

# Interplay Of Digital Content Directive, European Electronic Communications Code And Audiovisual Media Directive In Communications Sector

by Karin Sein\*

**Abstract:** In the near future, several new EU law acts such as the new Digital Content Directive (DCD), Electronic Communications Code (EECC) as well as the revised directive on audio-visual media services (AMVD) will be applicable to the communication sector. These directives are partly mutually exclusive but partly also cumulatively applicable. The article examines the complicated demarcation and interplay between these three directives, including their complicated interaction in case of bundle contracts, concentrating primarily on contract law issues. It shows, *inter alia* that subjecting number-dependent interpersonal communications services as a subtype of electronic communications services to the EECC and

number-independent interpersonal communications services to the DCD results in different contractual remedies for consumers which cannot be easily justified. The article also argues that certain provisions of AMVD should be considered as part of objective conformity criteria under the DCD, entitling consumers to use contractual remedies if the content requirements are not complied with. Finally, the new rules on bundle contracts allowing consumers to terminate the whole bundle even if only one part of the bundle is affected constitute a considerable improvement in the consumer's contractual rights compared to the previous rules.

**Keywords:** digital content directive; European electronic communications code; number-dependent and number-independent interpersonal communications services; OTTs; audio-visual media directive

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## A. Introduction

1 The telecom industry is facing a considerably changed legal landscape: by the end of 2020 the new Directive on Electronic Communications Code (EECC)<sup>1</sup> must be transposed into national law. Among many other

detailed rules, the new code also contains a chapter on end-user rights with several mandatory contract law provisions. These provisions, mostly maximum harmonizing, set forth rules on pre-contractual information obligations, contract termination, and bundle contracts (e.g., a fixed-fee package for digital TV, internet access and mobile phone subscription).

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2 Apart from the new code, several services offered by telecoms or other electronic communications providers may also fall within the scope of the new Digital Content Directive<sup>2</sup> (DCD) to be implemented

1 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L321/36 (EECC).

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 [2019] OJ L136/1 (DCD).

in Member States by summer 2021 and to be applied from 2022. The Digital Content Directive is not applicable to electronic communications services (e.g., internet access contracts<sup>3</sup>) apart from number-independent interpersonal communication services but does apply to digital television services,<sup>4</sup> as well as to different apps or video-on-demand services offered by telecom companies. These services are often offered in a bundle or package together with other telecom services that are subject to the EECC. Moreover, the new Directive on Audiovisual Media Services (AVMD)<sup>5</sup> lays down additional rules for certain core services of telecoms and other communications providers. These developments raise the question of the scope and interrelationship of the new EU rules in the context of telecoms and the communication industry in general.

- 3 In this context one must keep in mind that with the emergence of new digital interpersonal communication services, the old electronic communications rules aimed mainly at telecommunication services have now been broadened in their scope and are targeted at the electronic communications sector in general. Application of the electronic communication rules to digital interpersonal communication services poses the question whether services such as Skype, Facebook or WhatsApp fall into the scope of the DCD, electronic communication code, audio-visual media rules, or possibly all of them and what are the legal consequences of being subject to one or another legal regime? Which set of contractual remedies – the ones of the DCD or the end-user rights under EECC can consumers use if there is an irregularity in the service? Can breach of AVMD rules under certain circumstances be qualified as a breach of the digital services contract entitling consumers to use contractual remedies under the DCD? Finally, which rules and how do they apply if there is a complex relationship of bundle contract including different telecommunication services, digital TV and other services? Are the interests of consumers better protected under the new contract law rules?
- 4 To answer these questions, this article first defines the notion of electronic communications services as this is an essential precondition for delineating the

<sup>3</sup> See DCD, art 3(5)(b) and recital 19.

<sup>4</sup> DCD, recital 31.

<sup>5</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69 (AVMD).

scopes of the EECC and DCD (B.); then demarcates the scopes of the DCD and EECC, assesses the legal consequences of their application, and explores their interaction in case of telecom bundle contracts (C.). Finally, the article analyzes the co-application of the DCD and AVMD in the digital communication sector (D.).

