

Digital Content Directive And Rules For Contracts On Continuous Supply

by **Hugh Beale***

Abstract: This paper is in three parts. The first part gives a brief summary of the Digital Content Directive. The second part looks in more detail at longterm contracts for digital content or digital services, concentrating mainly on digital services but also considering contracts for digital content where there is to be “a series of individual acts of supply” and where the digital content is made available for a fixed period. It also considers “mixed” contracts under which digital services are to be supplied along with digital content and/or goods. The third and fourth parts look at

gaps in the legislation from the points of view of consumers and then of traders, considering both issues that fall within the scope of the Directive yet nonetheless are left to Member States, and issues that are outside the scope of the Directive, and attempting to assess the extent to which these gaps may cause problems. The paper ends with a reminder that we need to consider also enforcement by public bodies and consumer organisations, which may have a particular importance in relation to the supply of digital content and services.

Keywords: Digital content; Digital services; Scope of Directive; Trader’s obligations; Consumer Remedies; Gaps in Coverage; Enforcement by Public Bodies

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A. Overview of the Directive¹

Scope and nature of the Directive

1 In terms of scope, the Digital Content

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1 See generally JM Carvalho, Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771” [2019] J EU Consumer and Market Law 194; C Kaufmann, “New EU rules on business-to-consumer and platform-to-business relationships” [2019] Maastricht Journal of European and Comparative Law 1; P Giliker, “Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?” in T-E Synodinou, P Jougoux, C Markou and T Prasitou (eds) *EU Internet Law in the Digital Age* (Munich: Springer 2020), 299; K Sein and G Spindler, “The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader’s Obligation to Supply – Part 1” (2019) 15 *European Review of Contract Law* 257 and “Conformity Criteria, Remedies and Modifications – Part 2”, *ibid*, 365; R Schulze and D Staudenmayer, *EU Digital Law: Article-by-Article Commentary* (Oxford: Nomos/Hart 2020).

Directive² covers the supply of both digital content and digital services.³ The Directive applies to digital content that is supplied to the consumer directly in digital form (for example by downloading or streaming) and to digital content that is supplied on a tangible medium, where the tangible medium is merely the carrier of the digital content.⁴ It does not apply to goods with what are now termed “digital elements”, that is, essential embedded or interconnected software: these will fall within the new Directive on Sale of Goods.⁵ The Digital Content Directive applies when digital content or services are supplied for a price,⁶ which may be in money or

2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L136 of 22 May 2019 (“DCD”).

3 DCD Art 1.

4 DCD Art 3(3) and Rec 20.

5 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 166 of 22 May 2019 (“SGD”), Art 2(5)(b).

6 DCD Art 3(1) al 1.

some digital equivalent of money (such as a token or, presumably, a cryptocurrency),⁷ and where in exchange for the content or services the consumer provides personal data to the trader.⁸ I will not discuss the issue of supplying personal data for reasons of space. The Directive applies when digital content or digital services are supplied by a trader to a consumer. Later I will consider whether this may catch a third party rights-holder with whom the consumer enters an end user license agreement.

- 2 The Directive is a “full harmonisation” Directive.⁹ In other words, save as otherwise provided, Member States may not provide either less or more stringent measures of consumer protection. We will see that the Directive permits Member States to have different rules on one issue only.
- 3 For the sake of simplicity, in the remainder of this overview I will refer simply to contracts for the supply of digital content, but unless otherwise indicated the rules apply equally to the supply of digital services. Issues affecting the supply of digital services particularly will be considered in the next part.

Supply of digital content

- 4 The trader is under an obligation to supply the digital content, i.e. to make it accessible to the consumer,¹⁰ “without undue delay”, unless the parties have agreed otherwise.¹¹ Recital 61 states that in most cases the consumer can expect the supply to be immediate. However, if the digital content is supplied on a tangible medium, then the rules on delivery of goods contained in the Consumer Rights Directive¹²

apply and not the rules on supply of the Digital Content Directive.¹³

- 5 If the trader fails to supply the digital content, the consumer may terminate the contract immediately if the trader has stated or made it clear that it will not supply the digital content, or if it was either agreed or is clear from the circumstances that supply by a specific time was essential to the consumer.¹⁴ Otherwise the consumer must first “call on the Trader to perform” and may terminate the contract only if the trader then fails to supply without undue delay or within an agreed further period.¹⁵ The consumer will presumably be entitled to damages for late performance but, as we will see later, the question of damages is left to be regulated by Member States.¹⁶

Conformity of digital content

- 6 The digital content must comply with two sets of requirements. First, there is a set of “subjective” requirements: the digital content must comply with the terms of the contract¹⁷ and be fit for any particular purpose stated by the consumer, provided that there has been “acceptance” of the particular purpose by the trader.¹⁸ Though the question is not a new one,¹⁹ it is not quite clear what “acceptance” means here. As this is an additional requirement to knowledge of the consumer’s purpose, it seems clear that merely mentioning the particular purpose to the trader will not suffice, but equally “acceptance” cannot mean that the fitness for purpose requirement has to be written into the contract, because this criterion is different from the requirement that the digital content comply with the contract.²⁰ Secondly,

7 DCD Art 2(7). On whether the DCD and the SGD apply when payment is to be made in cryptocurrency see Jansen’s paper, below, pp 201-202.

8 DCD Art 3(1) al 2.

9 DCD Art 4 and Recs 3-9.

10 DCD Art 5(2).

11 DCD Art 5(1).

12 Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the 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 (“CRD”), Art 18. Equally the CRD rules on the consumer’s right of withdrawal from a goods contract will apply (DCD Rec 20), and presumably also CRD Art 20 on the passing of risk.

13 DCD Art 3(3).

14 DCD Art 3(2).

15 DCD Art 13(1). Schulze and Staudenmayer (n1 above), 230 argue that there may not be an immediate right to terminate if a further time has been agreed but the trader then refuses to supply within that time, as it is not explicitly covered by Art 13(2).

