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DOI
10.1017/9781780686035.002

Publication date
2017

Document Version
Final published version

Published in
Digital contents & Distance sales

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The Proposals for European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content

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* This chapter is based in part on presentations during the *Workshop Digital Single Market: Stakeholders' Perspectives on Proposed new Contract Rules*, organised by the Centre for the Study of European Contract Law of the University of Amsterdam and the Dutch ministries of Economic Affairs and of Security and Justice in the context of the Dutch Presidency of the European Union on 4 February 2016, and the *Conference New EU Rules for Digital Contracts*, organised by the ERA and held in Brussels on 18 February 2016. The chapter was finalised on 31 May 2016.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

1. INTRODUCTION

On 9 December 2015, the European Commission submitted the first three proposals for the implementation of the *Digital Single Market Strategy*.[1] These proposals identify obstacles to the conclusion of cross-border contracts and aim at taking away these barriers to the internal market by harmonising the contract law rules for such contracts.[2] A first proposal concerns a proposal for a regulation on cross-border portability of online content services in the internal market.[3] This proposal should result in the possibility for users that have concluded a contract for the supply of digital content services with a supplier (such as Netflix) in the EU Member State where they live, but that temporarily move to another Member State, to continue having access and being able to make use of the digital content during their stay in the other Member State. This proposal is primarily interesting from the perspective of copyright law. It will not be discussed any further here.[4] The second proposal concerns a directive for the supply of digital content,[5] the third proposal a directive for online and other distance contracts for the delivery of goods.[6] Both directives introduce harmonised rules on the basis of full harmonisation[7] and are intended to complement one another. These proposals are referred to hereinafter as the Digital Content Directive and the Online Sales and Distance Sales Directive (without indicating that these directives are currently only proposals).

In this chapter I will describe the contents of both proposals for directives globally. I will first address the Online Sales and Distance Sales Directive

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for a Digital Single Market for Europe, 6 May 2015, COM(2015) 192 final.

2 See as to whether this goal may be achieved with the proposals discussed in this chapter in more detail V. Mak, 'Op weg naar een Europese "Digital Single Market"', *Nederlands Juristenblad* 2016/8, pp. 519 and 524.

3 Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, COM(2015) 627 final.

4 See on this proposal D.J.G. Visser, P.J. Kreijger, 'Online diensten over de grens', *NtER* 2016/2, pp. 61–67.

5 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.

6 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final.

7 See Art. 3 Online Sales and Distance Sales Directive and Art. 4 Digital Content Directive.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

(Section 4) and then the Digital Content Directive (Section 5). I will conclude with some final comments on unresolved matters (Section 6) and conclusions (Section 7). However, before dealing with the two proposals, I will first sketch the road that has led to these proposals (Section 2). I will then deal with a preliminary question: is the introduction of a separate regime for distance sales contracts in addition of the existing raft of sale schemes a good idea (Section 3)?

2. THE ROAD LEADING TO THE CURRENT PROPOSALS[8]

2.1. THE EARLY LEGISLATIVE MEASURES

Where the laws of the Member States are the same, both businesses and consumers may profit from the internal market by selling and shopping cross-border. In an era of euro scepticism, European (consumer) contract and tort law offers the possibility for the European institutions to show that European integration is not only advantageous for businesses but also for consumers, i.e. for the citizens of the European Union. This is one of the reasons why the European Commission has been pushing for the harmonisation of consumer law. The Commission has done so consistently since the first Consumer Policy Programme, which was accepted in 1975.[9] Already at that time European consumer law was justified as being a measure to improve the quality of life of the peoples of the Member States of (then) the European Economic Community.

Yet, the road towards the 2015 proposals has been long. At first, rather isolated areas of private law were targeted, such as doorstep selling (1985), package travel (1990) and timeshare property (1994). The European legislation in these areas did not much influence the core of private law, and for that reason received relatively little attention from private law academics. This was different for the 1985 Product Liability Directive, but since that directive only provided remedies for very specific types of damage in addition to national contract and tort law remedies, and national law often was more generous to victims of product liability accidents, the Directive did not have as much of an impact as one might have expected from a full harmonisation directive. The 1993 Unfair

8 This section is an abbreviated and adapted version of M.B.M. Loos, A.L.M. Keirse, 'The Optional Instrument and the Consumer Rights Directive: alternative ways to a new ius commune in contract law – Introduction' in A.L.M. Keirse, M.B.M. Loos (eds.), *Alternative ways to Ius commune. The Europeanisation of private law*, Cambridge/Antwerp/Portland: Intersentia, 2012, pp. 1–20. Section 2.5 is largely taken from M.B.M. Loos, 'Consumer Sales in The Netherlands' in G. De Cristofaro, A. De Franceschi (eds.), *Consumer Sales in Europe*, Cambridge/Mortsel: Intersentia, 2016, pp. 109–130.

9 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, *OJ* 1975, C 92/2.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

Contract Terms Directive[10] and the 1999 Consumer Sales Directive[11] marked a different era, with consumer law legislation affecting the core of private law. This development has been continued into the twenty-first century, in particular with the 2005 Unfair Commercial Practices Directive[12] and the 2011 Consumer Rights Directive.[13]

2.2. THE POLITICAL DEBATE ON EUROPEAN CONTRACT LAW

The use of the Directive as the tool for harmonisation has not been unproblematic in the Member States. The implementation of, in particular, the Unfair Contract Terms Directive, the Consumer Sales Directive and recently the Consumer Rights Directive has had a profound influence on the national contract law systems. In each of these cases, for each Member State the question was how to implement the relevant directive without disturbing the inner coherence of the national legal system too much. Even though legislators have become increasingly more aware of the problem, this could not prevent the emergence of coherence problems within national law. By the year 2000, the question arose whether European patrimonial law or, slightly more limited, European contract law should not (ultimately) be fully harmonised in the form of a European Civil Code or at least a European Contract Law Code. The political debate on the issue really took flight with the 2001 Communication on European contract law,[14] followed by the 2003 Action Plan[15] and the 2004 Communication on European contract law and the revision of the acquis: The way forward.[16] In the Action Plan, the European Commission concluded from the responses to the 2001 Communication that at least for the moment, a majority of respondents was against a comprehensive body of legislation, but much support existed for the revision of the *acquis communautaire* and for the development of soft-law instruments. Consequently, the Commission proposed to undertake measures implementing these options. The Commission indicated that its priority was the improvement of the *acquis communautaire*, in order to increase the coherence

10 Council Directive 93/13/EEC, *OJ* 1993, L 95/29.
11 Directive 1999/44/EC, *OJ* 1999, L 171/12.
12 Directive 2005/29/EC, *OJ* 2005, L 149/22.
13 Directive 2011/83/EU, *OJ* 2011, L 304/64.
14 Communication of the Commission to the Council and the European Parliament on European contract law of 11 July 2001, COM(2001) 398 final, *OJ* 2001, C 255.
15 A more coherent European contract law: An Action Plan, Communication from the Commission to the Council and European Parliament of 12 February 2003, COM(2003) 68 final, hereinafter referred to as: Action Plan.
16 European contract law and the revision of the acquis: The way forward, Communication from the Commission to the Council and European Parliament of 11 October 2004, COM(2004) 651 final, hereinafter referred to as: 'The way forward'.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

thereof.[17] An important step towards better coherence, the Commission indicated, would be the development of a 'Common Frame of Reference'. That Common Frame of Reference, or CFR, would establish common principles and terminology in the area of European contract law.[18] The purpose of the CFR was described as being threefold. The Commission indicated that the CFR could be used when preparing new legislation. To that extent, the CFR should provide for 'best solutions in terms of common terminology and rules', including definitions for terms such as 'contract' and 'damage', and rules pertaining to non-performance of contracts.[19] Secondly, the CFR should become an instrument in achieving a higher degree of convergence between the contract laws of the Member States.[20] Thirdly, the Commission indicated that the CFR would be the basis for the Commission's reflection on 'whether non-sector-specific measures such as an optional instrument' is needed.[21] The Commission further indicated that it would finance extensive research in this area within the Sixth Framework Programme.[22]

2.3. ACADEMIC GROUPS AND THE DEVELOPMENT OF THE DRAFT COMMON FRAME OF REFERENCE

At the same time, academics had organised themselves into small networks discussing the possibility to develop common principles of contract law. The two most influential groups, the Commission on European Contract Law (the Lando Commission) and Unidroit, consisted of scholars and sometimes also some practitioners. They prepared 'principles of contract law', based on comparative research. These 'principles' were drafted as general rules of contract law, and were accompanied by explanatory comments and comparative notes, explaining whether the rule existed in the reported legal systems. The first results from the academic groups were published in 1994 (the Unidroit Principles of International Commercial Contracts, second draft published in 2004) and 1995 (the Principles of European Contract Law, with much extended versions published in 1999 and 2003).

Later, the Study Group on a European Civil Code prepared Principles of European Law in different areas of private law, ranging from sales and service contracts to unjustified enrichment, tort law, and to transfer of ownership and

17 Action Plan, paras. 54–58.
18 Action Plan, para. 59.
19 Action Plan, para. 62.
20 Action Plan, para. 62.
21 Action Plan, para. 62.
22 Action Plan, paras. 63, 68.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

security rights in movable goods.[23] At the same time, the Research Group on the Existing EC Private Law (Acquis Group) attempted to provide a restatement of existing Community private law in the Acquis Principles. A third group was the Project Group 'Restatement of European Insurance Contract Law', which published its own principles in 2009, and the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Législation Comparée* developed guiding principles and model rules of European contract law.[24] These groups ultimately made a joint bid for funding under the Sixth Framework Programme establishing a Network of Excellence working together in the development of an academic Draft Common Frame of Reference (DCFR). The DCFR was prepared in an intensive co-operation between the Study Group and the Acquis Group, who established a joint Compilation and Redaction Team (CRT), which was to coordinate the work of these two groups. The CRT undertook to integrate both the Principles of European Contract Law and the draft texts of the various subgroups of the Study Group and the Acquis Group into the Draft Common Frame of Reference and to revise them for the purposes of the DCFR.[25] The final text of the DCFR was published in 2009 in no fewer than six volumes and consisted of model rules, comments and national notes on the law of contract and obligations in general (Books I–III), various specific contracts (Book IV),[26] benevolent intervention in another's affairs, tort law and unjustified enrichment (Books V–VII), acquisition and loss of ownership of goods, proprietary security in movable assets, and trusts (Books VIII–X). The scope of the DCFR was therefore a very wide one, but certainly not equal to that of a Civil Code: important areas that are traditionally regulated in Civil Codes are missing, notably family law, succession law, the law of legal persons and the law regarding the transfer of ownership pertaining to immovable property. Similarly, important specific contracts such as the labour contract, the package travel contract, and the lease of immovable property are not included in the scope of the DCFR.

2.4. THE CONSUMER RIGHTS DIRECTIVE

Parallel to the development of the DCFR a separate discussion on the review of the consumer acquis took place. This review was first announced in the

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23 I have been involved with the Study Group since 1999, first as the team manager for service contracts and the Dutch reporter for sales contracts, and later as the team leader and the Dutch reporter for mandate contracts.

24 Other groups consisted of the European Group on Tort Law and the Académie des privatistes européen.

25 *Cf.* Ch. von Bar, E. Clive (eds.), *Principles, definitions and model rules of European private law. Draft Common Frame of Reference (DCFR). Full edition, Volume I*, Munich: Sellier, 2009, p. 31.

26 Sales, lease of movable goods, services, mandate, commercial agency, franchise and distributorship, loans, personal security, and donation.

Consumer policy strategy 2002–2006.[27] In its Communication 'The way forward',[28] the Commission indicated that in order to prepare a more coherent European contract law, a review of the consumer acquis was necessary. To this extent, it would prioritise the evaluation of whether eight existing directives in the area of consumer law[29] sufficiently contributed to the enhancement of consumer and business confidence in the internal market by way of a common high level of consumer protection and by eliminating barriers to the internal market and simplifying legislation.[30] In particular, the Commission would investigate the effects of minimum harmonisation clauses and whether the way in which Member States have implemented and applied directives meets these goals.[31]

By way of the *Green Paper on the Review of the consumer acquis*[32] the Commission delivered on its promise. Prior to the Green Paper consumer organisations and businesses had indicated various problems that consumers and businesses encounter. The European Commission concluded that these problems are the consequence of the use by Member States of the minimum harmonisation clauses that are included in most of the consumer directives: where Member States offer more protection than is required by a directive, by definition harmonisation can only be successful in part. Businesses and consumers would then in cross-border contracts again be confronted with differing rules.[33] Not surprisingly, the Commission took this as a sign that full harmonisation would be a better fit for the improvement of the functioning of the internal market.

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27 Consumer policy strategy 2002–2006, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2002) 208 final, *OJ* 2002, C 137/2.

28 'The way forward', pp. 4–5.

29 The directives that are subject to revision are Directives 85/577/EEC (doorstep selling), 90/314/EEC (package travel), 93/13/EEC (unfair contract terms), 94/47/EC (timeshare), 97/7/EC (distance selling), 98/6/EC (price indication), 98/27/EC (injunctions for the protection of consumers' interests), and 99/44/EC (consumer sales and guarantees). Given the fact that the Commission is also contemplating the possibility of introducing a direct action against producers in the case of non-conformity and the existing regulation on producers' guarantees (see Sections 4.8 and 4.9 below) it is remarkable that the revision of the Product Liability Directive (Directive 85/374/EEC) is not included in this list of directives.

30 *Cf.* also the then acting Commissioner for Consumer Policy M. Kuneva, 'The European Contract Law and Review of the Consumer Acquis', *Zeitschrift für Europäisches Privatrecht* 2007/4, p. 956.

31 The way forward, p. 4.

32 *Green Paper on the Review of the consumer acquis* of 8 February 2007, COM(2006) 744 final. The Green Paper's goal was to achieve a true internal market for consumers. In doing so, a balance must be struck between a high level of consumer protection and the competitiveness of companies, while the principle of subsidiarity must be respected, see Green Paper, p. 3.