## B. Definition of electronic communications services and its evolution

### I. Definition of an electronic communications service under the Framework Directive

- 5 Defining electronic communications services is an essential precondition for delineating the scopes of the EECC and DCD as article 3(5)(b) DCD excludes electronic communications services as defined in art 2 p 4 EECC from the scope of the DCD. Thus, the general rule is that electronic communication services are outside the scope of the DCD. However, OTT-s ('over-the-top' services)<sup>6</sup> or, more precisely, number-independent interpersonal communications services, are within the scope of the DCD as art 3(5) (b) makes an exception for number-independent interpersonal communications. Although the European Commission's proposal of the DCD excluded also the number-independent electronic communications services from its scope and left them subject to the telecommunications law, due to consumer protection purposes the legislator decided that the digital content directive should cover also these widely used services.<sup>7</sup> Therefore, in order to define the scope of the DCD we must look, first, at the definition of electronic communications services and then, second, at the definition of number-independent interpersonal communications as a subtype of electronic communication services.

<sup>6</sup> On the notion and different subtypes of OTTs, see Marcin Rojszczak, 'OTT regulation framework in the context of CJEU Skype case and European Electronic Communications Code', (2020) *Computer Law and Security Review* 3-4. He points out that there is no universally accepted definition of an OTT. The Body of European Regulators for Electronic Communications (BEREC) defines an OTT as "content, a service or an application that is provided to the end user over the public Internet." and differentiates between three different types of OTTs. BEREC Report on OTTs BoR (16) 35, 3.

<sup>7</sup> Dirk Staudenmayer in in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020), art 3 paras 96-99.

6 In order to understand how and why the notion of the electronic communications service under EU law has evolved and changed over the years, it is first necessary to examine the definition of an electronic communication service the “old” Framework Directive.<sup>8</sup> Article 2(c) of the framework directive defined an electronic communications service as a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting. Thus, the decisive criterion defining its scope was purely a technical one, depending on whether the main object of the service is the conveyance of signals.<sup>9</sup> This principle was clarified in two decisions of the Court of Justice of the European Union (CJEU) dealing with digital communication services.

7 First, the *SkypeOut* judgement<sup>10</sup> clarified that an interconnected VoIP (Voice over Internet Protocol) service such as SkypeOut<sup>11</sup> is an electronic communications service within the meaning of the framework directive and thus must comply with its provisions. The CJEU based its argumentation mostly on the fact that SkypeOut has promised – for a remuneration – its end-users the possibility to call the fixed or mobile numbers on the “public switched telephone network” (PSTN) and has concluded contracts with the authorized telecommunications services providers in order to facilitate that.<sup>12</sup>

8 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33.

9 Mario Martini in Hubertus Gersdorf and Boris P Paal (eds), *Beck'scher Online-Kommentar zum Informations- und Medienrecht* (28th edn 1.8.2019, CH Beck 2019) TMG § 1 paras 13ff.

10 Case C-142/18 *SkypeOut* EU:C:2019:460. The case is discussed in-depth by Rojszczak (n 6) 5-9. From the German perspective, see also Jürgen Kühling, Tobias Schall and Corinne Ruechardt, ‘Are Gmail, WhatsApp and Skype “Electronic Communications Services” within the Meaning of the Framework Directive?’ (2016) 17(5) *Computer Law Review International* 134–140.

11 The CJEU also used the notion of OTT in the descriptive part of the judgement: “The service provided by SkypeOut is an ‘over the top’ service – a service available on the internet without the involvement of a traditional communications operator.” *SkypeOut* (n 10) para 9. Later on, however, the CJEU does not use this notion anymore.

12 What mattered for the CJEU was the fact that it is Skype Communications which is responsible for the VoIP service which it provides to its clients and subscribers in return for payment. *SkypeOut* (n 10) para 40.

Therefore, the services of these telecommunications services can be attributed to the SkypeOut.<sup>13</sup>

8 In the *Gmail* case, by contrast, the CJEU found that web-based email services, which do not provide internet access, do not constitute electronic communications services within the meaning of the framework directive because their services do not consist “wholly or mainly” of the conveyance of signals. Whereas SkypeOut had promised its users the connectivity to the PSTN numbers, in the *Gmail* case the Court did not see any element to establish Google’s responsibility vis-à-vis the email account holders for the conveyance of signals necessary for that account’s functioning.<sup>14</sup>

## II. Definition of an electronic communications service under EECC

9 Previously, we saw that the decisive question under the Framework Directive for qualifying a service as an electronic communications service is a technical one, i.e., whether its main object is the conveyance of signals. OTT services were therefore outside of its scope although consumers as well as businesses were increasingly relying upon such services instead of telephony and other traditional communication services. Consequently, OTTs were rapidly becoming fierce competitors of traditional telecom operators.<sup>15</sup> At the same time they were not subject to the same legal rules. This was found problematic due to several reasons. For example, BEREC brought out that there is lack of clarity and certainty as to which OTT services are covered or not covered by the telecommunications rules and that national regulators are therefore often not able to collect necessary information from these service providers.<sup>16</sup> The European Commission stressed the necessity for equal treatment and a level playing

13 *SkypeOut* (n 10) paras 38ff.