16 DCD Art 3(10) and Rec 73.

17 DCD Art 7(a), (c) and (d).

18 DCD Art 7(b).

19 The Consumer Sales Directive, Art 2(2)(b) also refers to the seller having “accepted”.

20 For this reason I do not find the division into “subjective” and “objective” criteria helpful; I fear that “subjective” may be misinterpreted as requiring expression in the contract. The distinction is also criticised by Carvalho (n 1 above), 12.

the digital content must comply with “objective” criteria. It must be for the purposes for which digital content of the relevant type is normally used; it must be of the quality and performance that the consumer may reasonably expect, taking into account public statements made by the trader or others in the chain of transactions; it must come with adequate accessories and instructions; and it must match any trial version or preview that the trader made available to the consumer²¹ (and, presumably, that the consumer actually examined before the contract was concluded). The only exception allowed is where the consumer has been told that the digital content will not comply with the objective criteria and the consumer has accepted this expressly and separately.²² The requirement of “separate acceptance” is to be welcomed. Having to give a separate mouse-click next to a list of possible shortcomings of itself might not bring home much to most consumers,²³ but we can hope that “expressly” will be interpreted as requiring that the actual facts be made clear to the consumer. In the context of the Directive on Unfair Terms in Consumer Contracts,²⁴ consumers seem to have gained useful additional protection from the requirement that traders use plain and intelligible language and, in particular, the Court of Justice’s rulings, in the context of the exemption for “core terms”, that this requires a very high degree of transparency.²⁵ “Expressly” in the DCD should equally be interpreted as requiring transparency.

- 7 The trader must also provide the consumer with the right to use the digital content.²⁶ Again I will not discuss this further because it will be the subject of a separate presentation.²⁷

Maintaining conformity

- 8 It is not enough that the digital content conforms at the time it is supplied. The trader must inform the consumer of any updates that are necessary to keep the digital content in conformity with the contract and ensure that those updates are made available to the consumer.²⁸ Where “the contract provides for a continuous supply over a period of time”, this obligation applies throughout the period.²⁹ Where there is no fixed period of supply, for example where there is a single supply for use for an indefinite period, the trader must maintain conformity for the period that the consumer may reasonably expect.³⁰
- 9 Member States may limit the trader’s responsibility to nonconformity which appears during a limited period of time.³¹ Nonetheless the consumer must have the remedies prescribed by the Directive for non-conformities that appear in at least two years from the date of supply.³² Likewise, limitation periods, which are also left to Member States’ law, must not prevent the consumer from exercising any remedies for a non-conformity that appears within a two-year period.³³

I suspect that in practice “acceptance” will depend on the criterion applicable under the UN Convention on Contracts for the International Sale of Goods (Vienna, 1980), Art 35(2) (b), that the goods do not conform unless “the buyer did not rely, or... it was unreasonable for him to rely, on the seller’s skill and judgement”.

21 DCD Art 8(1).

22 DCD Art 8(5).

23 See also Spindler, below, p 114 (para 9).

24 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

25 E.g. *Van Hove v CNP Assurances SA* C-96/14 EU:C:2015:262, April 23, 2015. For a detailed discussion see H Beale (Gen Ed), *Chitty on Contracts*, 33rd edn (as supplemented in 2020), Vol.II, paras 38-261-38-262C (- S. Whittaker).

26 DCD Art 10.

27 See Spindler’s paper, below, p 111.

28 DCD Art 8(2) and Rec 44. It has been pointed out that updates are likely to be in the hands of third-party rights-holders, and a rights-holder may refuse to supply an update: see Kalamees’s paper, below, p 133, para 8. In that case it would seem to be disproportionate to require the trader to bring the digital content into conformity (see below, p 99, para 12) and the consumer will be able to reduce the price or terminate the contract. In principle this should result in the trader having a right of redress, directly or indirectly, against the rights-holder under Art 20, but see below (p 104-105, para 46) for the limitations of the right of redress.

29 DCD Art 8(2)(a).

30 DCD Art 8(2)(b) and Rec 47. Note the qualifications in Art 8(3) when the consumer has not installed the update.

31 This is often referred to as “the legal guarantee period”. Note that MSs may not require the consumer to notify the trader of a defect within any particular period, Rec 11.

32 DCD Art 11(2) al 2 and Rec 56.

33 DCD Art 11(2) al 3 and Rec 58.

10 We have seen that where digital content is supplied for indefinite use, the trader must inform the consumer of updates that are needed to maintain conformity of the content and ensure that they are made available to the consumer for a reasonable time.³⁴ Recital 47 says that this might require updating for a longer period than the “liability period” that may be set by a Member State, “particularly with regard to security updates”. It is not clear how this can be the case, however.³⁵ If an update is required to keep the digital content in conformity, that must be because a nonconformity has appeared. If a Member State has excluded the trader’s liability for nonconformities that appear only after the liability period, the trader cannot have an obligation to supply an update unless the non-conformity had appeared before the end of the liability period; nor would the consumer have a reasonable expectation that updates would be supplied beyond that period. Updates must be provided throughout that period³⁶ but not, it is submitted, beyond it.

Burden of proof

11 The burden of proving that the digital content was supplied (i.e. made available to the consumer) within the appropriate time is on the trader.³⁷ As to other forms of nonconformity, if the nonconformity appears within one year of supply, it is up to the trader to show that the digital content was in conformity at the time was supplied,³⁸ unless the requirements of the digital content were incompatible with the consumer’s digital environment and the trader had informed the consumer of these requirements in a clear manner;³⁹ or unless the consumer did not cooperate with the trader’s attempt to determine whether the consumer’s digital environment was compatible with the requirements, providing that before the contract was concluded the trader had informed the consumer that the trader might require the consumer’s co-operation and that the trader used the least intrusive means.⁴⁰

Remedies for nonconformity

12 The trader is required to bring nonconforming digital content into conformity, unless that is impossible or doing so would impose a disproportionate burden on the trader, and to do so within a reasonable time and without significant inconvenience to the consumer.⁴¹ If this would be impossible or disproportionate, or if the trader either fails or refuses to bring the digital content into conformity as required, or if the nonconformity is sufficiently serious to justify it immediately, then the consumer may either reduce the price or may terminate the contract,⁴² except that the consumer may not terminate the contract if the nonconformity is minor.⁴³ If however the digital content was not supplied for a price, then the consumer may terminate for even a minor nonconformity. Again the consumer will presumably be entitled to damages for any loss suffered, but these are left to Member States’ law.

