to return the digital content and the carrier on which it is stored, seems to suffice. In the current text of Article 173 paragraph (1) CESL, as the contract concerns digital content, the consumer would not be required to return the digital content and the carrier on which it was provided, but to pay the monetary value thereof. Similarly, when the consumer can only use the digital content through an online account, the provider of the digital content may simply close that account and thus prevent further use of the digital content. Where return of the digital content by its nature is not possible, e.g. in the case of streaming of digital content, where no lasting copy is made on the consumer's computer, the main rule of Article 173 paragraph (1) CESL, equally applicable to goods and services that cannot be returned, may be applied. Only in cases where the consumer might be able to continue using the digital content after termination of the contract and where the provider of the digital content would not have a means to prevent or detect such further use, a specific provision relation to digital content is needed. An example would be the case where the consumer may have made a copy of the digital content and have stored that on her own computer or on another device, e.g. on a smart phone or an mp3-file. In such cases, an obligation to pay the monetary value of the digital content would seem to be the correct approach. For this reason, we suggested in our Report (p. 230) that a provision be included, stating that the consumer has to pay the value (at the time of performance) of the digital content if its nature makes it impossible for the provider of the digital content to determine whether the consumer has retained the possibility to use it. The European Commission has generalised this suggestion to apply to all terminated digital content contracts. As such, it has created a distinction between

'ordinary goods' and goods on which digital content is stored where no justification for such a general distinction exists in our view.

Finally, Article 173 paragraph (6) CESL logically adds that in case of 'gratuitous' digital content, no restitution will be made: since no payment was made, the seller does not have to return any money. In return, the buyer is allowed to keep the (non-conform) digital content. However, we suggest adding a provision requiring the seller to remove the buyer's personal data from its data records in cases where the buyer has given personal data in exchange for the supply or the possibility to make use of the digital content.

Whereas Article 173 paragraph (6) shows that termination is possible also with regard to 'gratuitous' digital content contracts, Article 107 provides for a general *exclusion* of the right to termination. In our view, the latter Article should be amended. We will come back to this in section 3.7.

3.4. Price reduction

According to Article 120 CESL, a buyer who accepts a performance not conforming to the contract may reduce the price. This remedy seems to fit contracts for the supply of digital content in exchange for a monetary payment. It does, naturally, not apply to digital content that is not supplied in exchange for a price.

3.5. Damages

The CESL's rules on damages are laid down in Chapter 16 of the instrument. The provisions take a general approach, not making a further distinction between non-performance of contracts for the supply of goods or digital content. This approach seems to fit digital content contracts, in the sense that the assessment of loss caused by the non-performance of digital content contract will likely engage similar questions as the assessment of loss caused by contracts for the sale of goods.

3.6. B2B: seller's right to cure

In contracts for the supply of digital content between businesses, the seller has a right to cure (Article 106(2) and 109 CESL). This means that 'a seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance' (Article 109(1) CESL). During the time that the seller may cure the non-conformity, the buyer may not exercise any remedy except withholding his/her own performance (e.g. not yet paying the price for the digital content, until digital content is delivered in conformity with the contract). A right to cure does not apply in B2C contracts.

The right to cure seems to be relatively easily applicable in cases concerning digital content. Once more, the main difficulty is to establish what constitutes 'non-conformity'. Once that is clear, the rules on cure can be applied rather straightforwardly.

3.7. Limitation of remedies for digital content not supplied in exchange for a price

An important limitation of the range of remedies available in case of non-conformity of digital content is given in Article 107 CESL. This Article provides that in case of gratuitous digital content, the buyer may not resort to the remedies of: specific performance, repair,

replacement, withholding performance, termination of the contract or price reduction. The only right available is therefore the right to claim damages (following the rules of Chapter 16 CESL) for loss or damage caused by the non-conformity to the buyer's property, including hardware, software and data. This provision does not take into account other damage that the buyer may sustain in case of gratuitous digital content contracts. In particular, the buyer should be entitled to have any personal data provided to the provider of the digital content removed from the provider's data records.

The exclusion of price reduction is logical, given the fact that the contracts concern the supply of digital content without payment of a price. The exclusion of the other remedies, however, leaves the buyer with a highly reduced number of remedies in case of non-performance of the contract. This leads to disparities in treatment among, for instance, contracts for the supply of applications for smartphones that are offered for free and those that are offered for a micro payment of for instance 50 euro cents. In our view, there is no justification, why the buyer should not be able to claim specific performance, requiring the provider of the digital content to provide the promised digital content, or to provide other digital content where such alternative digital content is reasonably available to the provider of the digital content.