33 Green Paper, p. 11.

In October 2008, the next step was made: the European Commission published its proposal for a Consumer Rights Directive,[34] indeed based on the idea of full harmonisation.[35] Whereas the Green Paper announced the review of eight existing directives, the proposal for a Consumer Rights Directive concerned only four of them: the Doorstep Selling Directive, the Unfair Terms Directive, the Distance Selling Directive, and the Consumer Sales Directive. The Commission's choice to opt for full harmonisation provoked very critical reactions in the academic literature: as a consequence of the full harmonisation clause, further-reaching national consumer protection measures would have to be abrogated. This might have been acceptable if this had been compensated for by a rise in the level of consumer protection in other areas, but this was not the case: almost throughout the proposal the *minimum* rules of the existing directives were taken over one-for-one, implying that the European minimum level of protection would become also the European maximum. In sum, this would mean that the level of consumer protection would decrease in all legal systems.[36] The critique concentrated in particular on the provisions on consumer sales and unfair terms, where most Member States had introduced or maintained higher levels of consumer protection in one way or another, ranging from longer conformity periods in the Netherlands, to the right to reject in the United Kingdom, or the use of much more extensive black-lists of clauses that are deemed to be unfair in consumer contracts in, for instance, Germany. Ultimately, the Council and the European Parliament – which were both very critical as well – agreed that these subjects would be left out of the new directive almost entirely. The final text of the Consumer Rights Directive, adopted on 25 October 2011,[37] therefore contained extensive rules on information obligations and the right of withdrawal for off-premises contracts and distance selling contracts, and only a very limited number of rules in other areas, in particular on subjects that were considered to be missing from the Consumer Sales Directive and the Unfair Contract Terms Directive.

2.5. THE PROPOSAL FOR A COMMON EUROPEAN SALES LAW

The timing of the proposal for a Consumer Rights Directive was not particularly fortunate: an interim version of the DCFR had been published at almost the

[34] Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 October 2008, COM(2008) 614/4. This original proposal is available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0614:FIN:EN:PDF (last visited on 15 March 2017).

[35] See art. 4 of the CRD proposal.

[36] See for instance the papers published in G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Munich: Sellier, 2009.

[37] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the

same time as the proposal was published, and the final version of the DCFR was only published in 2009. This meant that the Commission could not make use of the results of the work of the Network of Excellence, which it had established and financed for the very purpose of providing a toolbox for the enactment of new legislation and the improvement of the coherence and quality of the existing acquis. The partial failure of the full harmonisation approach in the Consumer Rights Directive, in particular with regard to consumer sales and unfair contract terms, opened the way for an alternative approach, in which the European Commission could take the results of the DCFR into account: after the preparatory work of an Expert Group, which published a Feasibility Study in May 2011,[38] the European Commission published a proposal for a Regulation on a Common European Sales Law, just two weeks before the formal adoption of the Consumer Rights Directive.[39]

If CESL had been adopted, this would have introduced an additional regime that might be applicable to a sales contract. It is uncertain how this would have affected national sales law, but it stands to reason that it would have contributed to the growing complexity of sales law. This might to some extent have been tempered by the fact that parties had to opt-in to CESL, whereas CISG applies automatically in a cross-border commercial sales contract that is governed by the law of a country that has ratified CISG. The complexity would also have been slightly diminished if the scope of CESL had been restricted to cross-border distance sales contracts, as the European Parliament had proposed.[40] The Parliament had not proposed to restrict the scope of CESL to consumer contracts. Instead, it had suggested extending the scope to all business-to-business (B2B) contracts, whether or not any of the parties is a small or medium-sized enterprise.[41] The consequence remains, however, that B2B contracts could have been governed by three instruments (national law, CISG and CESL), and consumer contracts by two (national law and CESL). Moreover, in those areas where CESL (or CISG) was silent, the otherwise applicable national law had to be applied. This meant that where the parties would have opted into CESL,

European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ* 2011, L 304/64.

38 Available online at: http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (last visited on 15 March 2017).

39 Proposal for a Regulation on a Common European Sales Law (COM(2011) 635 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF (last visited on 15 March 2017).

40 See Amendment 60 amending Article 4(1) CESL. The text adopted by the European Parliament in its first reading is produced in: European Parliament, Texts adopted Part III at the sitting of Wednesday 26 February 2014, P7_TA(2014)0159, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0159+0+DOC+XML+V0//EN&language=EN (last visited on 15 March 2017).

41 See Amendment 70 amending Article 7 CESL, deleting the second sentence of paragraph 1 and deleting paragraph 2 altogether.

problems of private international law would have continued to exist, but in fewer cases than presently is the case, since CESL would have covered more subjects than CISG does,[42] and CESL could have been applied to consumer contracts, whereas CISG is available only for B2B contracts.

Moreover, whereas the DCFR more or less covered the whole of the law on movable goods, and was thus capable of governing sales contracts to a larger degree even then CISG, CESL did not cover the whole of sales law. In fact, there were important caveats that would have prevented CESL from being considered an effective instrument for sales contracts.[43] First, matters of invalidity of the contract for reasons of public policy and good morals, and matters of representation had been left out of CESL and would therefore have had to be determined on the basis of the applicable national law. The same is true for matters of invalidity arising from incapacity of the buyer. The absence of Europeanised rules for the capacity of minors is problematic, in particular for businesses that conclude contracts online.[44] In this respect it is relevant to note that a relatively large number of distance sales contracts concluded online are concluded by minors, in particular in so far as the supply of digital content (including music and gaming) is concerned, and that Member States have very differing laws on incapacity of minors.[45] Thirdly, and probably most problematic, would have been the absence of any rules pertaining to the transfer of ownership from seller to buyer. This implies that the dispute between consensual systems, such as French and Italian law, and those that make the transfer of ownership

42 See M.B.M. Loos, H.N. Schelhaas, 'Commercial sales: the Common European Sales Law compared to the Vienna Sales Convention', *ERPL* 2013/1, 109–18.

43 These and other matters not regulated in CESL are listed in recital 27 of the Preamble to CESL (as proposed by the European Commission) and Amendment 76 of the European Parliament introducing the new Article 11a(2) CESL.

44 See 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 and development of recommendations for possible future rules on digital content contracts*, 2011, p. 239. This report was prepared for the European Commission and is available at: http://csecl.uva.nl/research/projects/consumer-protection-in-relation-to-digital-content-contracts.html (last visited on 15 March 2017).

45 See 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 and development of recommendations for possible future rules on digital content contracts*, 2011, pp. 138–41, referring to the laws of Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, the United Kingdom, and that of non-Members Norway and the United States. See also the first report to the European Commission, which contains the national reports on these matters and which is also available at: http://csecl.uva.nl/research/projects/consumer-protection-in-relation-to-digital-content-contracts.html (last visited on 15 March 2017).

conditional upon delivery, such as Dutch and German law, would have remained unsettled: CESL would have required the seller to transfer ownership,[46] but the time at which ownership is transferred had expressly been left unregulated.[47] This implies that the national law applicable would have had to determine whether or not a buyer had already obtained the ownership of the goods – which is particularly relevant in the case of insolvency of any of the contracting parties. This does not seem to provide sufficient trust for the parties to be able to have relied on CESL: even for this fundamental issue a return to national law and to private international law would still have been needed. As a result, it seems unlikely that CESL would have been opted into by parties very often.

In sum, CESL was considered to lead to a too complex system of (sales) contract law at national level without providing an overarching legal system. And two of its advantages – it would apply only if the parties to a contract opted into the regime, and as a result it would not compromise the coherence of national law in the same way as a directive or regulation would – could also be considered as drawbacks: CESL would hardly lead to harmonisation, as parties were unlikely to opt-in and Member States need not take much account of the content of CESL as it was unlikely to apply to a contract anyway. These drawbacks were added to an extensive and critical discussion on the merits of introducing CESL as a second national system of contract law, thus evading the rules of the Rome I Regulation.[48] In addition, Member States were very critical as to the need for an optional instrument. In that sense, it did not come as a surprise that the Juncker Commission ultimately withdrew the proposal for a Common European Sales Law[49] and replaced it with two proposals within the framework of the Digital Single Market Strategy: the current proposals for an Online Sales and Distance Sales Directive and for a Digital Content Directive.

3. YET ANOTHER REGIME FOR SALES CONTRACTS?

The Online Sales and Distance Sales Directive contains rules for sales contracts concluded online or otherwise at a distance, i.e. contracts not concluded in the

46 *Cf.* Article 91(b) CESL.

47 The same is true for CISG, see Article 4(b) CISG.

48 See, for instance, G. Dannemann, 'Choice of CESL and conflicts of law' in G. Dannemann, S. Vogenauer (eds.), *The Common European Sales Law in context: interaction with English and German law*, Oxford: Oxford University Press, 2013, pp. 21–81; M. Heidemann, 'The parties choice of the Common European Sales Law – which governing law?', 2014, available at: http://ssrn.com/abstract=2725445 (last visited on 15 March 2017); S. Whittaker, 'The proposed "Common European Sales Law": legal framework and the agreement of the parties', *Modern Law Review* 2012, pp. 578–605.

49 *Commission Work Programme 2015, A New Start*, Strasbourg, 16 December 2014, COM(2014) 910 final, Annex 2, para. 60.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

physical presence of both the seller and the buyer. For such consumer sales contracts the provisions of the Online Sales and Distance Sales Directive replace the current regime of the 1999 Consumer Sales Directive;[50] however, this old Directive continues to apply to consumer sales contracts that have not been concluded at a distance.[51]

If the Online Sales and Distance Sales Directive were adopted in its current form, the national legislators would be faced with an additional regime for sales contracts, similar to what would have been the case if the Common European Sales Law had been adopted. In many legal systems, this would lead to the co-existence of at least five regimes that might be applicable to sales contracts. The first and most general regime consists of the rules applicable to the sale of goods between two private parties in a purely domestic setting. In addition, all Member States have specific rules applying to the sale of immovable property. Many Member States also provide specific rules for domestic sales contracts between traders (domestic B2B sales contracts). The Vienna Sales Convention applies in most Member States to international sales contracts between professional sellers, unless the parties to the contract have excluded the applicability of that Convention, in which case national law for domestic B2B sales contracts or, in the absence thereof, that for private parties, applies. For contracts where the buyer is a consumer and the seller a professional party, the rules applicable to consumer sales contracts apply, with the newly introduced distinction between distance contracts and contracts concluded on- or off-premises. And on top of that a separate B2C regime for the supply of digital content is introduced as well. This seems unworkable. It seems therefore likely that the European Parliament and the Council will only agree to adopt the proposal for an Online Sales Directive if its scope is enlarged to include also on- and off-premises contracts.[52] If such an extension is not agreed upon, then each Member State would be faced with the question whether it should accept the addition of this additional regime, or whether to amend its existing consumer sales law by extending the scope of the provisions for distance sales contracts to on- and off-premises sales contracts and in that way prevent unnecessary differences between distance sales contracts and other sales contracts, which would severely complicate consumer sales law at the national level. The Online Sales and Distance Sales Directive would then

50 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.

51 See art. 19(1) Online Sales and Distance Sales Directive.

52 Amendment 233 in the Draft Report of the Committee on the Internal Market and Consumer Protection of 18 November 2016 and 25 January 2017 indeed proposes to extend the scope of the directive in this sense (other amendments aim at accompanying provisions and recitals). The draft report is available at: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/0288(COD) (last visited on 15 March 2017) and will hereinafter be referred to as: Draft Report IMCO on the Online Sales and Distance Sales Directive.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

on a national level lead to spontaneous harmonisation of consumer sales law – in other words: the provisions of the Online Sales and Distance Sales Directive would spill over to the regulation for other sales contracts, in effect leading to more or less the same result as an enlargement of the scope of the Directive itself would have. Obviously, the civil servants negotiating the content of the Directive within the Council of Ministers will be aware of the fact that the outcome of the negotiations will have consequences reaching far beyond the harmonised area.

It will not come as a surprise to the reader that the possible addition of another regime for consumer sales contracts has engaged the immediate attention of legal practitioners and academics. Without exception it has been argued that the rules for distance sales contracts should be as similar as possible to the rules for consumer sales contracts concluded on-premises and off-premises.[53] Staudenmayer, Head of Unit at the European Commission, defended the proposal both in a workshop in Amsterdam and a symposium in Brussels[54] by arguing that the earlier proposal for a Common European Sales Law, that provided for a uniform regulation for sales contracts met with a lot of criticism because its scope was regarded as too broad by many Member States. For that reason, the Juncker Commission ultimately withdrew the proposal and announced that it would come with much more limited proposals in the context of the *Digital Single Market Strategy*.[55] The European Commission could demonstrate for online and other distance contracts that there was a need for harmonisation, but it could not demonstrate such need for on- and off-premises contracts. Staudenmayer noted, however, that the forthcoming *fitness check* of the existing Consumer Sales Directive could show such a need after all, and if that is the case the Commission would propose to extend the scope of the Online Sales and Distance Sales Directive to cover also on- and off-premises contracts. When asked by several participants why the European Commission could not simply have waited with its proposal for an Online Sales and Distance

53 In this sense also Mak 2016a, p. 524; J.M. Smits, *The new proposal for harmonised rules for the online sales or tangible goods: conformity, lack of conformity and remedies. In-depth analysis*, Briefing note for the Legal Affairs Committee of the European Parliament, PE 536,492, 2016, pp. 7–8 and 9, presented during a workshop on 17 February 2016. This paper is available at: http://www.europarl.europa.eu/committees/nl/events-workshops.html?id = 20160217CHE00181 (last visited on 15 March 2017). See also R. Mańko, *Contracts for online and other distance sales of goods*, Briefing note of the European Parliamentary Research Service for the European Parliament, 2016, pp. 8–9, in which the at this point mostly critical views of consumer organisations, industry associations, organisations of legal practitioners and scientists are displayed. This briefing note can be downloaded from: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)577962 (last visited on 15 March 2017).

54 For details on the workshop in Amsterdam on 4 February 2016 and the symposium in Brussels on 18 February, see n. * above.

55 Commission Work Programme 2015, A New Start, Strasbourg, 16 December 2014, COM(2014) 910 final, Annex 2, para. 60.

Sales Directive until the *fitness check* would be completed, he could, however, not give a convincing answer. The real answer seems to be that here a political choice is made: in her speech in Brussels, EU Commissioner Jourová hinted that she wanted a 'result' during her term as Commissioner, and that she could therefore not wait for the implementation of the *fitness check*. So much for the ambition of 'better regulation', participants in the Brussels symposium sneered.

4. ONLINE SALES AND DISTANCE SALES DIRECTIVE

4.1. SCOPE OF THE ONLINE SALES AND DISTANCE SALES DIRECTIVE

The scope of the current proposal is expressly limited to *consumer* sales contracts,[56] in the same manner as the current Consumer Sales Directive is limited. Contracts between traders, even if one of them is an SME, are therefore not covered by the scope of the directive.[57] Although the heading of the Online Sales and Distance Sales Directive suggests otherwise, the Directive as such does not provide specific rules for consumer sales contracts concluded 'online' – the notion is only mentioned on a number of occasions in the preamble and in Article 19 of the Directive, where the full name of the Directive is listed as a Directive to which the Regulation on consumer protection cooperation[58] and the Injunctions Directive[59] apply.[60] In reality, therefore, the directive is aimed at consumer sales contracts concluded *at a distance*.[61]

The Directive contains, in particular, rules on (non-) conformity (Articles 4–8) and the consequences of non-conformity (Articles 9–14) of the delivered goods.