Termination for nonconformity

13 The consumer may exercise the right of termination by simply giving notice to the trader.⁴⁴ The trader then has 14 days in which to refund all sums paid by the consumer.⁴⁵ As we will see later, it appears that the refund must be of the full amount with no deduction for any use that the consumer has made of the digital content. The trader must deal with the consumer’s personal data as is required by the General Data Protection Regulation.⁴⁶ Other types of data must not be used unless it is useless outside the application, relates only to consumer’s activity while using the digital content or cannot be disaggregated;⁴⁷ and the trader must enable the consumer to retrieve data generated or supplied by the consumer.⁴⁸

34 DCD Art 8(2)(b).

35 See also Sein and Spindler (n1 above), 387.

36 DCD Art 8(2)(a).

37 DCD Art 12(1).

38 DCD Art 12(2).

39 DCD Art 12(4).

40 DCD Art 12(5).

41 DCD Art 14(1)-(3).

42 DCD Art 14(4).

43 DCD Art 14(6).

44 DCD Art 15.

45 DCD Arts 16(1) and 18(1).

46 DCD Art 16(2).

47 DCD Art 16(3).

48 DCD Art 16(4).

14 Conversely, the consumer must refrain from using the digital content and, if it was supplied on a tangible medium, return the tangible medium to trader if asked to do so.⁴⁹

B. Digital services or supply of digital content over a period

Fact situations and issues

15 We need to consider a number of fact situations. First, the service may be supplied with no content being downloaded: for example, where data is stored in the Cloud or is streamed to the consumer's device. Secondly, the contract may provide for several individual downloads of digital content.⁵⁰ Thirdly, there may be a download of digital content that the consumer is allowed to use for only a limited period, as with recent versions of Microsoft Office. Lastly, there may be a combination of digital services and periodic downloads of content, or of digital content supplemented by a digital service.

16 We need to consider a range of issues: the time for supply, the meaning of conformity, the conformity period, remedies (including withholding of performance as well as termination) and modifications to the digital content or service by the trader.

Supply of digital services

17 The trader must start to supply the service without undue delay;⁵¹ as we have seen, this means making it available to the consumer, normally "immediately".⁵² If there are to be further downloads these will fall within the phrase "unless agreed otherwise". In either case, if the services of further downloads are not supplied on time, the consumer may terminate if the trader has been called on to perform but has failed to do so, again as agreed or without undue delay.⁵³

18 An obvious concern with digital services is that the services should be available to the consumer continuously (unless agreed otherwise, e.g. if the trader has stipulated that there may be 'down times' for site maintenance). From the Articles of the Directive by themselves it is not wholly clear whether an unauthorised interruption in service should count as a failure to supply within article 13 (so that the consumer may have to call on the trader to supply the services before terminating the contract) or as a nonconformity within article 14, but Recital 51 states that it is to be treated as a nonconformity. Thus the consumer must comply with the hierarchy of remedies, i.e. may have first to demand that the service be brought into conformity, and may then move to price reduction or termination. Where the trader has temporarily failed to supply the services and is called on to "bring it into conformity", the reasonable time for doing so will be expire almost immediately. The consumer may terminate immediately, however, if the trader is unwilling or unable to do so or if the delay is serious for the consumer;⁵⁴ or in those cases the consumer may opt immediately for price reduction.

The meaning of conformity

19 Leading commentators have written:

It needs to be emphasised that the quality criterion relates to the digital content or the digital service. It does not relate to its content. For example, if the e-book or digital film purchased is of bad quality from the point of view of the writing, directing or from an artistic point of view, does not amount to lack of conformity leading to the consumer remedies of Art. 14.⁵⁵

I am sorry to say that I think this may be misleading, if not positively wrong. If a film that is advertised as suitable for children under 10 were to contain scenes of a sexual nature or of great violence it would not be fit for the purpose for which digital content of the same type would normally be used, let alone possess the qualities that the consumer may reasonably expect.⁵⁶ The same must be true of an online translation service that regularly produces gibberish. It is true that it is not reasonable to expect the trader to be responsible for providing "good" writing (whatever that means), but unsuitable content or recurrent inaccuracy are different.

49 DCD Art 17(1) and (2). Schulze and Staudenmayer (n1 above), 298 note that any sanction for non-compliance is left to national law.

50 Recital 56 gives the example of a consumer being provided with a link to download a new e-book every month.

51 DCD Art 5(1).

52 DCD Art 5(2) and Rec 61.

53 DCD Art 13(1).

54 See Art 14(4).

55 Schulze and Staudenmayer (n1 above), 140.

56 See DCD Art 8(1)(a) and (b).

The conformity period

20 Where there is to be a “continuous supply” of digital content or services for an agreed period, it must conform throughout the agreed period.⁵⁷

21 Recital 57 indicates that this is also the position when the period for continuous supply is indefinite:

“Continuous supply can include cases whereby the trader makes a digital service available to consumers for a fixed or an indefinite period of time, such as a two-year cloud storage contract or an indefinite social media platform membership. The distinctive element of this category is the fact that the digital content or digital service is available or accessible to consumers only for the fixed duration of the contract or for as long as the indefinite contract is in force. Therefore, it is justified that the trader, in such cases, should only be liable for a lack of conformity which appears during that period of time.”

22 Conversely, the consumer is entitled to updates throughout the time for which the consumer is entitled to use the digital content.⁵⁸

23 It is submitted that the same must apply when digital content is supplied by a single download but is available to the consumer for a limited period only. This is certainly the case if the trader has undertaken to supply updates at intervals during the period, which Recital 57 seems to treat as a form of “continuous supply”.⁵⁹ The same result must apply even if there was no promise of updates: the consumer would reasonably expect updates for that period, though not beyond it. The consumer is not entitled to use the content after the expiry of the period and therefore be cannot entitled to have it updated later (unless of course the period is renewed).

Remedies for nonconformity

Withholding performance

24 If the digital service or digital content does not conform, the consumer is entitled to have it brought into conformity. What is the position before that has been done? With digital services, it is very likely that the consumer will be paying periodically, and possibly this will happen also with digital content that the consumer is permitted to use for only a limited period. Can the consumer suspend payment until digital content has been fixed? The Directive leaves the right to withhold performance to Member

States’ law.⁶⁰ This should not be a problem for most consumers, for two reasons.

25 First, Article 14(5) al 2 provides that consumer is entitled to a price reduction for the period of the nonconformity. This surely implies that the consumer who has not yet paid for this period need not do so.