14 Case C-193/18 *Gmail* EU:C:2019:498, paras 34ff.

15 Explanatory memorandum to the proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) COM/2016/0590 final, 2. Mobile operators have claimed that their revenues have been declining due to the new players such as Skype or WhatsApp. Martin Cave, Christos Genakos, Tommaso Valletti, ‘The European Framework for Regulating Telecommunications: A 25- year Appraisal’ (2019) 55 *Rev. Ind. Organ.* 47, 52.

16 BEREC report (n 6) 37.

field for market players<sup>17</sup> that would also guarantee equal rights for end-users. Still another important reason for widening the definition of electronic communication services was the intention to subject OTTs to the data protection regime of the e-privacy directive, subjecting them, for example, to obligations of confidentiality of the communication, notification of data breach, and traffic data erasure.<sup>18</sup>

- 10 The new EECC, therefore proceeds from a functional approach and is not purely based on technical parameters<sup>19</sup> but rather on the end-user's perspective.<sup>20</sup> Article 2(4) EECC defines electronic communications service as a service normally provided for remuneration via electronic communications networks, which encompasses – with the exception of services providing or exercising editorial control over content transmitted using electronic communications networks and services – the following types of services: (a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of regulation (EU) 2015/2120; (b) interpersonal communications service; and (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting. Consequently, the notion of electronic communications services under the EECC also includes other communication-enabling services than these which consist wholly or mainly in the conveyance of signals.<sup>21</sup> When compared to the previous definition of electronic communications services under the Framework

Directive, the new definition of electronic communications service includes also interpersonal communications services (OTTs) – a development that has been seen as one of the major changes in the new EECC.<sup>22</sup>

- 11 Therefore, whether VoIP services such as Skype can be qualified as an electronic communications service within the meaning of EECC no longer depends upon whether this service consists mainly or wholly in the conveyance of signals.<sup>23</sup> Rather, the legal consequences now depend upon whether an electronic communication service such as Skype or SkypeOut is an interpersonal communications service as a subtype of electronic communications service<sup>24</sup> and if yes, whether it is a number-dependent or a number-independent one. Interpersonal communications service is defined in art 2(5) EECC as a service normally provided for remuneration<sup>25</sup> that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s)<sup>26</sup> and does not include services which

17 Explanatory memorandum (n 15) 2. BEREC, however, admitted that while level playing field was preferable there can also be compelling reasons for different regulatory treatment. BEREC report (n 6) 4, 37.

18 Rojszczak (n 6) 10-11. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201, 37-47.

19 This is seen as a positive development in the legal literature. See e.g., Gerd Kiparski, 'Der Europäische Telekommunikations-Kodex – Ein neuer Rechtsrahmen für die elektronische Kommunikation' (2019) 3 *Computer und Recht* 180.

20 Recital 15 of EECC stresses that "while 'conveyance of signals' remains an important parameter for determining the services falling into the scope of the directive, the definition should cover also other services that enable communication" as from an end-user's perspective it does not make any difference whether a provider conveys signals itself or whether the communication is delivered via an internet access service.

21 Martini (n 9) TMG § 1 para 13f.

22 Giparski (n 19) 180.

23 Markus Ludwigs and Felix Huller, 'OTT-Kommunikation: (Noch) Keine TK-Regulierung für Gmail & Co' (2019) 15 *Neue Zeitschrift für Verwaltungsrecht* 1099.

24 See EECC, art 2(5) and 2(4)(b).

25 It is interesting to note that the concept of remuneration (counter-performance) is considerably wider under the EECC than under the DCD. Under the DCD, personal data obtained by cookies does – as a rule – not amount to counter-performance, nor does being exposed to advertising. See DCD, recital 25. Critical on excluding cookies (and being exposed to the advertisements) from the scope: European Law Institute (ELI), 'Statement on the European Commission's proposed directive on the supply of digital content to consumers' (ELI 2016) 15-16; Axel Metzger, Zohar Efroni, Lena Mischau, Jakob Metzger, 'Data-Related Aspects of the Digital Content Directive' (2018) 9 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 96. On the concept of data as counter-performance, see Carmen Langhanke and Martin Schmidt-Kessel, 'Consumer Data as Consideration' (2015) *Journal of European Consumer and Market Law* 218 et seq; Axel Metzger, 'Dienst gegen Daten: Ein synallagmatischer Vertrag' (2016) 216 *Archiv für die zivilistische Praxis* 817 et seq. By contrast, recital 16 of the EECC considers information collected and transmitted by cookies as well as end-users being exposed to advertisements as remuneration.