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56 See Arts. 1(1) and 2(a) Online Sales and Distance Sales Directive.

57 See critically H. Beale, *Scope of application and general approach of the new rules for contracts in the digital environment, In-depth analysis*, Briefing note for the Legal Affairs Committee of the European Parliament, PE 536.493, 2016, p. 11, presented during a workshop on 17 February 2016; this paper is available at: http://www.europarl.europa.eu/committees/nl/events-workshops.html?id=20160217CHE00181 (last visited on 15 March 2017).

58 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJ* 2004, L 364/1.

59 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *OJ* 2009, L 110/30.

60 During the symposium held in Brussels on 18 February 2016, U. Pachl (BEUC) rightly asked why Article 19 of the Online Sales and Distance Sales Directive does not also amend the scope of the ADR Directive (Directive 2013/11, *OJ* 2013, L 165/63) and the ODR Regulation (Council Regulation (EU) 523/2013, *OJ* 2013, L 165/1). Staudenmayer could not answer this question.

61 This suggests that the word 'online' is used primarily to justify why this proposal is submitted within the context of the Digital Single Market Strategy.

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The Directive does not, however, apply to the sale of tangible items on which digital content is stored, such as DVDs and CDs: such contracts fall within the scope of the Digital Content Directive.[62]

Article 1(2) Online Sales and Distance Sales Directive provides that with regard to mixed contracts under which both goods and services are supplied the Directive applies only to the supply of the goods.[63] Recital 12 of the preamble to the Directive suggests that this restriction would be in line with the Consumer Rights Directive. However, recital 50 of the preamble to the latter Directive merely provides that in so far as a consumer withdraws from a contract for the supply of both goods and services, the provisions on the return of the goods apply as to the goods delivered on the basis of the contract and the provisions on the compensation for services apply as to the services rendered on the basis of the contract.[64] The Consumer Rights Directive itself does not explicitly say this. Instead, it defines mixed contracts exclusively as *sales* contracts.[65] It is therefore uncertain whether the Court of Justice will follow the European Commission's interpretation of the Consumer Rights Directive on this point. The restrictive approach to mixed contracts also seems remarkable given the approach to similar situations: the Online Sales and Distance Sales Directive provides, in line with the provisions of the Consumer Sales Directive, that a contract under which goods are to be produced and then delivered is classified (only) as a sales contract[66] and that for contracts under which movable goods are installed by or under the responsibility of the seller, a defect in the installation of the goods equates to a lack of conformity of the goods themselves.[67] Moreover, delivery is only completed when the consumer or a third party designated by the consumer has obtained physical control over the goods. This is the case when the goods have been collected by or on behalf of the consumer or when the goods have been delivered to the consumer or a carrier nominated by the consumer. Until that moment the seller bears the risk of deterioration or destruction of the goods,[68] which implies that defects originating before this moment are to be considered as a lack of conformity of the goods for which the seller is liable.[69] This suggests

62 See Art. 1(3) Online Sales and Distance Sales Directive and Art. 3(3) Digital Content Directive.

63 Art. 1(2) Online Sales and Distance Sales Directive.

64 See recital 50, last sentence, of the preamble to the Consumer Rights Directive. In the Dutch implementation Act the Dutch legislator incorporated this in the law itself, see Art. 6:230g(2) Dutch Civil Code.

65 See the definition of 'sales contract' in Art. 2(5) Consumer Rights Directive.

66 See the definition of a sales contract in Art. 2(a) Online Sales and Distance Sales Directive; this definition is in line with the definition in Art. 1(4) Consumer Sales Directive.

67 See Art. 6 Online Sales and Distance Sales Directive; see also Art. 2(5) Consumer Sales Directive.

68 *Cf.* Art. 20 Consumer Rights Directive.

69 See Art. 8(1) Online Sales and Distance Sales Directive.

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that Article 1(2) Online Sales and Distance Sales Directive concerns only services which are not directly related to the production, use or delivery of the goods, e.g. to services such as storage or maintenance of the goods. Since such services are not regulated at the level of the European Union, the regulation of this part of the mixed contract is thus left to national law.

The scope of the proposed directive is further limited to 'certain aspects' of sales law, as the heading of the Online Sales and Distance Sales Directive indicates. The Directive does not affect provisions of general contract law, such as the rules on the conclusion, validity and effects of contracts, in so far as these provisions do not concern matters that are regulated within the Directive.[70] Such provisions are not uncommon in European directives,[71] but are problematic with regard to this particular Directive. I will give two examples that demonstrate why this is the case.

The first example pertains to the remedies for lack of conformity. The Directive expressly provides that in the case of such non-conformity, the consumer is entitled to repair or replacement (Article 11) or to price reduction or termination (Articles 12–13). The Explanatory Memorandum to the Directive suggests that under Article 1(4) of the Online Sales and Distance Sales Directive the consumer may also claim damages in accordance with national law, since the Directive does not regulate this remedy.[72] It is, however, questionable whether the wording of the Directive supports this, as Article 9 Online Sales and Distance Sales Directive appears to contain an exhaustive list of remedies for lack of conformity. Moreover, Article 1(1) of the Online Sales and Distance Sales Directive clearly indicates that the Directive in particular relates to conformity, remedies for non-conformity and the modalities for the exercise of these remedies, whereas Article 1(4) expressly leaves the consequences of *termination* of the consumer sales contract to national law. Moreover, not even the preamble to the Directive refers to national law as regards the right to damages. It is noteworthy that the proposal for the Digital Content Directive *does* contain an explicit provision on damages. This again suggests that in the area of distance contracts such a remedy would not exist. Clearly, the Directive needs to provide a clear reference to national law here if damages may indeed be obtained under national law.[73]

Another ambiguity concerns the right of the consumer to invoke a defect of consent. In particular with regard to whether or not the consumer has a right to claim avoidance of the contract on the basis of mistake, it seems necessary to

70 Art. 1(4) Online Sales and Distance Sales Directive.

71 See for instance Art. 3(5) Consumer Rights Directive and Art. 3(3) Unfair Commercial Practices Directive (Directive 2005/29/EC, *OJ* 2005, L 149/22). See also Art. 3(9) Digital Content Directive, which will be discussed below in Section 6 of this chapter.

72 *Cf.* the Explanatory Memorandum to the Online Sales and Distance Sales Directive, p. 3.

73 Amendment 359 Draft Report IMCO on the Online Sales and Distance Sales Directive aims at introducing such clear reference.

include an explicit provision. At first glance one would think that this matter is simply left to national law, as Article 1(4) Online Sales and Distance Sales Directive indicates that the Directive 'shall not affect national general contract laws such as rules on formation, [or] the validity or effects of contracts, including the consequences of the termination of a contract'. However, that provision also indicates that the reference to national contract law only applies in so far as the matter is not regulated in the Directive. It is, however, uncertain whether or not the doctrine of mistake should be regarded as regulated by the Directive. In this respect it should be noted that in many cases the facts that justify a claim on the basis of a lack of conformity would also justify a remedy on the basis of mistake. Under the Vienna Sales Convention it is assumed that the absence of an explicit regulation for mistake does not mean that the matter is left to national law. Instead it is argued that where the facts could justify a claim on the basis of non-conformity, a claim under national law on the basis of mistake is excluded, as otherwise the uniform application of the rules for non-conformity could be undermined, which would jeopardise the uniformity that the Convention intends to provide.[74] A similar reasoning could also be developed under the Online Sales and Distance Sales Directive, as the Directive provides that the consumer may only invoke a remedy for non-conformity for a defect that has manifested itself within two years after delivery.[75] This limitation could be circumvented by invoking a remedy for mistake, as national rules on prescription may allow for a longer period to invoke the remedy, and it could be argued that such circumvention should not be allowed in order to ensure the intended harmonisation, particularly since the Directive aims at full harmonisation of the targeted matters.[76] In my view, the Directive should be explicit on this contested matter – and should allow such recourse to national rules on mistake. If the Directive does not address the question, then it is a matter of time before the Court of Justice will be asked to render its judgment on the matter.

4.2. CONFORMITY OF GOODS PURCHASED AT A DISTANCE

The rules in the Directive offer a detailed regulation of the rules on conformity (Articles 4–8). This may be seen as a consequence of the aim of fully harmonising the rules on conformity and leaving as little room as possible for diverging interpretations of these rules at the national level. Full harmonisation implies that with regard to harmonised matters Member States are not free to offer

74 See M. Djordjevic, 'Comment 21 to Art. 4 CISG' in S. Kröll, L. Mistelis, P. Perales Viscasillas, *UN Convention for the International Sale of Goods (CISG)*, Munich: C.H. Beck, 2011, p. 71.

75 *Cf.* Art. 14 Online Sales and Distance Sales Directive.

76 See Art. 3 Online Sales and Distance Sales Directive.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

consumers more protection than follows from the Directive. Obviously this is a sensitive matter for the Member States in those areas where the introduction of the Directive would lead to a decrease in consumer protection. Almost by definition this will be the case for some Member States on some issues, as it seems unlikely that the European level of consumer protection could be set at the highest level of protection awarded in any of the Member States – bearing in mind that consumer protection always comes at a cost as it implies that the costs of traders are raised, which in turn means that traders will be forced to either raise prices or to accept lower profits.

One of the areas where a possible decrease in consumer protection is foreseeable pertains to the period during which consumers may invoke a remedy for lack of conformity. Article 14 Online Sales and Distance Sales Directive basically provides that this period is two years after the consumer has obtained physical possession of the goods or the goods have been installed.[77] This provision is in line with Article 5(1) of the Consumer Sales Directive, which, however, merely offers a minimum period for liability of the seller. According to the Explanatory Memorandum,[78] the two-year period has been adopted in 23 Member States: only Finland, Great Britain, Ireland, Sweden and the Netherlands allow for a longer period. This is, however, a misrepresentation of the facts. First, it is overlooked that in Belgium after the end of the period of two years the consumer can make use of the scheme for hidden defects.[79] The same is – since 2016 – true in France, where the scheme for hidden defects is applicable *alongside* the rules on conformity, and where the buyer may invoke a remedy for hidden defects within two years after discovery of the defect.[80] Moreover, in Belgium, the Czech Republic, Hungary, Malta, Slovakia and Spain, the two-year period is suspended during the period when the goods are being repaired and the consumer as a result cannot make use of the goods, or when negotiations take place between the parties regarding a remedy for performance.[81] For all these countries, this means that the period of two years can under certain circumstances be extended. Since the Online Sales and Distance Sales Directive does not provide for such a longer or extended period, effectively consumer protection is decreased in 12 Member States.[82]

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77 See in more detail below in Section 4.3.

78 See the Explanatory Memorandum, p. 6.

79 H. Schulte-Nölke, Ch. Twigg-Flesner, M. Ebers (eds.), *EU Consumer Law Compendium, Comparative analysis*, 2008, p. 701.

80 See Articles 1643 and 1648 Code Civil and Article L217-13 Code de la Consommation; Article L217-13 Code de la Consommation was introduced by *Ordonnance n° 2016-301 du 14 mars 2016 relative à la partie législative du code de la consommation*.

81 See Schulte-Nölke/Twigg-Flesner/Ebers 2008, pp. 682–83.

82 Amendments 360–365 Draft Report IMCO on the Online Sales and Distance Sales Directive aim at remedying this by introducing either a conformity period of six years, the full economic lifespan of the goods, by leaving the matter to national law, or by providing that the two-year period is a minimum harmonisation rule only.

Moreover, there are also substantive reasons why the limitation of remedies for non-conformity to two years after delivery should not be adopted. First of all, it is difficult to explain why the seller should not be liable if durable goods – such as refrigerators, washing machines and (new) cars, which are bought by the consumer for use during a longer period and which the consumer may reasonably expect to last for a longer period than two years – break down at a moment when the consumer need not expect this, and the consumer has proven that this is due to a defect that already existed at the moment of delivery and therefore is not the result of normal tear and wear.[83] Secondly, the provision provides an incentive to producers of durable consumer goods to produce only goods that do not last significantly longer than two years.[84] By doing so, the producer would ensure that consumers are either forced to purchase, at the time of conclusion of the original sales contract, an extended warranty,[85] or to purchase replacement goods if such an extended warranty was not obtained and the goods indeed break down shortly after the two-year period has elapsed.[86] Clearly, from the point of view of sustainability, the two-year period does not provide an incentive for companies to show their interest in corporate social responsibility – and effective competition may even force willing companies to step away from such an approach. Moreover, if the consumer resold the later defective goods herself to another consumer (e.g. via an auction platform such as eBay), she might be held liable towards her buyer without having recourse to the original seller. Finally, the absence of a 'suspension period' such as in Belgium and the Czech Republic effectively renders the conformity period even shorter if a defect had already occurred during the two-year period and the consumer at that time had given the seller an opportunity to cure the lack of conformity through repair or replacement and as a result she has not been able to make use of the goods during the full two-year period. All of these objections show that introducing the two-year period on the basis of full harmonisation is not the right way forward.

The European Commission is persistent on this point: the original proposal for the Consumer Rights Directive contained a similar provision.[87] In that proposal also a full harmonisation approach was adopted, but throughout

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83 See M.B.M. Loos, 'Consumer sales law in the proposal for a Consumer rights directive', *ERPL* 2010/1, p. 28; Ch. Twigg-Flesner, 'Fit for Purpose? The Proposals on Sales' in G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Munich: Sellier, 2009, p. 172.

84 *Cf.* J. Hijma, 'De Koopregeling in het Richtlijnvoorstel Consumentenrechten' in M.W. Hesselink, M.B.M. Loos (eds.), *Het Voorstel voor een Europese Richtlijn Consumentenrechten. Een Nederlands Perspectief*, The Hague: Boom Juridische uitgevers, 2009, p. 177.

85 *Cf.* Hijma 2009, p. 178.