26 Secondly, most legal systems seem to provide a right to withhold performance as a matter of general contract law. In many civil law systems, non-performance by party A will entitle party B to withhold its performance of a reciprocal obligation unless to do so would be disproportionate or contrary to good faith. Under common law, the right is a little more limited but B will be entitled to withhold its performance if the nonconformity is sufficiently serious that it would justify termination if ultimately it were not cured.⁶¹ Of course the right to withhold performance may be only a “default rule” that can be excluded by the terms of the contract, but any exclusion is likely to fall foul of the Directive on Unfair Terms in Consumer Contracts.⁶²

Refunds after termination

27 If the consumer justifiably terminates the contract, then the consumer is entitled to a refund of the price paid for the period of non-conformity and in respect of any period after the date of termination. Article 16 (1) al 2 provides:

“... in cases where the contract provides for the supply of the digital content or digital service in exchange for a payment of a price and over a period of time, and the digital content or digital service had been in conformity for a period of time prior to the termination of the contract, the trader shall reimburse the consumer only for the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated.”

⁵⁷ DCD Art 8(4).

⁵⁸ DCD Art 8(2)(a).

⁵⁹ DCD Rec 57 last sentence.

⁶⁰ DCD Rec 15. Contrast SGD Art 13(6), which requires the consumer to have the right to withhold performance, though MSs “may determine the conditions and modalities for the consumer to exercise the right to.” Why the Directives differ on this point is unclear.

⁶¹ See the Notes to the *Principles of European Contract Law* (PECL) Art 9:201 and *Draft Common Frame of Reference* (DCFR) Art III.-3:401.

⁶² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, see especially Annex para 1(b).

Conformity assessed objectively

- 28 What if the consumer uses, and indeed enjoys using, the digital content or services for a significant period before it discovers the non-conformity? It is submitted that under the Directive there can be a nonconformity even if the consumer is wholly unaware of it. Although Recital 66 states that the consumer should not have to pay for digital content or services when the consumer is “unable to enjoy” them, in the Directive itself this is implemented by the paragraph of Article 16(1) just quoted, which is dealing with contracts for supply over a period. For other contracts, i.e. where digital content is supplied for indefinite use, Article 16(1) al 1 requires the trader to refund all sums paid by the consumer and Article 17(3) further provides:

“The consumer shall not be liable to pay for any use made of the digital content or digital service in the period, prior to the termination of the contract, during which the digital content or the digital service was not in conformity.”

- 29 This provision appears to apply not only to a supply of services or content for a period but also to a supply for indefinite use. So where the supply was for indefinite use, if the nonconformity was present when the digital content was supplied, the trader must make a full refund, whether or not the non-conformity was known to the consumer at the time. The same must apply to cases of the continuous supply of services and where digital content supplied for use for a limited period.

Modifications (other than to cure non-conformity)

- 30 We have seen already that the trader has an obligation to update digital content or services to maintain conformity. In addition, the trader has the right to make other modifications provided that certain conditions are satisfied: the contract must reserve the trader’s right to do so and provide a valid reason for it; modification must be at no additional cost to the consumer; and the consumer must be informed “clearly and comprehensibly” of the nature of the modification and of the consumer’s rights.⁶³ These rights are that if the modification has more than a minor negative impact, the consumer may terminate the contract within 30 days of receipt of the information being supplied or the modification being made, whichever is later; and if the consumer elects to terminate, the trader must reimburse the consumer for any payments made for the period after the date of termination.⁶⁴

⁶³ DCD Art 19(1).

⁶⁴ CDC Art 19(2) and (3), applying Arts 15-18, the effects of which were outlined in Part I.

- 31 That may seem eminently fair to the consumer, who can allow the modification and terminate the contract if it turns out to be unsatisfactory. However, what the Directive gives with one hand it seems to take away with the other. Article 19(4) provides:
- 32 “Paragraphs 2 and 3 of this Article shall not apply if the trader has enabled the consumer to maintain without additional cost the digital content or digital service without the modification, and the digital content or digital service remains in conformity.”
- 33 So the consumer will have no right to terminate if trader gave the consumer the option of maintaining the digital content or service in its existing form without modification at no cost the consumer. To my mind this effectively undermines the consumer’s position. Most consumers will not be able to tell in advance whether modification will cause them a problem. If they decide to permit the trader to make a modification but then find it unsatisfactory, they will have to live with it. The consumer has no right to revert to the original version of the digital content or service.
- 34 It is possible that the Trader might bundle the modifications with an update that is necessary to keeping the digital content in conformity. It seems to me that to do this, without allowing the consumer to choose separately whether or not to accept the “unnecessary” modification, might well amount to an unfair commercial practice.⁶⁵

Evaluation in respect of “long-term” contracts

- 35 How useful is the Digital Content Directive for consumers? As far as digital content is concerned, the Directive seems to perform a very useful role. Few Member States have any legislation specifically designed for digital content, though some like the Netherlands and Germany have provided that their legislation on sale of goods should extend to digital content.⁶⁶ In the absence of such provisions, courts may find it hard to know how to treat contracts for digital content. The contracts will not normally fall within legislation on sale of goods for two reasons: first, digital content is intangible and, secondly, it is very seldom that ownership is transferred under the contract - normally the consumer only obtains

⁶⁵ See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

⁶⁶ See Loos’s paper (below, p 230).

the right to use the digital content.⁶⁷ But equally legislative provisions on services may not seem wholly appropriate to digital content, particularly where there is a one-off download for use for an unlimited period.⁶⁸ Moreover, in many systems to treat the supply of digital content as a service would lead to the result that the trader is under an obligation to use reasonable care (*de moyen*) rather than a stricter obligation (e.g. of result); and it would also affect the remedies available, at least in common law jurisdictions where specific performance is traditionally not available for contracts for services.⁶⁹ The approach of the Directive, which leaves categorisation to national law,⁷⁰ and applies the rules however the contract is categorised, seems to me to be very sensible.

- 36 How useful are the provisions on digital services for consumers? It seems to me that they are valuable in three ways. First, the trader is under an obligation of result to supply services and content) that conform to the subjective and objective criteria, not merely one to use reasonable care. Secondly, the consumer's remedies are clear, particularly the right to have the services brought into conformity. Thirdly, the trader's right to make modifications must be set out in the contract, with reasons for the modification – though I am not clear what “reasons” really means and whether it will provide any effective

safeguard for the consumer. Something like “to meet operational requirements” is a kind of reason but will tell the consumer almost nothing.

C. Gaps in consumer protection

Damages

- 37 Recital 73 provides:

“The compensation should put the consumer as much as possible into the position in which the consumer would have been had the digital content or digital service been duly supplied and been in conformity. As such a right to damages already exists in all Member States, this Directive should be without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules.”