Furthermore, there is no reason why the buyer should not be able to terminate the 'gratuitous' digital content contract. Article 173 paragraph (6) CESL shows that the European Commission also accepts such right, albeit that no restitution will have to be made: the seller does not have to return any money (which has not been paid), whereas the buyer may retain the digital content. In our view, however, the seller should be required to remove, upon the buyer's request, the buyer's personal data from its data records, in cases where the buyer has given personal data in exchange for the supply or the possibility to make use of the digital content.

4. SIMPLICITY, LEGAL CERTAINTY AND EFFECTIVENESS

In most legal systems, in current legal practice the conformity test is applied to digital content as it has evolved under Article 2 of the Consumer Sales Directive²³ with regard to 'ordinary' consumer goods.²⁴ The provisions of the CESL can be expected to enhance legal certainty insofar as they give explicit rules for digital content. Still, as indicated above, improvements may be made to make the CESL's provisions on conformity and remedies more effective. In general, legal certainty requires a further specification of the rules on transfer of ownership (section 4.1). Furthermore, in particular, the assessment of the rules on non-conformity and remedies given in the previous sections implies that amendments may clarify how these rules can effectively apply to digital content (4.2).

4.1. Transfer of ownership and sales contracts

In a traditional sales contract, one of the purposes of the sales contract is that ownership of the goods passes at some point from the seller to the buyer. In some legal systems the transfer occurs, in principle, when the contract is concluded, in other legal systems delivery is required to effectuate the transfer. Article 91 CESL follows the second approach. The Article reads, insofar as is relevant here, as follows:

'The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must:

- (a) deliver the goods or supply the digital content;
- (b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied (...)'.

With regard to digital content, this provision may be read in two different ways. First, it may be read as requiring the provider of the digital content to deliver the digital content, and to transfer the ownership of the tangible medium on which it is supplied. Secondly, it could also be read as meaning that the provider of the digital content is not only required to deliver the digital content, but also transfer the ownership thereof. In this second reading, the provider of the digital content would be required to transfer the intellectual property rights associated with the digital content. In our view, it must be clear that the European Commission intended the first reading. However, the second is also possible. This constitutes a problem, in particular with regard to digital content contracts that are not performed on a tangible medium, but, for instance, by the buyer downloading the digital content from the provider's website. In this situation, typically no transfer of any property rights takes place. In practice, the providers of digital content hardly ever intend such transfer when concluding the contract and merely wish to grant the buyer usage rights, often also because the provider of the digital content itself is not the owner of the intellectual property rights. In this sense, buyers

²³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999, L 171/12.

²⁴ See also Schmidt-Kessel et al. 2011, p. 10, with references to Austrian, French and German law, and 13. See also more generally Th. Wilhelmsson, 'The solution of the Consumer Sales Directive', in: H. Collins (ed.), *The forthcoming EC Directive on Unfair Commercial Practices. Contract, consumer and competition law implications*, The Hague/London/New York: Kluwer Law International, 2004, p. 235, who argues that there is no obvious reason to treat the marketing of goods and services differently.

Similarly, in the US Art. 2 UCC, developed for the sale of tangible goods, is applied to software contracts. Art. 2-314 UCC contains a provision on the implied warranty of merchantability, which is phrased in much the same manner as the conformity test of Art. 2 Consumer Sales Directive. Art. 403 of the Uniform Computer Information Transactions Act (UCITA) extends the test to cyberspace; cf.

M.L. Rustad, *Software Licensing*, New York: Oxford University Press, 2010, p. 571, 583.

could not reasonably expect that the transfer of the ownership of the digital content or the intellectual property rights associated with it is included in the digital content contract. In our view, this should be reflected in an explicit rule to avoid legal uncertainty and, in particular, to prevent any reasoning on the basis of analogous application of the main obligation under sales law pertaining to the transfer of ownership. In this sense, it should be noted that without an explicit provision to the contrary, it could be argued that the ordinary rules of sales law would at least suggest that in the case where the digital content is contained on a physical medium, such transfer should also include a transfer of the intellectual property rights associated with the digital content. This in itself could create uncertainty as to the legal obligations of the business. Moreover, if the analogy is taken even further, one could argue that where the digital content is only contained in an intangible medium, the transfer of ownership – which is quintessential for sales contracts – must then pertain to the ownership of the intellectual property rights themselves. Even though it seems unlikely that a court would accept such analogy, it would take considerable time and effort for providers of digital content to obtain legal certainty in this respect, which would seriously compromise the interests of providers of digital content to opt-in to the CESL. It is thus suggested that Article 91 CESL be amended accordingly.