86 On this already Loos 2010, pp. 27–28.

87 See Art. 28(1) of the proposal for a Consumer Rights Directive, COM(2008) 614/4, on which critically Loos 2010, p. 28; Twigg-Flesner 2009, p. 172.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

the proposal the European Commission had not raised the level of consumer protection above the minimum level that already resulted from the Consumer Sales Directive. Had this proposal been adopted in its original form then that would have meant that national legislators would have had to abolish national measures of consumer protection going beyond the European minimum without an increase in consumer protection on other points. That proved to be politically too problematic, and ultimately the Consumer Rights Directive was adopted without provisions replacing those of the Consumer Sales Directive (and those of the Unfair Contract Terms Directive).[88]

That is different in the proposal for the Online Sales and Distance Sales Directive, which on several points does go above the minimum level of consumer protection offered by the Consumer Sales Directive. The first example is the absence of a duty to notify. Under Article 5(2) of the Consumer Sales Directive Member States were given the possibility to introduce or maintain a provision that, in order to benefit from his rights, the consumer must inform the trader of the lack of conformity within a period of two months from the date on which she detected such lack of conformity. According to the Explanatory Memorandum, 17 Member States have made use of this option.[89] The duty to notify may have the effect that consumers lose well-substantiated claims for remedies. This is considered to be problematic especially in a cross-border transaction where the law of another Member State applies and the consumer may not be aware of this notification obligation resulting from the law of another Member State.[90] This is not a very convincing argument not to introduce a duty in this particular Directive, as the problem of the consumer being surprised by a duty to notify under a foreign national law would not exist – as the law would be fully harmonised anyway, and the duty to notify therefore would exist or not also in the consumer's national legal system. Nevertheless, it seems that the exclusion of the duty to notify is justified also from a substantive point of view. First, under the current regulation of the duty to notify the consumer is only required to notify as of the moment that she has actually discovered the defect. It seems likely that at that moment the consumer will in most cases indeed notify the defect to the seller whether or not she has a duty to that effect as she will not be satisfied and will want to invoke a remedy. Moreover, if the consumer were late in doing so, this could easily be concealed from the seller, as the consumer need only state that she found out 'just now' and it would be almost impossible for the seller to substantiate that the consumer in fact had noticed the defect earlier and had failed to notify at that time. And finally, it is doubtful whether a consumer should be under any *duty* to notify the seller for the *seller's* breach

88 See above, Section 2.4.
89 *Cf.* the Explanatory Memorandum, p. 6.
90 *Cf.* recital 25 of the preamble to the Online Sales and Distance Sales Directive.

of his contractual obligations to the extent that the seller could subsequently invoke the consumer's breach of this notification duty to escape liability for the breach of her own obligation as to conformity.

A second improvement of the position of the consumer is the limitation of the seller's defence against a claim for non-conformity by arguing that the consumer already was or should have been aware of the defect before the contract was concluded. Under Article 2(3) Consumer Sales Directive, this defence leads to the conclusion that the consumer had accepted that particular defect and therefore that there was no lack of conformity. Article 4(3) Online Sales and Distance Sales Directive, however, provides that the consumer only loses the right to invoke a remedy for lack of conformity if she not only *knew* of the defect at the time when the contract was concluded, but also had *accepted* that defect *explicitly*.[91] That will in any case prevent the discussion whether the consumer could reasonably have expected that the defect would have been repaired before delivery or that she had tacitly accepted the defect by not expressly demanding repair before that moment.

The third example pertains to termination in case of minor defects. Whereas Article 3(6) of the Consumer Sales Directive excludes termination in such cases, a similar exclusion deliberately has not been adopted in the Online Sales and Distance Sales Directive.[92] This implies that for consumers in legal systems where the exclusion had been adopted in national law, the new Directive enlarges the possibility for consumers to terminate the contract and therefore extends the extent of consumer protection on this point. This means that the contract for the sale of a car could be terminated for a small defect such as a scratch on the lacquer of the car, which may appear to be a disproportionate sanction. On the other hand, given the hierarchy of remedies (which will be discussed below, Section 5.1), termination is available only where neither repair nor replacement is available to the consumer, where the seller refuses to repair or replace the car, where the seller causes significant inconvenience to the consumer when repairing or replacing the car, or where the seller is required but neglects to repair or replace the car within a reasonable period. In most of these cases, the seller could have prevented the termination by complying with his obligation to repair or replace the goods. Where neither of these remedies is available to the consumer – implying that the seller is not capable of remedying the scratch herself or having it remedied on her behalf by a garage – the defect typically is not as minor as one would think. The choice made by the European Commission in any case prevents an otherwise complicated debate on the seriousness of the defect and thus facilitates a speedy resolution of the consumer's claim.

91 *Cf.* Beale 2016, p. 16.

92 *Cf.* recital 29 of the preamble to the Online Sales and Distance Sales Directive and the Explanatory Memorandum, pp. 3, 13 and 15; *cf.* also Smits 2016, p. 13.

Fourthly, whereas the consequences of termination have largely been left to national law,[93] Article 13(3)(d) of the Directive does provide that in the case where the goods are to be returned to the seller after termination, the consumer is only liable to compensate the trader for the loss of value due to the use of the goods in so far as the decrease in value is larger than would result from the normal use of the goods. The provision intends to reconcile on the one hand the effectiveness of the right to terminate and on the other hand the desire to avoid that the consumer unjustly is enriched as a result of the termination of the contract.[94] In this respect the Directive derogates to the benefit of consumers from the Consumer Sales Directive, where recital 15 of the preamble to that Directive explicitly left Member States the possibility to oblige the consumer to pay for the use of the goods prior to termination. The provision is, however, more restrictive than the corresponding provision for a decrease in value in the case of replacement, since for that situation Article 10(3) Online Sales and Distance Sales Directive excludes any right for the seller to claim compensation for the loss in value.

The last and arguably most important improvement of the consumer's position[95] pertains to the extension of the reversal of the burden of proof from six months[96] to two years.[97] This last improvement measure implies that throughout the full period during which the consumer can exercise rights due to non-conformity, the seller bears the burden of proof that the non-conformity did not already exist at the time of delivery. The *Faber* decision of the Court of Justice,[98] rendered under the current Consumer Sales Directive, brings about that this requires a full shift of the burden of proof, implying that the seller must prove that the defect was caused only after delivery; however, and in accordance with Article 5(3) Consumer Sales Directive, the burden of proof is not shifted if the nature of the goods or the nature of the defect is irreconcilable with the presumption that the defect already existed at delivery. If that is the case, the consumer not only must prove the lack of conformity itself but also that it existed already when the goods were delivered. If the seller indeed will be required to bear the burden of proof for the full period of two years after delivery, this will improve consumer protection considerably, as in many cases it is precisely she who bears the burden of proof who loses the procedure. Whether the extension

93 See Art. 1(4) Online Sales and Distance Sales Directive.
94 See recital 31 of the preamble to the Online Sales and Distance Sales Directive.
95 See in this respect expressly the Explanatory Memorandum, pp. 3 and 11.
96 See Art. 5(3) Consumer Sales Directive.
97 *Cf.* Art. 8(3) Online Sales and Distance Sales Directive.
98 CJEU 4 June 2015, Case C-497/13, ECLI:EU:C:2015:357 (*Faber v Autobedrijf Hazet Ochten BV*); see in contrast Smits 2016, p. 10, who is of the opinion that the seller need only shed doubt as to the correctness of the presumption that the defect already existed at the moment when the goods were delivered.

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will be included in the final version of the Directive is, however, uncertain, as this is politically controversial.[99]

4.3. REMEDIES FOR NON-CONFORMITY OF GOODS PURCHASED AT A DISTANCE

From Article 9(3) Online Sales and Distance Sales Directive it becomes clear that the European Commission has adopted the Consumer Sales Directive's hierarchy of remedies for non-conformity – the primary remedies being repair or replacement, and the remedies of termination and price reduction fulfilling only a subsidiary role. Whereas, according to the Explanatory Memorandum, 20 Member States have adopted this hierarchy, eight have not[100] – which implies that the Online Sales and Distance Sales Directive, which is based on full harmonisation, would lead to a decrease of consumer protection on this point in eight Member States.

With regard to the right to repair and replacement, the Online Sales and Distance Sales Directive expressly provides that it is the *consumer* who may choose between the two remedies. Only if the chosen remedy is disproportionate for the seller, is the consumer required to accept the alternative remedy for bringing the goods into conformity.[101] In addition, the *Weber v Wittmer* and *Putz v Medianess* joined cases[102] are codified to the extent that when the consumer had installed the goods in accordance with their nature or purpose before discovering the non-conformity, the seller is obliged not only to provide replacement goods, but also to either remove the defective goods and reinstall the repaired or replacement goods, or to compensate the consumer for the costs thereof.[103] The provision that the consumer is not required to pay any compensation for the use of the goods prior to replacement[104] may be seen as codification of the *Quelle* judgment.[105] The Directive is, however, not clear whether in the case of a

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99 See Amendments 277–284 Draft Report IMCO on the Online Sales and Distance Sales Directive, where diverging solutions are proposed ranging from a return to the current six-month period to a shift of the burden of proof during the full economic lifespan of the goods.

100 Explanatory Memorandum, p. 6.

101 Art. 11 Online Sales and Distance Sales Directive.

102 CJEU 16 June 2011, Joined Cases C-65/09 (*Gebruder Weber GmbH v Wittmer*) and C-87/09 (*Putz v Medianess Electronics GmbH*), ECLI:EU:C:2011:396. On these cases, see J.A. Luzak, 'Who should bear the risk of the removal of the non-conforming goods? Joined cases C-65/09 and C-87/09 (Weber and Putz)', *Zeitschrift für europäisches Unternehmens- und Verbraucherrecht/Journal of European Consumer and Market Law* 2012/1, pp. 35–40; J.A. Luzak, 'A storm in a teacup? On consumers' remedies for non-conforming goods after *Weber and Putz*', *ERPL* 2015/4, pp. 689–704.

103 *Cf.* Art 10(2) Online Sales and Distance Sales Directive.

104 *Cf.* Art 10(3) Online Sales and Distance Sales Directive.

105 CJEU 17 April 2008, Case C-404/06, ECLI:EU:C:2008:231 (*Quelle AG v Bundesverbraucherzentralen und Verbraucherverbände*).

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non-conformity of, for instance, a television that has manifested itself after one and a half years, the consumer is entitled to a *new* television or to a replacement television that has already been used for one and a half years. If the latter is the case, replacement may be less burdensome for the seller, since the returned television could be repaired by the seller and then be used as a replacement television for another consumer claiming replacement for lack of conformity. A related question is whether after having received the replacement goods the consumer again is entitled to invoke a remedy for non-conformity during a further two years or merely during the remainder of the original period of the two years, possibly supplemented by the period between the notification of the non-conformity and the receipt of the replacement goods, such as is currently accepted in Belgium, the Czech Republic, Hungary, Malta, Slovakia and Spain.[106] Clarification on these matters, whether in the text of the Directive itself or in a recital in the preamble would be very welcome for practice.

For termination, a notice is required. Article 13 Online Sales and Distance Sales Directive makes clear that any means of communication suffices, thus indicating that no form requirement applies as to the termination of the contract. The Directive does not provide, however, when termination will take effect. Instead, this will have to be determined on the basis of the applicable national law.

After termination, the seller must return the price within 14 days of receipt of the termination notice, whereas the consumer is required to return the goods within 14 days following the dispatch of the termination notice.[107] This implies that the consumer's obligation to return the goods becomes due before the seller's obligation to return the price – in particular in cross-border cases where the consumer does not terminate by email but by a letter in writing. This implies that in such cases the seller may withhold repayment of the price until the consumer has returned the goods, burdening the consumer with the risk of the seller's insolvency or non-performance. Such an order of procedure is very well defensible in the case of the consumer's withdrawal during the cooling-off period,[108] as in such case the ending of the contract is caused by the consumer without this being in any way attributable to the seller. In the case of termination for non-conformity, however, this is different. First, termination is the result of the fact that the *seller* has not performed her original obligations under the sales contract. Moreover, due to the hierarchy of remedies, the seller was first put in the position to cure the defect through repair or replacement, and apparently has not cured the defect. Under these conditions it is difficult to see why the consumer should be required to – again – trust the seller to properly perform

106 *Cf.* Schulte-Nölke/Twigg-Flesner/Ebers 2008, pp. 682–83.
107 Art. 13(3)(a) and (b) Online Sales and Distance Sales Directive.
108 Arts. 13 and 14 Consumer Rights Directive.

her obligation where she has already has proven not to be trustworthy on several occasions.[109]

Article 13(3)(c) Online Sales and Distance Sales Directive provides that when the goods cannot be returned because they have been destroyed or lost, the consumer must reimburse the monetary value of the goods that these would have had at the time when the obligation to return them became due and which they would have had if the consumer at that time had returned them. A similar result, but in much simpler wording, is achieved by Article 7:10(3) of the Dutch Civil Code (Burgerlijk Wetboek (BW)), according to which the risk of loss or destruction of the goods is for the account of the seller if the buyer has invoked the right to termination or replacement on good grounds. In such cases, the consumer would be under a duty of care towards the goods as of the moment when she would reasonably have had to take the possibility of the future termination or replacement of goods into account, Article 7:10(4) BW provides. Moreover, under Dutch law the seller who wishes to claim the original value of the now destroyed or damaged goods will have to prove that the consumer has breached her duty of care, whereas the Online Sales and Distance Sales Directive seems to require the consumer to prove that the destruction of the goods is the result of the non-conformity. Such proof may be difficult for the consumer to provide.

The Online Sales and Distance Sales Directive does not expressly deal with the consumer's right to claim damages for damage caused by the non-conformity. The Explanatory Memorandum indicates that this matter is left to national law.[110] As was indicated above in Section 3, this is far from clear, as the Directive seems to offer an exhaustive list of remedies in Article 9. If, however, the Directive indeed leaves room for national rules on damages, it does seem likely that courts will interpret the Directive in such a way that the two-year cut-off period under Article 14 of the Directive would equally apply to a claim for damages under national law based on non-conformity. There does not appear to be a convincing argument to limit liability in this way – whereas it could be argued that there is a valid reason to exclude the consumer's right to claim repair, replacement and termination after some time in order to save the seller from the potentially far reaching consequences of these remedies, such an argument cannot reasonably made as to the statutory exclusion of the right to compensation for damage sustained after (only) two years.[111]

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109 *Cf.* Notaries of Europe, Position Paper on the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635) and a Directive on certain aspects concerning contracts for the supply of digital content (COM(2015) 634), p. 2: http://www.notaries-of-europe.eu/index.php?pageID=13390 (last visited on 15 March 2017).