- 38 Accordingly, Article 3(10) leaves the question of damages entirely to Member States. This may be problematic.⁷¹ My understanding is that the laws of damages in all Member States are generally functionally equivalent (i.e. though they employ different concepts and terminology, they give broadly similar outcomes), but there are at least two areas that may be problematic.

Damages for loss of enjoyment

- 39 The first is the recovery of damages for loss of enjoyment. In some systems damages for loss of enjoyment are awarded regularly, at least where the main purpose of the contract was to provide enjoyment,⁷² as will often be the case with contracts for digital services. In some other systems there seems to be a problem. For example in German law §283 BGB provides that damages for non-pecuniary loss may be recovered only where stipulated by law⁷³ or if the loss was the result of an injury to the claimant's body, health, freedom or sexual self-determination. I am not aware that there is a relevant stipulation in the law and I would find it hard to bring loss of enjoyment of films, music or video games within the second paragraph.⁷⁴

67 These problems seem not to arise in every MS. For example, Lithuanian sales law applies not just to goods but to the sale of rights, which includes the transfer of limited rights such as a licence to use digital content. See Didziulis's paper, below, p 261.

68 For a discussion in the UK context see R. Bradgate, Consumer Rights in Digital Products, A research report prepared for the UK Department for Business, Innovation and Skills (2010), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf.

69 Under the UK Consumer Rights Act 2015 the consumer can now require the trader to repair or replace digital content (s 43) or to repeat performance of a service to make it conform to the contract (s 55), and if necessary the court can grant an order of specific performance to compel the trader to perform (s 58); but ironically, the Act does not provide for specific performance to compel delivery or performance in the first place. Under the common law rule specific performance will seldom be available because damages would be treated as an adequate remedy and, with services, also because of difficulties over supervision. See H Beale (Gen Ed), *Chitty on Contracts* (33rd edn, 2018), Vol I, paras 27-015 – 27-045.

70 DCD Rec 12.

71 It is criticised also by Schulze and Staudenmayer (n1 above), 43.

72 See PECL Art 9:501, Note 4, and DCFR Art III.-3:701, Notes Section IV.

73 Which is the case for holiday contracts (§ 651f BGB).

74 For examples in other national laws see DCFR Art III.-3:701, Note 13.

Strict versus fault-based liability

- 40 The second is that while in the common law systems liability for damages is normally strict, in some continental systems liability in damages is based on fault⁷⁵ and in others force majeure is a defence.⁷⁶ This is again left to Member States' law.⁷⁷ Lack of fault or force majeure is most likely to be relevant where the trader has failed to supply the digital content or service in due time or there has been an interruption in its provision.
- 41 How far this is really a problem is not clear. Even if the applicable Member State's law does not recognise force majeure as a defence or does not require fault for damages, it is quite likely that the express terms of the contract will purport to exclude the trader's liability if the non-performance was not the trader's fault. Then the question would be whether the exclusion is fair under the Directive on Unfair Terms. It is quite possible that the court would accept the term as a fair departure from normal law, even in those countries in which force majeure is not a defence and fault is not required for liability.

Harm to the consumer's digital environment

- 42 I am also unsure about the traders' liability if the digital content causes harm to the consumer's "digital environment" - e.g. it corrupted other digital content on the consumer's appliance. In many countries this situation would simply be seen as a form of breach of contract by the trader, but it has been suggested that in others (e.g. in German law⁷⁸) this would fall within a duty of protection, and that duties of protection are outside the scope of the Directive.⁷⁹
- 43 Where the harm was caused by the digital content itself, it seems to me that the harm will normally be the result of a nonconformity, and the trader will be "liable" under Article 11(1). Nonetheless, the Directive does not actually deal with the situation. In any event, the consumer's right to have the digital content brought into conformity will not entitle the

consumer to have the corrupted data restored. The consumer will merely be entitled to damages, which are left to national law.

- 44 Where the damage was caused by the method of installation adopted by the trader, it is far from clear that the Directive applies at all, as it might not be seen as a non-conformity but as a breach of a duty of protection.
- 45 So in either case the trader may be able to escape liability by showing that it was not at fault or that it could not have anticipated or avoided the problem.

Digital content and service developers

- 46 In many cases the trader with whom the consumer first contracts will not be the producer of the digital content or services; the consumer will be given a right to use digital content or services that are actually provided by a third party rights-holder under an end user license agreement (or "EULA"). If that is the case, and the digital content or services are defective, what is the position? First, it is clear that the trader with whom the consumer first dealt will be liable to the consumer; the content or services supplied are non-conforming and, as we have seen, lack of fault is no defence to a claim to enforce the right to have what was supplied brought into conformity with the contract. If the trader reasonably incurs costs in bringing the content or services into conformity or (where appropriate) in providing the consumer with a refund, the trader should in principle be able to pass the cost back up the chain of supply. Article 20 of the Digital Content Directive replicates the provision found in the Consumer Sales Directive under which the trader "shall be entitled to pursue remedies against the person or persons liable in the chain of commercial transactions".⁸⁰ However, in practice the trader may find difficulty in obtaining an effective remedy. As in the Consumer Sales Directive, even though the principle of effectiveness may require that the

75 E.g. § 280(1) BGB.

76 E.g. French law, see H Beale, B Fauvarque-Cosson, J Rutgers and S Vogenauer) *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law* (Hart, 3rd edn 2019), ch 28.3.

77 DCD Rec 14.

78 On duties of protection in German law, see B Markesinis, H Unberath and A Johnston, *The German Law of Contract*, 2nd ed (Hart, 2006) 126

79 See Schulze and Staudenmayer (n1 above, 40).

80 CSD Art 4; now replaced by SGD Art 18. It is not entirely clear to me whether these provisions apply to the case where the trader is made liable in damages to the consumer, as the matter of damages is left to MSs' law, see above. While to an English lawyer the word "liable" immediately suggests liability in damages, in the DCD the word is used to refer to the trader being responsible to provide a remedy of the kind required by the Directive (see e.g. Art 8(3) and Art 11). The relevant recital (Rec 78) does not help on this point. However, the question may be moot, as I imagine that in most MSs' laws the trader would be able to pass back liability in damages provided that the next person up the chain was responsible, on which see above (whether requirement of fault or defence of force majeure).

trader has a remedy of some sort,⁸¹ questions of against whom the trader may pursue remedies, the relevant actions and conditions of their exercise are left to national law. In practice recovery by the initial trader will depend very much on what terms are contained in the relevant contracts and whether, if the relevant contract attempts to limit the liability of the party higher in the chain, national law will uphold the limitation of liability.