4.2. Non-conformity and remedies

The provisions on non-conformity and remedies offered by CESL by and large appear adequate and sufficiently clear to guarantee legal certainty in case of non-conformity of digital content. However, the analysis presented in the previous sections show that legal certainty of contracting parties should be improved on the following points:

- Legitimate expectations of users of digital content. A specification of the impact of statements made by sellers of digital content on the legitimate expectations that users may have can create greater certainty as to how courts should apply the non-conformity test to digital content (section 2.1.3 above).
- Private copying and back-ups. Given the different approaches of copyright law and consumer protection law to the question of whether buyers may make private copies of digital content, a clarification of this matter would be desirable (as set out in section 2.1.4 above).
- Repair and replacement of defective digital content. In case of digital content containing bugs or flaws, specific performance in the form of repair or replacement does not seem to offer an effective remedy. Legal certainty could be enhanced by specifying alternative means by which performance may still be remedied, such as the offer of a free download of other materials in replacement of the non-conforming digital content.
- Termination. The effects of termination of digital content contracts could be closer to the effects of termination of other sales contracts. This would make the application of the remedies for non-conformity as similar as possible, which would be in the interest of legal certainty and simplicity, in particular in cases where the digital content is provided on a tangible carrier. The only situation which requires specific regulation pertains to situations where the buyer might be able to continue using the digital content after termination of the contract and where the provider of the digital content would not have a means to prevent or detect such further use.

- Remedies for non-conformity related to accessibility of digital content. Doubts arise as to whether the remedies available under the CESL are able to effectively solve access problems. Since we see no alternative solutions at this moment, we suggest that buyers in this case resort to price reduction, termination or damages.
- 'Gratuitous' digital content contracts. The exclusion of all remedies but a claim for damages seems to be too restrictive. The exclusion of the right of specific performance, in particular repair or replacement, in the case where defective digital content has been provided, seems unjustified. The relation between the exclusion of the right to termination of 'gratuitous' digital content contracts in Article 107 CESL and the specific provision on the effect of termination with regard to the restitution of performances in case of 'gratuitous' digital content contracts in Article 173 paragraph (6) CESL requires clarification. Furthermore, both in the case of termination and in the case of a claim for damages, the buyer has a justified interest in having his/her personal data that were provided to the provider of the digital content removed from the provider's data records upon her request. Such a right should be made explicit to prevent legal uncertainty in this area.

5. CONCLUSIONS AND SUGGESTIONS

We believe that the European Commission has rightly included digital content contracts within the scope of the CESL. The choice to include also 'gratuitous' digital content contracts is to be applauded as well, given the fact that a different approach would make it impossible for providers of digital content to apply one legal regime to all digital content contracts they offer to their customers, each making use of a different business model (for instance: free digital content requiring the buyer's attention to advertisement vs. the same digital content for a small price but free from advertisement).

However, some amendments are necessary in order to reflect that digital content is not 'just' like goods. Firstly, it should be realised that no general standards have developed regarding the normal use of digital content. As a consequence, what the buyer may reasonably expect of the digital content to a large extent depends on the information provided by the provider of the digital content. However, this opens the door for chicaneries by the provider of the digital content: by consistently downplaying, for instance, the reliability of the digital content ('100 % bug free is not possible, so do not expect ...') or the possibility to access the digital content ('access to your personal account on our server depends on the quality of your internet connection, for which only your internet access provider is responsible') providers of digital content may lower buyers' – in particular: consumers' – expectations and thus the chance of being held liable for non-conformity. In our view, leaving the matter entirely to the discretion of the courts would therefore not provide sufficient guidance to practice. Given the insecurity that exists in legal practice, we suggest that Article 100 CESL ("Criteria for conformity of the goods and digital content") is supplemented by an additional provision stating that with regard to digital content contracts, statements made by the provider of the digital content or by a party for whom she is responsible pertaining to the digital content may restrict the expectations the consumer may have of the digital content only insofar as this is reasonable in the circumstances of the case.