110 Explanatory Memorandum, p. 3.

111 In this sense also Beale 2016, pp. 19–20.

5. DIGITAL CONTENT DIRECTIVE

5.1. SCOPE OF THE DIGITAL CONTENT DIRECTIVE

The Digital Content Directive covers the supply of digital content, irrespective of the way in which the agreement has been concluded (in or outside of a shop or at a distance) and regardless of the way in which the digital content is delivered (on a durable medium, such as a DVD, by means of a download, by way of streaming or by providing access to the consumer).[112] Moreover, the Directive is applicable both to contracts under which the supplier must enable the consumer to obtain the control over the digital content for repeated use (such as in the case of a download) and to contracts under which the supplier merely offers services (as is the case with streaming or cloud storage, but also where the supplier operates a social medium facility, such as the platforms of Twitter and Facebook). The Directive applies only where the supplier is a professional party, the other party is a consumer, and where the digital content is provided against payment of a price in money[113] or against counter-performance by the consumer in the form of the provision of data.[114]

Undoubtedly, the extension of the scope of the Digital Content Directive to certain contracts for the supply of 'free' digital content concerns the most important innovation of the Directive for legal practice. The Directive applies where the supplier requires the consumer to actively provide personal or other data in addition to such data that must be provided to the supplier in order for her to carry out the contract or to meet regulatory requirements. For example, when the supplier requests the consumer to inform the supplier of her email address in order for the supplier to send her the requested digital information via email, the provision of the email address by the consumer is necessary in order to comply with the consumer's request. In this case, the Directive *does not* apply. If the supplier, however, also uses the email address for other purposes, for example in order to target the consumer with advertising or in order to sell

112 Only the provisions on the supply of digital content (Art. 5 Digital Content Directive) and on the right to directly claim termination in case of a failure to deliver the digital content (Art. 11 Digital Content Directive) do not apply to the supply of digital content on a durable medium, Art. 3(3) Digital Content Directive provides. As the Online Sales and Distance Sales Directive does not indicate that in such cases that Directive is applicable if the contract is concluded at a distance, both the obligation to deliver the DVD with the digital content and the remedies for a failure to do so under Art. 18 of the Consumer Rights Directive apply. Before being able to terminate the contract, the consumer will then normally have to give notice to the seller of the DVD and to fix an additional period for delivery.

113 As far I know, this Directive for the first time explicitly indicates that 'price' is intended to mean money in exchange for the supply of digital content provided by the supplier, see Art. 2(6) Digital Content Directive.

114 See Arts. 1 and 3 Digital Content Directive.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

collected email addresses to information brokers, the collection of the email address (also) has a commercial purposes, and the Directive *does* apply.[115] When a consumer creates an account with a platform for social media and to that extent agrees to transfer intellectual property rights in relation to photos and texts shared or distributed through the platform, this is considered to constitute such counter-performance.[116] The Directive also seems to apply in cases where the supplier initially does not intend to collect the consumer's data for commercial purposes, but later decides to use them for such purposes. In such case it is, however, unclear whether this later use entitles the consumer to invoke the protection of the Directive also with regard to digital content which was purchased before the supplier's later commercial use – in particular if the digital content has proven to be defective. If this would not be the case, the supplier would reap the commercial advantages of the consumer's supply of the (personal) data without suffering the consequences of the supply of non-conforming digital content – which could incentivise the supplier to claim that she did not have a commercial purpose at first and thus largely escape liability for any digital content provided until that moment. Accepting that the consumer could invoke the protection of the Directive, however, does imply that de facto the contract is classified as a digital content contract retroactively.

However, the Directive is applicable to 'free' digital content only where the consumer *actively* provides data to the supplier of the digital content. When the data is collected by the supplier, for example, by setting cookies on the consumer's computer, or when the consumer's counter-performance consists in having to tolerate advertisement, the Directive is *not* applicable.[117] The limitation of the scope of the Directive to cases where the data is gathered *explicitly* may lead to the undesirable situation that the supplier evades the applicability of the Directive by not expressly asking for the provision of the data, but by (whether or not secretively) collecting that data via cookies. In order to prevent this, the scope of the Directive needs to be expanded to include at least this situation.[118]

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115 *Cf.* Art. 3(4) Digital Content Directive.

116 *Cf.* B. Fauvarque-Cosson, *The new proposal for harmonised rules for certain aspects concerning contracts for the supply of digital content (termination, modification of the digital content and right to terminate long term contracts), In-depth analysis*, Briefing note for the Legal Affairs Committee of the European Parliament, PE 536.495, 2016, p. 7, presented during a workshop on 17 February 2016; this paper is available at: http://www.europarl.europa.eu/committees/nl/events-workshops.html?id=20160217CHE00181 (last visited on 15 March 2017).

117 *Cf.* Art. 3(4) Digital Content Directive and recital 14 of the preamble to the Directive.

118 In this sense also Beale 2016, p. 13; V. Mak, *The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content. In-depth analysis*, Briefing note for the Legal Affairs Committee of the European Parliament, PE 536.495, 2016, p. 9, presented during a workshop on 17 February 2016; I will refer to this paper as Mak 2016b: http://www.europarl.europa.eu/committees/nl/events-workshops.html?id=20160217CHE00181 (last visited on 15 March 2017). Amendments 31 and 35 in the Draft Report of the Committee

The notion of 'digital content' is defined broadly in Article 2(1) Digital Content Directive. It consists, in the first place, of data in digital form, which is produced and delivered in the form of video, audio, apps, games or other software. Secondly, the notion concerns the provision of a service which consists in the creation, processing or storage of data delivered in digital form by the consumer. Finally, also the supply of a service that allows a consumer to share data in digital form with other users of the service or that allows a consumer to interact with such data provided by other users of the service. The definition is intentionally broad and aims to include all types of digital content, including downloaded digital content, streamed movies, cloud storage, and social media.[119] The Directive explicitly aims to be 'future-proof'.[120]

Services that use the digital content primarily as a carrier and for which the supplier's human activity is predominant, are excluded from the scope of the Directive. The same is true for electronic communication services, services in the field of healthcare, gambling services and financial services.[121] With regard to mixed contracts, the Directive only applies to the obligations and remedies of the parties as supplier and consumer of the digital content.[122] Goods that make use of embedded software, where the digital content is functionally subordinate to the movable goods, such as the electronics and software in a car, and the software for a thermostat that can be turned on remotely with an app, fall outside the scope of the Digital Content Directive. Instead, such contracts are exclusively governed by the Online Sales and Distance Sales Directive or the Consumer

on the Internal Market and Consumer Protection of 7 November 2016 and 15 February 2017 indeed propose to extend the scope of the Directive in this sense. This draft report is available at: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/0287(COD) (last visited on 15 March 2017) and will be referred to hereinafter as: Draft Report IMCO on the Digital Content Directive. See also the Opinion of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs of 21 November 2016, p. 3, available at the same website. I will refer to this Opinion as: LIBE Opinion.

119 Explanatory Memorandum, p. 11; see also recital 11 of the preamble to the Digital Content Directive.

120 Mak 2016b, p. 9, doubts whether the Directive can achieve this aim, given the fact that it is intended to apply also to digital applications that currently do not even exist.

121 *Cf.* Art. 3(5) Digital Content Directive.

122 *Cf.* Art. 3(6) Digital Content Directive. Recital 12 of the preamble to the Online Sales and Distance Sales Directive offers a comparable approach to mixed contracts in which elements of a sale and of a service may be distinguished, e.g. a contract whereby a garage sells a car and agrees to maintain and service the car annually. Wendehorst rightly noes that both Directives fail to indicate what the consequences are of termination of a *part* of the contract, see C. Wendehorst, *Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age. In-depth analysis*, Briefing note for the Legal Affairs Committee of the European Parliament, PE 556.928, 2016, p. 7, presented during a workshop on 17 February 2016; this paper is available at: http://www.europarl.europa.eu/committees/nl/events-workshops.html?id=20160217CHE00181 (last visited on 15 March 2017).

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

Sales Directive.[123] In practice it is, however, difficult to distinguish between contracts for the supply of goods with embedded software and mixed contracts for the sale of goods and the supply of digital content. For instance, is a contract by which a laptop is sold with Windows 10 and Microsoft Office installed to be considered a mixed contract or a sales contract pertaining to goods with embedded software?[124] One could think that the distinction should be made whether or not the digital content has an independent economic significance. That is certainly the case with Microsoft Office, but already unclear with regard to Windows 10. And since both the conformity test and the remedies differ, it is rather important to classify the contract properly.[125] The development of goods and digital content that are intertwined is likely to go much further in the coming years, and it will be increasingly more difficult to make the distinction between goods with embedded software and mixed contracts. This distinction therefore jeopardises the aim of providing a 'future-proof' regulation for digital content contracts.[126] In this respect, it probably makes more sense – also with regard to future developments – that the Digital Content Directive is applicable to goods operated by embedded software, rendering the supplier liable in case of any defect in the proper functioning of the goods, unless the supplier of the digital content proves that the defect lies in the hardware of the good.[127]

Contracts that are concluded without direct human involvement, such as a refrigerator that automatically places an order at a grocery shop or a supermarket when it detects that the milk runs out, fall outside the scope of the Directive. In the preamble, in this context it noted that it is 'opportune' to address specific issues of liability related to the *Internet of Things* in a separate way.[128] That suggests that this matter is outside the scope of the Directive. However, the definition of the notion of 'digital content' is so broad that it is uncertain whether the *Internet of Things* is really outside its scope[129] – and this will all the more be the case if embedded software will be governed by the Digital Content Directive, as members of the European Parliament's Committee on the Internal Market and Consumer Protection and of the Committee on Civil Liberties,

123 *Cf*. recital 12 of the preamble to the Digital Content Directive. On this, see critical R. Mańko, *Contracts for supply of digital content. A legal analysis of the Commission's directive proposal. In-depth analysis*, May 2016, pp. 8–9, 12–13; this paper is prepared by the Members' Research Service, http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)582048 (last visited on 15 March 2017). The paper will be referred to as Mańko 2016. See also Wendehorst 2016, p. 7.

124 The example is developed by Wendehorst 2016, p. 8; see critical also Mańko 2016, pp. 9, 13.

125 *Cf*. Mańko 2016, p. 14.

126 In this sense also Mańko 2016, pp. 14–15.

127 Amendments 10 and 34 Draft Report IMCO on the Digital Content Directive together propose to amend recital 12 and to add a new paragraph 3a to Article 3 of the Directive in this manner. See also LIBE Opinion, p. 6.

128 See recital 17 of the preamble to the Digital Content Directive.

129 Mak 2016b, p. 8.

Justice and Home Affairs suggest.[130] In my view, this matter should be clarified in the Directive itself and not in the recitals.

Recital 16 of the preamble to the Directive makes clear to what extent the Directive applies with regard to 3D printing. In the case of 3D printing, a consumer may obtain so-called computer-aided design (CAD) software or CAD files from a supplier of digital content, develop her own CAD file or amend an existing CAD file to her liking, and subsequently send the CAD file to a 3D printer for 3D printing.[131] According to the recital, the supply of the CAD files or the CAD software to the consumer is governed by the Directive, but the 3D printing of the goods on the basis of the CAD file sent to the 3D printer is excluded from the scope of this Directive and governed exclusively by the Online Sales and Distance Sales Directive.

The Digital Content Directive does not seem to aim at holding the *producer* of the digital content liable in case of non-conformity of the digital content. However, the wording of the Directive may very well lead to that result – and that may be a very good idea, as the supplier in many cases is not much more than an in-between person. Such direct liability of the producer seems likely when the digital content is supplied by a supplier, but is accompanied by an End User's Licence Agreement (EULA), which is submitted by the producer of the digital content. If the producer effectively forces the consumer to agree to the conclusion of the EULA and to accept the producer's terms and conditions, and requires the consumer to provide personal data, such as her email address, then it seems that the requirements of Article 3 Digital Content Directive as to the applicability of the Directive have been met. That is certainly the case if the EULA requires the producer to send regular updates and patches to remedy bugs and errors in the digital content that originally was provided by the supplier.[132] It remains to be seen, however, whether or not the contract is valid, since the consumer is more or less coerced into concluding the EULA even though she has already obtained the right to use the digital content by purchasing it from the supplier. It may very well be that under the applicable national law the consumer is entitled to avoid the EULA altogether or to invoke the unfairness of its terms. These matters have been left outside the scope of the Digital Content Directive.

Finally, it is important to note that the Directive is expressly without prejudice to the protection of individuals offered by the Data Protection Directive legislation.[133] Moreover, it does not concern provisions of general contract law,

130 See n 128.

131 See on this Ch. Twigg-Flesner, 'Conformity of 3D prints – Can current Sales Law cope?' in R. Schulze, D. Staudenmayer (eds.), *Digital Revolution – Challenges for Contract Law*, Baden-Baden: Nomos/Hart, 2016, p. 36.

132 In this sense also Beale 2016, p. 13.

133 Art. 3(7) Digital Content Directive. The Directive refers to the General Data Protection Regulation, i.e. Regulation (EU) 2016/679, *OJ* 2016, L 119/1. On this, see Mańko 2016, p. 6.

such as the rules on the conclusion, validity and effects of contracts in so far as these matters are not regulated in the Directive.[134] As was already mentioned with regard to the Online Sales and Distance Sales Directive, the question may arise whether in addition to a remedy for non-conformity the consumer could also invoke avoidance on the basis of mistake, or that this matter is effectively regulated in the Directive through the provisions on non-conformity. As was argued above, in Section 4.1, with regard to the Online Sales and Distance Sales Directive, this matter should be dealt with explicitly in the Digital Content Directive.

5.2. SUPPLY AND FAILURE TO SUPPLY DIGITAL CONTENT

According to Article 5(1) Digital Content Directive, the supplier must supply the digital content to the consumer or to a third party designated by her. 'Third party' in this context refers to a party that operates a physical or virtual facility through which the digital content is made available or accessible to the consumer. The notion includes an Internet host that allows for cloud storage of the digital photos produced by the supplier of the digital content, but also a platform that provides access to an online game for which the consumer has purchased, for instance, a virtual shield or other power.

The obligation to supply the digital content must be performed within 30 days, unless a shorter or longer period of time for performance is agreed between the parties, Article 5(2) provides. In practice, the parties will almost always have made a specific arrangement as to the moment of delivery: typically the parties will have agreed on immediate supply of the digital content or supply thereof within a few working days.

When the obligation to supply at the agreed moment is not met, the consumer is entitled to directly terminate the contract without prior notice of default.[135] In this respect the Digital Content Directive derogates from the corresponding provision in Article 18(2) Consumer Rights Directive. This provision indicates that for sales contracts in principle prior notice is required. A reason for the diverging approaches is not provided.[136] To complicate matters further, whereas digital content provided on a durable medium is largely governed by the Digital Content Directive, as regards the obligation to supply and the remedies for failure to supply, it is not the Digital Content Directive but the Consumer

134 Art. 3(9) Digital Content Directive.
135 See Art. 11 Digital Content Directive.
136 Amendments 689–691 Draft Report IMCO on the Digital Content Directive propose to introduce a provision similar to Article 18(2) Consumer Rights Directive. Amendments 687 and 701 together instead propose to delete Article 11 Digital Content Directive and to offer a unitary system of remedies for digital content that is either defective or not supplied.

Rights Directive that applies.[137] This means that for digital content that was to be supplied on a DVD prior notice of default is required, whereas if the digital content was to be supplied by way of a download such notice is not required.