- 47 Will the consumer have rights only against the trader with whom the consumer first contracted, or will the consumer also have rights against a third party rights-holder who developed the digital content? One possibility is that the rights-holder is liable as a “producer” under the Product Liability Directive;⁸² but there is doubt about the applicability of the Directive to digital content,⁸³ let alone digital services, and in any event the consumer’s loss will seldom meet the €500 minimum level for liability for damage to property.⁸⁴
- 48 What about liability under the Digital Content Directive itself? Recital 13 might be read as indicating that the Directive does not apply to developers. It says:

“Member states also remain free, for example, to regulate liability claims of a consumer against a third party that supplies or undertakes to supply the digital content or digital service, such as a developer which is not at the same time the trader under this Directive.”

- 49 However, the last phrase of the recital begs the question: might the developer be a trader and supplier under the Directive? Although it can be argued that the EULA is sometimes no more than a grant of a permission to use the digital content, if the content or services (or updates) are downloaded from the licensor’s website, then it is being “supplied” by the licensor, and Article 3(1) second alinea does not say the supply must be under a contract.⁸⁵ If the developer then collects personal data from the consumer, the developer will be responsible for supplying data that meets

the objective criteria for conformity⁸⁶ and, of course, any subjective criteria⁸⁷ that are contained in the EULA. So I think developers and other rights-holders may sometimes find themselves liable under the Directive; but consumers will not have a remedy against such parties in every case.

Other gaps for consumers

- 50 There seem to be at least four further gaps in protection for consumers.

Mixed-purpose contracts

- 51 It has been noted by others that Recital 17 leaves the question of mixed-purpose contracts to Member States’ law, which seems unfortunate.⁸⁸

Right to terminate long-term contracts

- 52 Unlike the initial proposal,⁸⁹ the Directive as adopted does not deal with the consumer’s right to terminate a long-term contract for the supply of digital content or services. I understand that this is because Member States were not able to agree on an article.⁹⁰ Most Member States have the rule that contracts for an indefinite duration can be terminated by either party on reasonable notice;⁹¹ and any clause of the contract which purported to tie the consumer down to a really lengthy notice period would almost certainly be treated as unfair. I suspect the problem comes with contracts that are for a long, fixed period. The length of the period would probably not be subject to review for fairness under the Directive on Unfair Terms in Consumer Contracts because it would be part of the “main subject matter” of the contract. What I do not know is whether there are serious problems over long-term contracts for digital content and services. When things in the digital market change so quickly, I would not expect traders to use long fixed period contracts.

81 Schulze and Staudenmayer (n1 above), 320-321.

82 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Art 1.

83 S Whittaker, “European Product Liability and Intellectual Products” (1989) 105 Law Quarterly Review 125.

84 Art 9(b).

85 Compare Art 3(1) al 1, which applies the Directive to “any contract” to supply in exchange for a price under

86 Under DCD Art 8.

87 DCD Art 7. Art 7(b) will seldom apply since there will normally be no exchange of information between the consumer and the rights-holder before the EULA is concluded.

88 See e.g. C Caufmann (n 1 above), 11.

89 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2105) 634 final of 9 December 2015, art 16.

90 See Schulze and Staudenmayer (n1 above), 81 and 91.

91 See DFCR Art III.-1:109, Notes Section III.

53 However, we have to recognise that the effects of the Coronavirus are likely to be that many families suffer a very sudden and wholly unexpected fall in income. For them even a contract for digital services lasting only a year may suddenly become insupportable, and we may be very sorry that the Directive does not at least allow termination of fixed period contracts for an important reason such as illness or unemployment. We may see more laws adopting a doctrine of social force majeure.⁹²

54 Another serious point is the one made by Sein and Spindler,⁹³ that the Directive does not give the consumer who terminates a contract by notice the right to retrieve data that the consumer has supplied or created. That seems a very unfortunate omission.

Mixed and bundled contracts

55 The second problem arises with mixed or bundled contracts, where the supply of digital certain content or digital services is combined with the supply of goods or other services. The effect of the termination of one element of the contract on the rest of the bundle is left to Member States. This must leave consumers who have entered mixed or bundled contracts in some doubt as to their position. The omission again seems unfortunate, particularly as Recital 34 points out that bundling may be an unfair commercial practice. The issue of linked contracts is also left to Member States' law, with potentially similar results.

Digital input from third party required

56 Lastly, I am concerned about the situation where the consumer is supplied with digital content which requires input in the form of digital services from a third party - for example, where the consumer buys a navigation programme that for its proper operation must have regular traffic reports that may be provided by a third party.

57 If the digital service is to be provided under the trader's responsibility then the issues seem to be similar to those that arise when goods with a digital element require digital services to operate, a situation discussed by Sein and Spindler.⁹⁴ The question will be

either what was actually agreed between the parties, or what it was reasonable for the consumer to expect. Needless to say, the outcome does not depend simply on the agreement made between the trader and the third-party; it is a question of what the consumer was led reasonably to expect. Article 13(3) provides that in case of doubt the supply of incorporated or interconnected content or service is presumed to be covered by the sales contract.

58 If nothing is said to the consumer about the extent of the third party's responsibility or the trader's responsibility for provision by the third party, and the digital content is made available for a fixed period (for example on an annual subscription), I think it would be reasonable to expect that the necessary digital service would remain available for the same period of time. If there is no fixed period, then it seems to me that the digital services should remain available for a reasonable period, just like necessary updates. In other words, the question might be whether the service provided meets, first, the "subjective" requirements of the contract and, secondly, the objective requirements. It is not easy, however, to fit the question of the continued supply of digital services by a third party into either set of conformity criteria. The nearest explicit criterion in the Directive is "accessibility" which, I have it seen argued,⁹⁵ covers supply of digital content on a limited number of occasions; perhaps "accessibility" can be stretched to cover our situation also.