Secondly, we have extensively argued why a specific provision regarding the right of consumers to make a limited number of private copies. Alternatively, the European legislator could introduce an obligation for providers of digital content to specifically draw the attention of consumers to the *absence* of a possibility to make private copies. In either case, the right to make back-up copies should be extended to other digital content than computer programs. Given the fact that much uncertainty exists in this area and the matter is regulated very differently from one legal system to the next, we think that for reasons of legal certainty a specific provision regulating the matter is needed.

Thirdly, whereas in a traditional sales contract, one of the purposes of the sales contract is the transfer of ownership of the purchased goods, in the case of digital content contracts such transfer normally does not take place. We suggest that Article 91 CESL should be amended to clarify that in the case of a digital content contract, the provider is required to transfer usage rights to the buyer as well as ownership of the tangible carrier if the digital content is provided on such a carrier, but – unless expressly agreed otherwise – not required to transfer the intellectual property rights associated with the digital content.

Fourthly, with regard to long-term contracts for the provision of digital content, Article 105 paragraph (4) CESL ("Relevant time for establishing conformity") takes account of problems regarding updates. As such, it probably suffices for digital content contracts pertaining to, for instance, online subscriptions to databases, e-papers and e-magazines, satellite navigations systems and antivirus-programs. However, it is probably insufficient with regard to *access problems*, where the buyer originally had obtained access but at a later moment experiences problems. We suggest that this paragraph (4) be replaced by a more general provision indicating that where the digital content is not provided on a one-

time permanent basis, the trader must ensure that the digital content remains in conformity with the contract throughout the contract period. Such a provision would be applicable to all digital content contracts that do not consist in a one-time performance on a permanent basis – i.e. both to subscription contracts and to streaming – and irrespective of the nature of the problem – i.e. problems regarding updates or access. Alternatively, the European legislator could introduce a provision in addition to paragraph (4) taking care of this type of problem.

With regard to the remedies for non-conformity, our conclusion is that these remedies to a large extent are fit to be applied also to digital content contracts. An exception must be made for the right to specific performance, in particular the right to claim repair or replacement. This right will probably not be available in the strict sense where the provided digital content is not of the quality the buyer could reasonably expect it to have, e.g. because it contains bugs or flaws, as it cannot be easily substituted for a conforming one. We suggest adding a provision indicating that in such cases, the provider of the digital content may offer alternative remedies, such as alternative digital content, which the buyer would, however, be free to decline the offer, in which case the buyer should be able to terminate the digital content contract. In order to safeguard the buyer's interests, it is suggested that the provider of the digital content would be required to inform the buyer of his right to decline the offer and of the consequences thereof.

Where the problem is not so much the quality, but rather the access to digital content, one may wonder whether repair and replacement actually provide an adequate remedy to the problems that buyers encounter. Rather, remedies would have to address the manners in which to make sure digital content is compatible to the medium through which it is accessed. The present text of the CESL does not provide for such remedies; however, at this point we do not see an alternative. This implies that for such problems, the buyer will probably have to resort to price reduction, termination or damages.

In our view, the restriction of the buyer's remedies to damages in the case of a gratuitous digital content contract should be reconsidered. In particular, where the buyer has provided personal data to the provider of the digital content, he/she has a legitimate interest in having these data removed from the provider's data records. Moreover, we fail to see why the buyer should not be entitled to specific performance, where this remedy is available.

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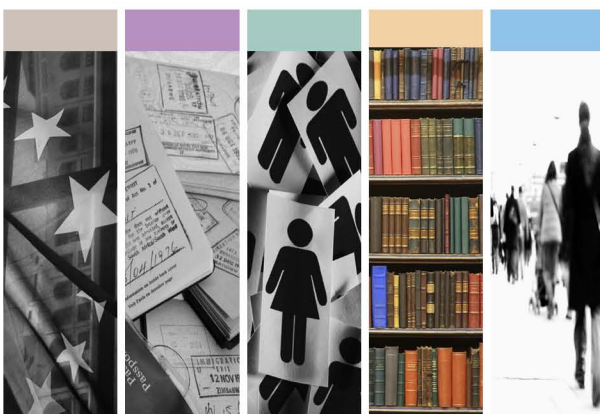
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