In addition to termination, consumers can also claim damages in accordance with Article 14(1) Digital Content Directive. The Directive does not make clear whether the consumer may also simply claim performance of the contract: only damages and termination are explicitly mentioned as remedies for failure to supply the digital content. This is problematic since the Directive is based on full harmonisation. It is therefore possible that a court would find that the Digital Content Directive offers an exhaustive list of remedies – which would not be surprising given the extensive rules on the remedies for lack of conformity in its Articles 12–14 – and therefore not award specific performance. Yet, there does not seem to be a good reason to deny consumers the right to claim performance of the contract.

Another matter which deserves consideration is how a failure to provide the agreed supply of updates is to be classified: does this constitute a failure to supply the digital content within the meaning of Article 5 Digital Content Directive or should this rather be seen as non-conformity in the sense of Article 6 of the Directive?[138] This is important not only in view of the discussion above whether or not the consumer may demand the supply of the updates in case the failure to supply updates would be governed by Article 5 Digital Content Directive, but also because of the more restricted possibilities for termination for non-conformity in case the failure to supply updates would be classified as non-conformity, as will be discussed below, Section 9.

5.3. CONFORMITY OF DIGITAL CONTENT

With regard to conformity, Article 6(1) Digital Content Directive provides that the digital content must comply with the specific purposes for which the consumer has purchased it – in as far as these specific purposes have been disclosed to the supplier before the conclusion of the contract – and with the information that has been provided by the supplier before or at the conclusion of the contract.[139] This conformity test applies both to the purchase of software or games and to the supply of online services, such as a subscription to Netflix

137 See Art. 3(3) Digital Content Directive, and the definition of a sales contract in Art. 2(5) Consumer Rights Directive.

138 Fauvarque-Cosson 2016, pp. 7–8, treats this as a matter of non-conformity; I am inclined to agree with her on this. She argues, however, on p. 9 that the provisions on termination should not differ for termination because of a failure to supply and termination for non-conformity.

139 *Cf.* Art. 6(1) Digital Content Directive.

or access to an online game.[140] Moreover, unless agreed otherwise, the supplier must deliver the latest version of the digital content that was in circulation at the time of contract conclusion.[141]

The wording of Article 6(2) Digital Content Directive indicates that *objective* standards apply for the assessment as to whether the digital content conforms to the contract only if the parties have not made any specific arrangements as to what requirements the digital content has to conform with. This implies, for instance, that where the supplier had indicated for which purposes the digital content may be used, the digital content need not be fit for normal use thereof. During the symposium in Brussels,[142] Staudenmayer, acting as the representative of the European Commission, indicated that a derogation from the normal conformity rules is required in the case of digital content due to the restrictions which the holder of the intellectual property rights may have imposed on the supplier, which restrictions in turn the supplier must be allowed to pass on to the consumer. In addition, Staudenmayer argued, the supplier should be allowed to put so-called beta versions of digital content on the market. Characteristic of such beta versions is that they are still being developed and that the supplier therefore knows that the digital content will contain bugs and flaws, but does not know which bugs and flaws there will be. One could add that in the case of digital content, an objective standard often does not (yet) exist because of the often still relatively innovative character of digital content and the rapid succession of new versions and applications, or such standard is largely restricted to matters such as security or the primary functions of the digital content.[143] These objections can, however, also be accommodated by applying the objective test of Article 6(2) Digital Content Directive, according to which there is only then a lack of conformity if the digital content does not meet with what the consumer was *entitled* to expect under the agreement. Where the supplier has sufficiently clearly indicated which restrictions were imposed on him by the copyright holder and which he has to pass on, and what it means that the consumer will obtain a beta version of the digital content, this will have lowered the legitimate expectations accordingly. Moreover, the primacy of subjective over objective criteria can lead to problems: the supplier can in fact escape from the minimum requirements set by the Digital Content Directive by mentioning only very limited usage possibilities, potentially hiding that information within standard contract terms or among an abundance of other information provided to the consumer. By mentioning these limited usage

140 See also Beale 2016, p. 22, who remarks that whereas service contracts usually are characterised by obligations of means (*obligations de moyen*), the Digital Content Directive contains obligations of result (*obligations de résultat*).

141 *Cf.* Art. 6(4) Digital Content Directive.

142 For details on the conference in Brussels on 18 February 2016, see n. * above.

143 *Cf.* Mak 2016b, p. 15.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

possibilities the supplier would then no longer have to vouch for the possibility to use the digital content for other, possibly more common, purposes. Moreover, in such a case the supplier would also not be bound by public statements of the producer of the digital content, unless she has repeated these statements herself, even if these statements have clearly shaped the consumer's expectations of the digital content: the compliance with such statements is part of the objective test under Article 6(2) Digital Content Directive, which does not apply if the supplier has indicated for which purposes the digital content is fit herself. It seems that on this point the Digital Content Directive has to be amended.[144]

An amendment is also needed with regard to the provision in Article 8(1) Digital Content Directive on the rights of third parties: that provision now provides that the supplier should ensure that the digital content is 'free from any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract'.[145] However, as far as the digital content is copyright protected, there are rights that the producer of the digital content cannot transfer to the supplier, and in turn this means that the supplier by definition cannot meet the requirements of Article 8(1). These rights pertain to personality rights (moral rights), including the inalienable right of the author of a copyright-protected work to oppose mutilations and deformities of the work.[146] The supply of copyright-protected digital content therefore by definition would lead to a lack of conformity, and would entitle the consumer to a remedy, even in those cases where the digital content could be used in accordance with the nature of the intellectual property right and therefore would not lead to mutilation or deformation of the copyright-protected work. This problem can easily be remedied by way of a textual amendment of the Article.[147]

Digital content must often be installed in order for it to function properly. Article 7 Digital Content Directive in this respect provides that the supplier is also liable for a lack of conformity resulting from the incorrect *integration* of the digital content into the digital environment of the consumer if the digital content is integrated by or under the responsibility of the supplier or if it is integrated by the consumer and the defective integration is the result of defects in the integration instructions or the absence thereof if the provision of such

144 In this sense also Beale 2016, pp. 20–21; Mak 2016b, p. 15; Mańko 2016, pp. 22–23. Amendments 56–60, 541, 561–563, 568–571 Draft Report IMCO on the Digital Content Directive all (in different wording) propose the recommended changes.

145 Amendments 615–618 and 620–622 Draft Report IMCO on the Digital Content Directive all aim at remedying this problem. A similar problem exists with regard to the corresponding provision of Article 7(1) Online Sales and Distance Sales Directive, but is of lesser relevance there. The most important examples for that Directive pertain to the sale of art artefacts and the sale of books.

146 *Cf.* Art. 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as subsequently amended.

147 See also Mańko 2016, p. 5.

instructions was agreed upon between the parties. This provision is clearly based on the corresponding provisions in Article 2(5) Consumer Sales Directive and Article 6 Online Sales and Distance Sales Directive, which provisions speak of 'installation'. The term 'integration' appears to have been chosen to make clear that the provision aims at the proper functioning of the digital content in connection with the digital environment of consumers, which consists of other digital content (such as the operating system, e.g. Windows or iOS, and programs like Word), the hardware (the computer, tablet, laptop or smartphone, but also the printer), and the network connection of the consumer.[148] The definition of the notion of 'digital environment', however, does not clarify whether, for example, cloud services and other facilities operated by third parties are part of the consumer's digital environment. Yet, the fact that Article 5 Digital Content Directive explicitly acknowledges that the consumer may require the supplier to supply the digital content to such a third party suggests that this is indeed the case. In my view, this should specifically be addressed, at least in the recitals of the preamble to the Directive, since third-party services increasingly operate as an integrated part of the digital environment of the consumer. For instance, operating systems such as Windows, iOS and Android, and programs such as Word are supplied with frequent updates, and the digital content supplied by a professional supplier of digital content must also be integrated with these updates.

This points to another matter. According to Article 10(b) and (c) Digital Content Directive, the supplier is liable to the consumer for any lack of conformity which exists at the time the digital content is supplied; where the contract provides that the digital content shall be supplied over a period of time, the supplier is liable for any lack of conformity which occurs during that period. This implies that unless the parties have agreed that the supplier would provide updates, the supplier is not liable if after some time the digital content *no longer* is compatible with the consumer's digital environment.

In the case of long-term contracts, such updates by definition are part of the contract, as the digital content must remain in conformity with the contract throughout the period for which the contract is concluded.[149] For other contracts, the parties may have made explicit arrangements as to updates of the digital content.[150] Where no such agreements have been made explicitly, in my view, the consumer may nevertheless expect the supplier to ensure that she can make use of the digital content for a reasonable period of time, which period is to be determined on the basis of the circumstances of the case. The supplier's obligation, then, includes an obligation to update the digital content, free of

148 *Cf.* Art. 2(2) and (8) Digital Content Directive. In my view the term 'installation' could also have been used without any problems resulting from the chosen wording.

149 See Arts. 6(3) and 10(c) Digital Content Directive.

150 See Art. 6(1)(d) Digital Content Directive.

charge, in so far as this is necessary for the proper use of the digital content: if such an obligation were not imposed on the supplier, then this would imply that digital content frequently will become unusable soon after delivery.[151] This is particularly true for updates that remedy later discovered defects in the digital content, since under Article 12(1) Digital Content Directive the consumer in many cases is entitled to the supply of such updates as a remedy for the lack of conformity of the digital content.

Moreover, as a professional party of digital content, the supplier knows or ought to know that the digital environment of the consumer is subject to change. For instance, an app developer of smartphone apps knows that the operating system of a smartphone is regularly updated or upgraded. In my view, the consumer may expect to be able to update the app free of charge if soon after the supply of the digital content the operating system is updated or upgraded and as a result the app no longer properly functions. Where the supplier fails to provide such an update of the app, I believe there would be a lack of conformity, even though the defect did not yet exist at the time the digital content was supplied, since in such a case the consumer is entitled to expect an update on the basis of a (tacit) agreement in the contract.

The supplier will not have ensured that the digital content remains compatible with technical developments and with updates and upgrades of existing hardware and software that go beyond 'ordinary' updates and upgrades aimed at keeping that hardware and software fit for their ordinary purpose. Obviously, the consumer may not expect to obtain newer functionalities for the digital content that did not exist when the digital content was sold to the consumer. This means that the digital content over time will become obsolete. In such cases, the consumer will often replace the digital content with new digital content purchased from the same or another supplier and whether or not for a price in money. For these reasons, a limitation of liability for the supplier to two years after the original supply of digital content seems to be more appropriate here than is the case for the delivery of goods under the Online Sales and Distance Sales Directive.

Article 9 Digital Content Directive provides that in the case of a lack of conformity the burden of proof that the defect did not exist at the moment of delivery is on the supplier. This shift of the burden of proof is not restricted to six months (Consumer Sales Directive) or two years (Online Sales and Distance Sales Directive), but applies permanently. However, the supplier does not bear the burden of proof if she proves that the digital environment of the consumer is not compatible with the interoperability requirements and other technical requirements of the digital content and the supplier had informed the consumer before the conclusion of the contract of these requirements.

151 *Cf.* Beale 2016, p. 27.

This exception implies that the supplier of the digital content has an interest in obtaining information from the consumer before the conclusion of the contract regarding the consumer's digital environment, in particular in those cases where the digital content must be installed on the consumer's device (e.g. a computer or a smartphone), as the supplier is liable for defects caused by problems in the integration of the digital content in the consumer's digital environment. If the consumer has failed to provide the requested information, the reversal of the burden of proof does not apply. The consumer's duty to co-operate is restricted to providing the information that is necessary to determine the consumer's digital environment by the least intrusive technical means for the consumer. However, in my view, the supplier should only be allowed to invoke this exception if she has made it clear to the consumer why she is in need of the information, and if the consumer is not asked to provide more information than is necessary with a view to the proper performance of the contract. This approach implies, in my view, that if the supplier asks for an excessive amount of information and the consumer (possibly in reaction thereto) does not provide any information, this does not constitute a breach by the consumer of her duty to co-operate, but rather an infringement by the supplier of the consumer's privacy which the consumer may ignore. If this were be different, it would constitute an incentive for the supplier to collect in this manner information to which she is not entitled, and which the consumer in practice is forced to provide in order to conclude a contract in the first place.

A permanent reversal of the burden of proof seems to be a very heavy load for the supplier. The Explanatory Memorandum to the Directive argues that this reversal is nevertheless justified because digital content is not subject to tear and wear.[152] This is correct with regard to digital content that is not provided on a durable medium, but this is not the case for digital content supplied on a DVD or a CD. For digital content supplied in such manner it seems more fair to adopt the corresponding provision of the Consumer Sales Directive or the Online Sales and Distance Sales Directive, in which case the shift of the burden of proof would be restricted to six months or two years, respectively.[153] For other digital content contracts, the European Commission's argument appears to be convincing in so far as the supplier would only be liable if the digital content were not in conformity with the digital environment of the consumer which existed at the time of delivery, as follows from Article 10 Digital Content Directive. However, it is argued above that in many cases the consumer may in fact expect that the supplier of the digital content offers free updates to remedy a lack of conformity which occurs after the supply of the digital content as a result

[152] See the Explanatory Memorandum to the Digital Content Directive, p. 12.

[153] *Cf.* Art. 5(3) Consumer Sales Directive and Art. 8(3) Online Sales and Distance Sales Directive.

of updates or upgrades of other parts of the consumer's digital environment. The logical consequence of this would be that the unlimited shift of the burden of proof is restricted here to two years, as is accepted under the Online Sales and Distance Sales Directive. This has as an advantage that unnecessary differences between the two Directives are prevented. This may prevent litigation as to whether the non-conforming digital content is subordinate to the goods on which it is installed (in which case the digital content is embedded and would be classified as a sales contract) or whether the digital content has an independent economic significance (in which case the contract is a mixed contract to which also the Digital Content Directive applies).[154]

5.4. REMEDIES FOR NON-CONFORMITY OF DIGITAL CONTENT

With regard to remedies, the Digital Content Directive introduces the same hierarchy as is the case with the delivery of goods under the Consumer Sales Directive and the Online Sales and Distance Sales Directive: the consumer is first entitled to have the digital content brought into conformity with the contract; termination and – if the contract was concluded in exchange for a price in money – price reduction are available only as subsidiary remedies.[155] Similarly to the Online Sales and Distance Sales Directive, the consumer is not under a duty to notify a lack of conformity.[156]

Where the consumer invokes her right to have the digital content brought into conformity, it is for the supplier to choose the method through which she wishes to comply with the consumer's demand.[157] The supplier may, for example, provide an update or a patch or require the consumer to download a new copy of the digital content from the supplier's server or to sign up on the supplier's website for online access to the new digital content.[158] The remedy must be performed free of charge, within a reasonable period and without causing significant inconvenience to the consumer.[159] The consumer does not, however, have a right to have the digital content brought into conformity if this would be impossible, disproportionate or unlawful.[160] Since the consumer does not have the choice between repair or replacement – which in most cases would amount to the same anyway – the test to determine whether the remedy of having the

154 See above, Section 6.
155 See Art. 12(3) Digital Content Directive; see critical Mak 2016b, p. 24.
156 *Cf.* recital 9 of the preamble to the Digital Content Directive.
157 This is different from the situation under the Online Sales and Distance Sales Directive, where it is the consumer who may choose, see Art. 11 Online Sales and Distance Sales Directive.
158 See recital 36 of the preamble to the Digital Content Directive.
159 Art. 12(1) and (2) Digital Content Directive.
160 Art. 12(1) Digital Content Directive.

digital content brought into conformity would be disproportionate is amended as well: instead of comparing the costs for repair to the costs for replacement, the possible disproportionality is assessed objectively by taking into account the value that the digital content would have had if it were in conformity with the digital content, and the significance of the lack of conformity for attaining the purpose for which consumers would normally use digital content of the same description.[161] It should be noted that this reference to 'the normal purpose' of the digital content seems difficult to reconcile with the subjective conformity standard which is accepted under Article 6 Digital Content Directive. The combination of these provisions could lead to the odd result that a supplier who expressly undertakes to supply digital content enabling the consumer to use the digital content in one particular way cannot be forced to supply digital content with that functionality if the functionality would not be of interest for the normal use of the digital content, whereas on the other hand that same contractual arrangement would prevent the consumer from claiming that the digital content should be fit for normal use.