59 Where the trader does not either expressly or implicitly accept responsibility for provision of the digital service, there may be more of a problem. If the digital content (or for that matter, goods with digital elements) will only operate satisfactorily with a service for which the trader takes no responsibility, then surely the Consumer Rights Directive requires the trader to inform the consumer; this would seem to be a main characteristic of what is being supplied,⁹⁶ albeit a negative one. However, if the trader fails to inform the consumer, it is not clear that at present the consumer has any remedy. The Consumer Rights Directive states that information given by a trader before a distance or off-premises contract will form an integral part of the contract⁹⁷ but says nothing about failures to give information. However when

92 Cf T Wilhelmsson, "Social Force Majeure – A New Conception in Nordic Contract Law" (1990) 13 J of Consumer Policy 1. On the way that different laws of contract are being changed, or measures are being taken to alleviate hardship, in response to the effects of the Coronavirus, see E Hondius et al (eds) *Coronavirus and the Law in Europe*, Part 4, available at <https://www.intersentiaonline.com/bundle/coronavirus-and-the>

93 Sein and Spindler (n1 above), 379.

94 Sein and Spindler (n1 above), 272-275

95 Schulze and Staudenmayer (n1 above), 142.

96 CRD Art 5(1)(a) and 6(1)(a). Alternatively, this could be treated as an aspect of "functionality" under Arts 5(1)(g) and 6(1)(r). The CRD does not define "functionality" but DCD Art 2(11) says it means "the ability of the digital content or digital service to perform its functions having regard to its purpose". In practice this definition will probably be read across to the CRD.

97 CRD Art 6(1).

the new better enforcement and modernisation Directive⁹⁸ comes into force, the consumer who has been the victim of an unfair commercial practice will have remedies of damages and price reduction or termination.

- 60 It is possible that where the digital content will not work satisfactorily without the supply of digital services which are to be supplied by third party under a separate contract, the two contracts will be seen as linked. This may often mean that the ending of one contract will give the consumer right to terminate the other contract. However, as we saw earlier, the question of linked contracts is left to national law. I suspect national rules are far from consistent.

D. Surprises for traders

Background⁹⁹

- 61 Like other consumer Directives, the digital content Directive has as its legal base promotion of the internal market; consumer protection per se is not a legal basis on which the EU may legislate. Before approximately 2003, most Directives were aimed at promoting the internal market by encouraging consumers “actively” to shop abroad (either in person or by distance contract) by giving them the confidence that, wherever they shopped, they would have certain set of minimum rights, for example as to the conformity of goods, remedies for non-conformity and to challenge unfair contract terms. Thus most of the consumer Directives were minimum harmonisation Directives. Many Member States used the opportunity to give or maintain higher standards of consumer protection than was required by the Directives. So for example, some Member States allow terms to be challenged as unfair even if they have been negotiated¹⁰⁰ or in some

cases even if the term was one of the core terms that under the Directive is exempt from review.¹⁰¹ The UK, for example, provided that a consumer who has been supplied with nonconforming goods could reject them and obtain a full refund of the price without first asking for repair or replacement.¹⁰² In about 2003, however, the European Commission’s approach changed. Though consumer protection remains an important goal,¹⁰³ the emphasis shifted to trying to promote the internal market by making it easier for traders to sell their goods across borders.¹⁰⁴ In particular the Commission was concerned with what came to be known as “the Rome I problem”. Under the Rome I Regulation¹⁰⁵ parties to a consumer contract remain free to choose which law should govern the contract, and so the trader may continue to use the law with which it is familiar and its normal terms and conditions, subject only to the rule the mandatory rules of that law - but there is one important exception. This is contained in Article 6(2) of the Regulation: if a trader contracts with the consumer in the state in which the consumer is habitually resident, or if the trader directs its activities at consumers in that state, consumers contracting with the trader are entitled to protection of the mandatory rules of the state in which they are habitually resident. This might mean, for example, that a business seeking to sell its products across Europe via a website might have to deal with the different rules of consumer protection in every member state.

- 62 The Commission’s first answer to this was to move from minimum harmonisation to full harmonisation, so that in effect the rules of consumer protection would be the same everywhere and traders would not have to worry about the differences. Member States have not always welcomed the change in approach, as it might mean reducing their level of consumer protection to the European minimum standard. The first attempt by the Commission was its 2008 proposal for a Consumer Rights Directive,¹⁰⁶ which would have replaced not only the Doorstep

98 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, Art 3(5), inserting a new Art 11a into the CRD.

99 This section draws on H Beale, “The Story of EU Contract law - from 2001 to 2014” in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2016) 431.

100 See H Schulte-Nölke, C Twigg-Flesner and M Ebers, *EC Consumer Law Compendium* (Sellier, 2008) 199-200, 226. The UK now also allows the review of terms that were negotiated: Consumer Rights Act 2015, s 62.

101 E.g. the Nordic Contracts Act s 36.

102 Sale of Goods Act 1979, ss 1 and 13-15; see now Consumer Rights Act 2015, s 19.

103 See DCD Rec 5.

104 See DCD Rec 4

105 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

106 Proposal for a Directive of the European Parliament and of the Council of 8 October 2008 on consumer rights COM(2008) 614 final.

Sales¹⁰⁷ and Distance Sales¹⁰⁸ Directives but also the Unfair Terms and the Consumer Sales Directives. There would have been some increase in consumer protection but the main change would have been to full harmonisation. Politically this was something of a failure; the Commission was only able to get the Consumer Rights Directive through by limiting it, by and large, to distance and what are now called off-premises sales.

- 63 The Commission then turned to a different approach, proposing a Common European Sales Law¹⁰⁹ which would not have replaced the various national laws but would have provided traders and consumers with an optional, alternative regime. That too was a political failure and was withdrawn.¹¹⁰ The Commission has now reverted to full harmonisation.
- 64 As far as the Digital Content Directive is concerned, I think it can be said that the full harmonisation approach has been pretty successful. Most of the issues that are covered by the Directive will be fully harmonised, the main exception being that Member States may limit the consumer's remedies to non-conformities that appear within a certain period, provided that the period is at least two years from the date of supply.¹¹¹ The same cannot be said for the new Directive on Sale of Goods. This is not the place for analysis of that Directive but so many issues are left to Member States that it can only be described as Swiss cheese harmonisation – full of holes.
- 65 So, in the context of contracts to supply digital content and digital services, what are the gaps in full harmonisation that might cause problems for traders who want to sell across borders but do not have the resources to investigate the laws of the states but they are targeting, so that they might be in for a nasty surprise?
- 66 Some of the same issues that I have suggested may be problematic for consumers because they are left to national law may also be problematic for traders. For example, a trader who normally operates in a regime in which damages are based on fault, but who has

contracted to supply a consumer in a common law jurisdiction, may be surprised to find itself strictly liable to the consumer.