In four situations the consumer has the right to claim termination of the contract or, if the digital content was provided in exchange for a price in money, price reduction:[162]

(a) when performance is impossible, disproportionate or contrary to the law;
(b) if the supplier has failed to bring the content into conformity within a reasonable time;
(c) when performance would cause significant inconvenience for the consumer (for example, because consumers need to purchase digital content temporarily elsewhere); or
(d) when the supplier has stated that she will not bring the content into conformity, or, given the circumstances of the case, it is clear that the supplier is not willing to do so.

Termination is only allowed if the non-conformity impairs the functionality, interoperability or other core features of digital content, such as the accessibility, continuity and security of the digital content. Where the supplier claims that the lack of conformity is not serious enough to justify termination, she bears the burden of proof thereof.[163] However, if the supplier is able to prove the minor nature of the lack of conformity but simply refuses to bring the digital content into conformity even though the consumer is legally entitled to this remedy, in my view the consumer should be able to terminate the contract even

161 Art. 12(1)(a) and (b) Digital Content Directive.
162 Art. 12(3) Digital Content Directive.
163 *Cf.* Art. 12(5) Digital Content Directive.

for such minor lack of conformity.[164] If this is not the case, then in the case of non-conforming digital content that is provided in exchange for the consumer's (active) provision of data by the consumer, both the remedy of price reduction and the remedy of termination are excluded. If the supplier then refuses to cure the defect, the consumer can only claim damages, provided that she is able to prove the damage. This would in fact mean that the consumer is left without an effective remedy. If the Directive is not amended on this point, the remedies for the supply of digital content in exchange for the provision of personal information may turn out to be 'all bark and no bite'.

After termination, the supplier must return any price in money paid by the consumer within 14 days.[165] Moreover, according to Article 13(4) Digital Content Directive, the consumer is not required to compensate the supplier for any use of the digital content that had been supplied prior to termination. However, in so far as the digital content was supplied on the basis of a long-term contract, termination is possible only from the time the digital content was not (any longer) in conformity with the contract.[166] The provision of Article 13(4) implies that the consumer need not compensate the supplier for any use of the digital content supplied that originally functioned properly and only later on was found out to be defective. That, I believe, goes too far, in particular since – in contrast to the Online Sales and Distance Sales Directive – the conformity rule is limited in time only on the basis of national rules of prescription, so that the supplier could potentially be faced years later with the termination of the agreement for a lack of conformity which manifests itself only at that time.

In so far as the consumer has paid for the digital content with her data (whether or not in addition to payment of a price in money) or such data have been collected by the supplier in the course of the duration of the contract, the supplier must take all reasonable steps to prevent the further use of such data. This implies that the supplier must either delete the consumer's personal data or render it anonymous in such a way that the consumer cannot be identified by any means that is reasonably likely to be used either by the supplier or by any other person. The obligation does not go so far as to require the supplier to prevent further use by a third party of any personal data gathered and sold to third parties in accordance with data protection legislation during the duration of the digital content contract.[167]

The obligation to take reasonable steps to prevent the further use of the consumer's data applies also to any digital content provided by the *consumer*.[168]

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164 In this sense see also Fauvarque-Cosson 2016, p. 9; Mak 2016b, p. 15.

165 Art. 13(2)(a) Digital Content Directive.

166 See Art. 13(5) Digital Content Directive.

167 *Cf.* recital 37 of the preamble to the Digital Content Directive. This implies that Art. 13(2)(b) Digital Content Directive does not stand in the way of the collection and use of personal data in the form of Big Data.

168 *Cf.* Art. 13(2)(b) Digital Content Directive.

The supplier is not required to delete the digital content that has been jointly produced by the consumer and others who continue to make use of the platform, as for instance may be the case for open-source software produced or amended by the consumer and by other users.[169] This implies, for instance, that if a consumer has put a photograph on Snapshot or on Instagram, the supplier is required to remove the photograph from her servers and to make sure that the photograph can no longer be accessed through her platform. It is, however, unclear how far the supplier's obligation goes. It seems unlikely that Snapshot or Instagram would be required to ensure that other users of the platform delete the photograph from their devices as well. But it may be that, for instance, Facebook is required to remove the photograph not only from her own servers, but also to remove the copies of the photograph on other consumers' Facebook pages. Moreover, it is uncertain whether a company such as Facebook could argue that it cannot be required to remove the digital content unless the consumer proves that *she* has originally provided the original photograph (and not obtained the photograph herself from another supplier)? Similarly, it is unclear how the supplier of a platform should deal with a post in a discussion to which other users have reacted. If the obligation to prevent the further use of the data is excluded also in these cases, then there is not much left of that obligation.

The supplier is furthermore required to offer the consumer the possibility to retrieve, free of charge, within a reasonable period and in a commonly used format, the digital content provided by the consumer (such as digital content stored in the supplier's cloud) and any data that was produced or generated by the consumer and which has been retained by the supplier.[170] This implies that the consumer should be provided with the technical means to store and use the data on her own computer or in the cloud of another provider of storage facilities. An exception applies again to digital content generated together with other users, in so far as the other users want to continue the use of the digital content.

In turn, after termination the consumer is no longer allowed to continue to use the digital content.[171] Where the digital content was not supplied on a durable medium, the consumer may comply with this requirement by deleting the copy or copies of the digital content or by rendering the copy or copies unintelligible.[172] If the digital content was supplied on a durable medium, such as a DVD or a CD, the supplier may request the consumer to return that durable medium at the supplier's expense. The consumer is required to comply with such request within 14 days from the receipt of the supplier's request.[173] The Directive

169 Examples are the CAD files discussed above, on which see Twigg-Flesner 2016, p. 36.
170 Art. 13(2)(c) Digital Content Directive.
171 *Cf.* Art. 13(2)(d) and (e)(ii) Digital Content Directive.
172 *Cf.* Art. 13(2)(d) Digital Content Directive.
173 *Cf.* Art. 13(2)(e)(i) Digital Content Directive.

does not, however, provide for a specific remedy if the consumer does not comply with his obligation to return the durable medium and not to make further use of the digital content, which implies that this is left to national general contract law.[174] It should be noted that unless the consumer is required to return the durable medium upon the supplier's request – the supplier in many cases will have no opportunity to verify whether the consumer refrains from using the digital content.[175] In this respect the additional right for the supplier to prevent the further use of the digital content herself[176] may be more useful, in particular in cases where the consumer must make use of a user account provided by the supplier.

From what is stated above it becomes clear that the obligation of the supplier to return the price becomes due before the consumer's obligation to return the durable medium, e.g. a DVD, as the latter obligation only arises if the supplier, after having been informed of the termination, requests the consumer to return the DVD, and both parties have 14 days to perform their respective obligations. The Directive does not make clear whether the consumer is entitled to withhold performance of her obligation in case the supplier has not performed her obligation on time. On the one hand, it could be argued that such a right may exist in accordance with national general contract law.[177] On the other hand, it could be argued that all rights that the consumer may have in the case of non-conformity are regulated exhaustively in Articles 10–14 Digital Content Directive and that only the consequences of the termination of the contract and the conditions governing the exercise of the right to damages are left to the Member States. In my view this should be addressed, at least in the recitals of the preamble to the Directive. The same is true with regard to the question whether the consumer is entitled to interest on the price she has paid for the digital content pending reimbursement, and more specifically whether interest becomes due as of the moment when the lack of conformity manifests, when the supplier is notified thereof, when the consumer has terminated the contract, or when the 14-day period for the repayment of the price has expired. Given the fact that the right to reimbursement arises when the contract is terminated, in my opinion the most logical moment would be the moment of termination.[178]

Unlike the Online Sales and Distance Sales Directive, the Digital Content Directive does contain a provision on damages: Article 14(1) of the Directive provides that the supplier is liable for economic damage to the digital environment of consumers caused by non-conforming digital content or

174 See Art. 3(9) Digital Content Directive.
175 In this sense also Mak 2016b, pp. 25–26.
176 Art. 13(3) Digital Content Directive.
177 See Art. 3(9) Digital Content Directive.
178 Fauvarque-Cosson 2016, p. 14, seems to suggest that the end of the 14-day period should be the moment when interest starts to accrue.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

by a failure to supply the digital content. The provision further adds that the compensation is to bring the consumer as much as possible into the position in which she would have been if the digital content had been in conformity with the contract. National law further stipulates the conditions under which the right to damages may be exercised, paragraph (2) adds. Since the Directive is based on full harmonisation, the explicit recognition of a right to claim compensation for economic damage to the legal environment seems to imply that other grounds for damages are excluded. That indeed seems to have been the intention of the European Commission.[179] That would mean that the supplier is not liable to compensate the consumer for other forms of damage. It is, however, easy to come up with other types of damage that could justify a claim for damages. First, it would stand to reason that the consumer would have a claim for damages for the costs that she has to incur to have the digital content (temporarily) replaced or to have it repaired.[180] Secondly, non-pecuniary loss is foreseeable if, for example, digital photos or other, for the consumer valuable, memories are lost – that such loss is possible is even explicitly recognised in recital 4 of the preamble to the Directive. Nevertheless, apparently such loss need not be compensated for. Thirdly, a security bug in the digital content may cause third parties to obtain the consumer's personal data and subsequently enable them to steal money from the consumer's bank account of the consumer.[181] Although this is economic damage, it is not damage caused to the consumer's digital environment, and therefore would not have to be compensated by the supplier either – not even in the situation where the supplier *knew* of the bug and decided not to care. Finally, a lack of conformity of the digital content may even lead to personal injury. A first example is the case where the digital content is integrated into movable property and causes the movable property to malfunction and to cause personal injury. In so far as the digital content may be seen as *embedded software*, such as digital content in a car or a refrigerator, it is not the Digital Content Directive, but the Consumer Sales Directive and the Online Sales and Distance Sales Directive that apply, since ultimately the non-conformity of the movable property is at stake here[182] – and for the latter Directive it is uncertain whether a claim for damages is allowed at all.[183] It is, however, also possible that the defective digital content causes damage to the digital environment of consumers, e.g. the consumer's hardware is caused to

179 See the Explanatory Memorandum, p. 13; see also critically Beale 2016, pp. 23–24; Notaries of Europe 2016, p. 2. Instead, Mańko 2016, p. 27, argues that other losses are not covered by the Directive and therefore national law may provide compensation for such losses.

180 In this sense also Mak 2016b, p. 27.

181 See also Mak 2016b, p. 27.

182 See recital 12 of the preamble to the Digital Content Directive.

183 See above, Section 4.3.

overload. It is conceivable that in such a case the hardware causes personal injury. To give two examples: the overload may cause the computer to explode or overheat; the defective digital content may lead a pair of virtual reality glasses to cause burns or eye problems. When the manufacturer of the hardware could have been aware of the potential hazard of the hardware she will be liable on the basis of product liability, and also the seller of the hardware could be liable on the basis of non-conformity of the hardware. These parties would then in turn be able to seek redress from the supplier of the digital content. When the producer and the seller of the hardware could successfully invoke *force majeure* because the problem was caused by the digital content, and they could not be seen as having breached a duty to prevent the damage, I see no reason why in such a case the consumer should not be entitled to claim damages from the supplier of the digital content, subject to the requirements for damages under the applicable national law. In my view, the Directive needs to be amended considerably on this point.[184] Fortunately, the European Parliament seems to share this view – although not all suggested amendments are equally helpful.[185]

5.5. LONG-TERM CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

Article 15 Digital Content Directive entitles the supplier of the digital content to change the main performance features of the digital content in case the contract is a long-term contract. This is possible subject to four conditions:

(a) the supplier must have included a clause to change the main performance features in the contract;
(b) the consumer must be expressly informed of the change a reasonable time prior to the change of the digital content and on a durable medium;
(c) the consumer must be allowed a period of at least 30 days as of the receipt of the notice to terminate the contract free of charge; and
(d) the consumer must be provided with the technical means to retrieve the digital content and other data from the servers or the cloud of the supplier after termination has taken effect.

184 In this sense also Beale 2016, pp. 23–24; Notaries of Europe 2016, p. 2.

185 See Amendments 855–870 Draft Report IMCO on the Digital Content Directive. In some cases it is just suggested to delete Article 14 – which would lead to the question whether damages are available at all, similar to the matter discussed with regard to the Online Sales and Distance Sales Directive, see above, Section 4.1. Another Amendment proposes to hold the supplier liable only in case of fault – which will be impossible for the consumer to prove.

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The first three conditions appear to be a codification of the case law of the Court of Justice with regard to the assessment of the possible unfairness of clauses allowing for a change of the price.[186] In an earlier publication Luzak and I have argued that the same criteria also should apply as to the change of other contract terms[187] and to changes of the product itself.[188] The Digital Content Directive seems to confirm this by setting these conditions also in the case of modification of the digital content. The last requirement set by the Court of Justice – that the supplier should also specify in the contract on what grounds the supplier may change the price – has, however, not been retained. In my view, the European Commission has rightly chosen not to apply that condition here as well: it is difficult to predict how the technical development of digital content will proceed and therefore when and why adaptation of the main performance features may be necessary, so it would be stretching the possibilities of suppliers of digital content too far to demand them to foresee this already in their standard terms or in the contract itself.[189]

The fourth condition set by the European Commission is in line with the consequences of termination of the contract for lack of conformity and refers to the corresponding provisions.[190]

When the consumer makes use of her power to terminate the contract in case of a change of the performance features of the digital content by the supplier, the supplier must refund the consumer the price (paid in money) as far as the price pertains to the period after the change of the digital content. In addition, the supplier must refrain from (further) use of the data that the consumer has provided in exchange for the digital content, and of other data the supplier has gathered, including digital content created by the consumer. Remarkably, the exception for digital content generated by the consumer and other consumers,

186 See in particular CJEU 21 March 2013, Case C-92/11, ECLI:EU:C:2013:180 (*RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*), paras. 50–54; CJEU 23 October 2014, Joined Cases C-359/11 and C-400/11, ECLI:EU:C:2014:2317 (*Schulz v Technische Werke Schussental GmbH und Co KG* and *Egbringhoff v Stadtwerke Ahaus GmbH*), paras. 46–49; CJEU 26 November 2015, Case C-326/14, ECLI:EU:C:2015:782 (*Verein fur Konsumenteninformation v A1 Telekom Austria AG*), paras. 24–25.