- 67 There are other issues which might cause problems for traders, some of them not even mentioned by the Directive. I think the list must include illegality, though I accept that to ask for harmonisation on such a culturally specific and sensitive issue would be to cry for the moon. More realistically, a trader used to a “legal guarantee” period limited to two years may be surprised to find that in the consumer's law there is no such limit. Traders may be surprised at the effects of termination (some Member States do not require each party to make full restitution after termination, though admittedly that will not be problem for the trader who was able to demand full payment from the consumer in advance); limitation periods; liability for hidden defects; and the liability of producers who are not traders within the meaning of the Directive (at least to the extent that digital content or services is seen as being outside the scope the Product Liability Directive.) The last kind of liability is of course non-contractual but it might well be regarded as mandatory by the applicable law, and so fall within Article 5 of the Rome II Regulation.¹¹²
- 68 Whether there are other issues of general contract law that have not yet been addressed by Directives and that might cause traders to be unpleasantly surprised is a topic for another day. My suspicion is that there are not very many.¹¹³ Some issues are simply not likely to arise in the context of the supply of digital content or digital services to consumers. For example, there are major differences between the various general laws on questions such as mistake, fraud by silence and duties of disclosure,¹¹⁴

107 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/ 31.

108 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19

109 COM(2011)635 Final of 11 October 2011.

110 European Commission, Commission Work Programme 2015 Com(2014) 910 final, Annex 2 p.12.

111 DCD Art 11(2).

112 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

113 There might be some scope for liability for breaking off negotiations contrary to good faith (on which see, for example, J Cartwright and M Hesselink, *Precontractual liability in European Private Law* (Cambridge University Press 2011). The Law Commission for England and Wales has been looking at the practice of many online sellers to defer the formation of the contract until the goods have been dispatched. (See Law Commission, *Consumer Sales Contracts: Transfer of Ownership* (CP No 246, (2020), ch 4.) Might consumers who are unaware of this practice and who have acted on the assumption that their orders have been accepted, only to find that seller is not willing to supply the goods after all, have a remedy?

114 See e.g. R.Sefton-Green (ed), *Mistake, Fraud and Duties to inform in European Contract Law* (Cambridge University Press, 2005); H Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law* (Oxford: OUP, 2012).

but given the extensive information duties imposed on traders by the CRD and the private law remedies that will shortly be available if information is not disclosed, I suspect issues of this type will seldom arise in this context. Nor do I not see much scope for doctrines such as threat, undue influence (at least in its common law meaning, which requires abuse of a relationship between the parties)¹¹⁵ or abuse of the consumer's circumstances. Equally until very recently I doubted whether adjustment for change of circumstances, at least along "classical" lines, will apply, as most contracts will be fairly short term; but, as mentioned earlier, the coronavirus may change this in ways we cannot yet fully foresee.

E. Conclusion and a final point

Conclusions

69 Overall, as far as concerns the supply of digital services, contracts for digital content where there is to be "a series of individual acts of supply" and contracts where the digital content is made available for a fixed period, the new Directive is a useful piece of legislation for both consumers and traders. There are certainly some problems with its provisions, for example that consumers who have agreed to a modification that later they regret may be left without recourse;¹¹⁶ but by and large the Directive seems fit for purpose as far as it goes.

70 The main problems with the Directive are over the issues that it does not harmonise, that instead are left to national law - either explicitly, or because they are outside the scope of the Directive. Perhaps the most serious examples are liability in damages, the right of Member States to limit liability to non-conformities that appear within two years, limitation periods and possibly rights to terminate long-term contracts.

71 Consumers and traders will have to hope that work to protect them or, as the case may be, to save them from unpleasant surprises, can be taken further in future years. But the Directive is a good start.

Enforcement by public bodies and consumer organisations

72 I would like to end by briefly referring to another issue that the rises under the Directive (and also under the Directive on Sale of Goods). It is an issue

that I have given fuller treatment elsewhere,¹¹⁷ but I mention it again because I believe it is important.

73 Article 21 of the Digital Content Directive requires Member States to enable public bodies and consumer organisations to ensure that the provisions of the Directive "are applied". This appears to mean that public bodies and consumer organisations must be empowered to act against defaulting traders. I think in practice this is likely to be far more important than any private remedy given to an individual consumer. Particularly in relation to digital content, claims by consumers are likely to be of relatively low value. If so, consumers will have little incentive to take up their rights and remedies. However, the aggregate harm caused by a defaulting trader to the body of consumers as a whole might be very significant. Public enforcement may play a very important role in policing the market, just as it has in relation to unfair terms. With digital content and services in particular, it seems that public bodies and consumer bodies will find it relatively easy to identify traders who are causing a problem by monitoring comparison websites and platforms, and possibly by watching social media. It has been pointed out that this monitoring is most likely to be effective if it is combined with ADR or an Ombudsman service. And hopefully the public bodies and consumer organisations will encourage traders to take responsibility things gone wrong and act so as to prevent things going wrong in the future, rather than using times as the sole means of deterring traders. Chris Hodges has described "The ideal sequence of reactions to adverse events" as being:

1. To identify an issue as quickly as possible.
2. To identify the root cause of the problem.
3. To share information on the problem and to discuss and agree the appropriate response.
4. To implement the right response, and share that information.
5. To apologize for harm caused, and repair it or provide redress.
6. To monitor the situation and see if changes need to be made in the initial response.¹¹⁸

117 See H Beale, "Conclusion and Performance of Contracts: an Overview" in R Schulze, D Staudenmayer and S Lohsse (eds), *Contracts for the Supply of Digital Content: regulatory Challenges and Gaps* (Baden-Baden: Nomos, 2017), 33, Part III.

118 (C Hodges, *Ethical Business Regulation: Growing Empirical Evidence*, 2016), <http://www.fljs.org/sites/www.fljs.org/files/publications/Ethical%20Business%20Regulation.pdf>

115 Cf the different meaning under the Unfair Commercial Practices Directive Art 8.

116 See above, p 102, paras 30-33.

- 74 If this approach is taken, it is likely to lead to significant improvements in both the initial quality of digital contents and services and, if things do go wrong, in the way that consumer complaints are handled.