187 M.B.M. Loos, J.A. Luzak, 'Wanted: a bigger stick. On unfair terms in consumer contracts with online service providers', *Journal of Consumer Policy* 2016/1, pp. 67–72.

188 Loos/Luzak 2016, pp. 72–74.

189 Luzak and I have argued in the same vein as to the ability of online service providers to amend their services, see Loos/Luzak 2016, p. 73.

190 It would be seem to be more logical if reference were made to the corresponding provision on termination of long-term contracts in Article 16 Digital Content Directive, which will be discussed below. However, the reference to Article 13(2)(c) Digital Content Directive could in fact point to a difference as regards the possibility of retrieving the digital content and other data for free or against payment.

expressly regulated for termination in the case of non-conformity[191] is missing here.[192]

A similar exception is also missing in the subsequent Article, which is on the supplier's right to terminate a long-term contract and on the consequences of such termination. Article 16(1) Digital Content Directive provides, first of all, that long-term contracts may be terminated at any time by the consumer from the moment when 12 months have expired from the beginning of the contract (where relevant: as subsequently extended or renewed). A corresponding right for the supplier to terminate the contract is *not* regulated, not even for cases where the digital content has become outdated and largely obsolete. The mandatory nature of the Directive[193] seems to have as a result that the supplier cannot include a contract term allowing her to terminate in such cases. She would then have to make use of a contractually agreed right to change the contract in accordance with Article 15 Digital Content Directive in order to change, for instance, the price and make the price so unattractive that the *consumer* would make use of *her* right to terminate the contract. A more straightforward right for the supplier to terminate the contract under the same conditions as those allowing her to change the performance features of the digital content seems to be preferable.

When the consumer terminates the contract, she may give notice in any form, as is the case with termination of the contract for lack of conformity. The contract then ends 14 days after the receipt of the notice.[194] The consumer is required to pay for any contract period that has already elapsed.[195] Apart from the aforementioned missing exception for digital content generated in cooperation with other consumers, the termination has the same consequences as termination for non-conformity of the digital content. The supplier also in this case must enable the consumer to retrieve the digital content and other data, but the addition that this should be made possible free of charge is missing.[196] It is unclear whether this is intentional or a drafting error – it could be argued that where the termination is attributable to the consumer the possibility to retrieve the digital content or other data need not be provided free of charge, whereas this is different if the termination was precipitated by the supplier by either not providing the digital content, by providing defective digital content, or by proposing to change the performance features of the digital content.[197]

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191 See Art. 13(2)(b) Digital Content Directive.

192 In this sense see also Fauvarque-Cosson 2016, p. 15.

193 See Art. 19 Digital Content Directive.

194 Art. 16(2) Digital Content Directive.

195 Art. 16(3) Digital Content Directive.

196 Fauvarque-Cosson 2016, p. 15.

197 An argument in this direction could be found in the reference in Article 15(1)(d) Digital Content Directive to Article 13(2)(c) Digital Content Directive instead of to Article 16(4)(a) Digital Content Directive.

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6. UNRESOLVED MATTERS

In some cases digital content and the consumer's digital environment are interdependent – the one cannot function without the other. The question is whether this must have legal consequences for contracts which, at least formally, are not interconnected. A first example is offered by satellite navigation systems and updates for roadmaps. Imagine that a consumer purchases such a system from a seller, installs it in her car, and subsequently concludes a long-term contract for updates of the roadmaps from the producer of the system. Obviously, when the satellite navigation system no longer functions or is replaced for another reason, the consumer should be able to terminate the digital content contract. Article 16 Digital Content Directive indeed offers the consumer that possibility, but only after the first year of the contract is completed. In case of a lack of conformity, the seller may be liable to compensate the consumer for the payments that become due during the remaining contract periods under national contract law, but it is uncertain whether such a claim for damages is allowed under the Online Sales and Distance Sales Directive.[198]

A second question is what happens if the consumer has sold the car on which the satellite navigation system is installed. Is the contract with the supplier of the updates automatically transferred to the new owner of the car and the satellite navigation system? If not, then the consumer would be required to pay for the remaining contract periods until she may terminate under Article 16 Digital Content Directive. This connects to a more general matter. Currently, the question on the transferability of accessory rights,[199] such as the rights under a warranty, is not dealt with under any European legal instrument. With the development of a market for second-hand goods, which are sold through online platforms, this question has gained importance as the second owner no longer is a person within the sphere of the original buyer and it is therefore unlikely that the original buyer would be willing to invoke the remedies under the warranty on behalf of the second buyer if the second buyer cannot claim these remedies herself. Even if the European legislator would shy away from direct liability of the producer[200] it could be argued there is at least a good reason to finally deal with these accessory rights.[201] First steps had been taken in the form of

198 See above, Section 5.

199 The same would, of course, apply with regard to the consumer's corresponding obligations (if any), such as paying a subscription price.

200 I personally believe that the European legislator should deal with such liability; in any case the arguments *against* introducing direct producer's liability are weak, see already M.B.M. Loos, *Revision of the European Consumer Acquis*, Munich: Sellier, 2008, pp. 34, 80; Loos 2010, pp. 50–51.

201 Loos 2008, pp. 33–37; M. Loos, 'Consumer sales law in the proposal for a Consumer rights directive', *European Review of Private Law* 2010/1, pp. 15–55.

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press

the support of consumer organisations and a large number of Member States, in their comments to the Green Paper *Review of the consumer acquis*, for an automatic transfer of such rights, possibly subject to contractual modification by the seller or producer.[202] The Draft Common Frame of Reference indeed includes such a provision,[203] and the original proposal for a Consumer Rights Directive grey-listed clauses that restrict the transferability of the commercial guarantee.[204] The proposal for a Common European Sales Law, however, did not contain any proposal to include a provision on this subject, and neither do the two Directives discussed here. In my view, it is high time for the next step to be taken.

Thirdly, what happens in the case where the digital content is needed for the proper use of the purchased goods (whether the digital content is provided separately or in the form of embedded digital content) and the digital content is no longer provided by the supplier, e.g. because the supplier considers the device on which the digital content is installed to be outdated? This is not a hypothetical situation, as the Dutch case of the Dutch consumer organisation *Consumentenbond v Samsung* shows.[205] In this case, Samsung was the producer of smartphones that were sold either by Samsung itself through its own webshop or by other sellers, as well as the supplier of updates of the Android operating system installed on the smartphones. The buyers of a Samsung smartphone thus obtain a licence from Samsung to use the Android operating system and the Samsung software shell. Google frequently provides upgrades and security updates of the Android operating system, but Samsung stops providing updates to consumers once a smartphone has been on the market for two years.[206] Since a smartphone (and any computer) is subject to viruses and other security problems, this means that it is no longer safe to use the smartphone as of the moment that the updates are no longer provided. In the case of Samsung, this implied that the smartphone did not conform to

202 See Loos 2008, p. 35; Loos 2010, p. 46.

203 See Art. IV.A.-6:102(2) DCFR.

204 See Loos 2010, pp. 47, 55.

205 District Court Amsterdam 8 March 2016 (summary proceedings), ECLI:NL:RBAMS:2016:1175 (*Consumentenbond v Samsung Electronics Benelux B.V. and Samsung Electronics Co. Ltd.*). The *Consumentenbond's* claim was dismissed on procedural grounds. The *Consumentenbond* recently started substantive proceedings against Samsung, see: https://www.consumentenbond.nl/nieuws/2016/bodemprocedure-tegen-samsung-van-start (last visited on 15 March 2017).

206 See for instance Samsung's statement of May 2014 on fansite Sammobile at: http://www.sammobile.com/2014/05/08/samsung-officially-confirms-no-kitkat-for-galaxy-s-iii-gt-i9300-and-galaxy-s-iii-mini (last visited on 15 March 2017), where Samsung announced it would not provide an update for the Galaxy S III and the Galaxy S III mini, which at that time had not even been on the market for two years. The official reason for refusing to provide the update was that the RAM of these smartphones was too small to cope with the newer version of Android. This was, however, disputed on an independent technological website such as Tweakers, see: https://tweakers.net/nieuws/95894/galaxy-s3-en-s3-mini-krijgen-geen-update-naar-android-44.html (last visited on 15 March 2017).

the contract anymore. The legally relevant question then was whether the seller could be held liable for damage caused by a virus using a bug in the operating system which was not remedied by an update, since the seller was liable only for defects that already existed at the moment of delivery.[207] This might not be the case if the seller at the time of the conclusion of the contract already had informed the consumer of the fact that Samsung would only update the digital content during the first two years after the product was first put on the market, as the statement would then influence the legitimate expectations the consumer may have of the goods. This would, however, effectively severely limit the consumer's rights under the Directive.

The interrelation between the smartphone and its operating system may cause more problems. Who is liable if, at the time of delivery, the operating system was not defective, but a later update by the supplier in fact *causes* a security problem in that operating system. Since at the time of delivery the defect did not exist, it could be argued that the seller should not be liable. Moreover, if that argument were accepted, the consumer would be required to show which bug actually caused the smartphone to malfunction – which is something the average consumer would not be able to do. In my view, the solution has to be that the seller is liable for any updates provided within (at least) the two-year period by the supplier of the digital content. In turn, the seller may seek redress against his seller and, ultimately, against the supplier that has caused the problem.

A related question pertains to devices that cannot function without the embedded digital content where the supplier of the digital content simply stops supporting the digital infrastructure needed by the consumer's device. For instance, Revolv offered a device capable of communicating with light switches, garage door openers, home alarms, air conditioners, etc. By using an app on a smartphone, the device could be used remotely. The device was sold with a one-year warranty. In October 2014, Revolv was bought by Nest (which in turn is owned by Alphabet, which is also the parent company of Google), and the device was no longer offered for sale. In February 2016, Revolv announced on its website that as of 15 May 2016, the service would no longer be available, the app would not open anymore and the device would not work anymore. Since all warranties had expired, consumers were left without any contractual remedy.[208] In cases such as this, the question arises whether the consumer would be entitled to a remedy under the two new Directives. If the digital content is to be considered as subordinate to the device produced by Revolv and therefore is classified as embedded software, as a starting point only the Online Sales and Distance Sales Directive applies. During the first two years after delivery, the seller is liable for the proper functioning of the device. Where the embedded digital content or the

207 See Art. 8(1) Online Sales and Distance Sales Directive.

208 On this, see: http://www.theverge.com/2016/4/4/11362928/google-nest-revolv-shutdown-smart-home-products (last visited on 15 March 2017).

service operated by Revolv no longer functions, the seller will be liable for lack of conformity of the device as the consumer could reasonably expect the digital content to be updated and the service to be operated. When two years have passed after the device was purchased by the consumer, all remedies towards the seller are, however, lost as Article 14 Online Sales and Distance Sales Directive provides that the seller is no longer liable.

Revolv – unless it was the seller itself – will only be liable if it has concluded a *separate* digital content contract with the consumer that falls within the scope of the Digital Content Directive. In the case of embedded digital content, such a digital content contract can only have come into existence if the consumer pays Revolv a price in money for the operation of the website or for the supply of updates, or where Revolv has required the consumer to actively share his personal data when the consumer (first or later) connected to Revolv's server requesting the service or updates. In that case, Revolv is bound by the digital content contract. However, the contract may have been concluded for a determined period only; if so, the contract is terminated automatically when the agreed period has elapsed. Similarly, the contract may have been concluded for an undetermined period of time but may include a termination clause. If that clause is not unfair and the conditions for termination set out in that clause have been met, Revolv may terminate the contract by notice. In both cases, after termination Revolv would no longer be liable for any negative effects the termination of the contract might result in for the consumer.

The example of Revolv's device shows that consumers can easily be deprived of the ability to use goods with embedded digital content which technically are capable of working properly, but are rendered useless by a decision from a party they may not even have had a contract with.

7. CONCLUDING REMARKS

The two proposals for Directives discussed here will remain at the centre of attention for European private law scholars and practitioners for the coming time. In this respect, the Digital Content Directive seems to be fairly uncontroversial – of course, amendments are necessary in some respects, but overall the industry, consumer organisations, scholars and Member States seem to have welcomed the proposal and to regard its provisions fairly favourably. This Directive also has the advantage that in most Member States there is no coherent regulation for digital content contracts, whereas there certainly is a need for regulation.[209] This Directive may therefore be adopted within a relatively short period.

[209] The primary exception is the United Kingdom, which recently introduced legislation, see Consumer Rights Act 2015, Part 1, Chapter 3 (sections 33–47), which is dedicated to the supply of digital content. In addition, in the Netherlands the supply of digital content is

This is very different with regard to the Online Sales and Distance Sales Directive. The scope of that Directive – as long as it has not been amended following the *fitness check* of the Consumer Sales Directive – guarantees continuous abstract discussions as to the desirability of different regimes for consumer sales contracts; and the use of full harmonisation as the type of harmonisation chosen by the European Commission will lead to extensive debates as to the level of consumer protection. However, it should be noted that the current proposal does appear significantly more balanced than the original proposal for the Consumer Rights Directive was, where the minimum level of the Consumer Sales Directive and the Unfair Contract Terms Directive simply was transposed as the maximum level of protection under that proposal. With regard to the Online Sales and Distance Sales Directive, steps back in the consumer protection in one country may be levelled out by a rise in consumer protection for that country on another point, and the level of consumer protection as a whole seems to have been raised to at least the level of protection awarded in the Member States. That ultimately renders the question whether the level of consumer protection is high *enough* a (legal-)political question. This contribution does not lend itself to giving a final answer to that question. It does, however, allow for a prediction: this proposal will be the subject of prolonged and critical discussions. Acceptance of this proposal for a directive may therefore not be expected in the short run or without extensive amendments.

treated as a consumer sales contract in case the digital content is either supplied on a durable medium or is individualised and subject to the consumer's physical control (*cf.* Art. 7:5(1) and (5) BW).

https://doi.org/10.1017/9781780686035.002 Published online by Cambridge University Press