26 Recital 17 EECC cites linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines as examples which cannot be qualified

enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.<sup>27</sup> Looking at this definition, Skype-type services clearly qualify as interpersonal communications services within the meaning of art 2(5) EECC. Whether they will also be subject to the rules of the DCD depends upon whether they can be qualified as number-dependent or number-independent, as will be shown in the next chapter.

## C. Delineation between the scopes of the DCD and EECC and its legal consequences

### I. Defining the scopes of the DCD and EECC

12 We saw that the classification of an electronic communications service under the Framework Directive depended on the technical design of the service with the consequence that without knowing the technical design of a certain service, consumers are not able to determine whether the sector-specific regime is applicable to it or not.<sup>28</sup> The new functional approach of the EECC is, as such, easier to understand for the consumers. However, I will show that determining the scopes of the EECC and the DCD in the case of digital communication services is still complicated, to say the least, and leaves consumers in considerable uncertainty as to which legal rules are applicable to their contracts.

13 Complication is due to the fact that under the new set of rules an OTT is also a digital service offered by a trader to consumers and can thus, in principle, also be subject to the DCD. We saw above that while electronic communications services are outside the scope of the DCD, number-independent

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as inter-personal electronic communications services. Similarly, the CJEU stated in *SkypeOut* that certain services offered by Skype such as screen-sharing services, instant text messaging, file sharing and simultaneous translation cannot be classified as ‘electronic communications services’ as they do not consist wholly or mainly in the conveyance of signals; *SkypeOut* (n 10), para 42.

27 An example of a feature that could be considered to fall outside the scope of the definition of interpersonal communications services might be a communication channel in online games, depending on the features of the communication facility of the service. See EECC, recital 17.

28 Andreas Grünwald and Christoph Nüßing, ‘Kommunikation über die Top Regulierung für Skype, WhatsApp oder Gmail?’ (2016) 2 *Multimedia und Recht* 91, 95.

interpersonal communications services are still within (art 3(5)(b) DCD).<sup>29</sup> In order to demarcate the scopes of the DCD and EECC it is hence important to distinguish between number-independent and number-dependent interpersonal communications services:<sup>30</sup> an OTT is subject to the DCD only if it can be qualified as a number-independent interpersonal communications service as defined in art 2(7) EECC. According to art 2(7) EECC number-independent interpersonal communications service is an interpersonal communications service, which does not connect with publicly assigned numbering resources; namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans. The defining criterion here is the connection with the international numbering plans and whether the service enables end-users to reach persons to whom such numbers have been assigned<sup>31</sup>; if such a connection does not exist, the interpersonal communications service is number-independent and falls within the scope of the DCD.

14 It should be stressed, however, that mere use of a phone number as an identifier<sup>32</sup> should not be considered to be equivalent to the use of a number to connect with publicly assigned numbers: therefore, it should not be considered sufficient in itself to qualify a service as a number-based interpersonal communications service.<sup>33</sup> Services like *SkypeOut* do enable communication with numbers in national or international numbering plans – even if only with the help of other service providers. Consequently, such services are number-based interpersonal communications services as they enable end-users to reach persons to whom such numbers have been

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29 See art 3(5)(b) DCD, which includes interpersonal communications services within the scope of DCD.

30 Such distinction has been criticized because of its merely technical nature and failure to take into account the end-user perspective. Joachim Scherer, Dirk Heckmann, Caroline Heinickel, Gerd. Kiparski, Frederic Ufer, DGRI-Stellungnahme zum Richtlinienvorschlag über europäischen Kodex für elektronische Kommunikation (2017) *Computer und Recht* 197, 198.

31 EECC, recital 18.

32 This is the case of e.g., WhatsApp where end-users are identified by their phone numbers. It is probably not different in the case of WhatsApp Business, which can be used with a landline (or fixed) phone number but does not enable to call PTSN numbers. Therefore, WhatsApp Business should also be qualified as a number-independent interpersonal communications service falling within the scope of the DCD.

33 EECC, recital 18.

assigned.<sup>34</sup> Putting it simply: if such a service allows me to call the landline and mobile numbers then it is a number-dependent electronic communications service with the consequence of being subject to the EECC and outside the scope of the DCD. On the other hand, if my mobile phone number is used only to identify me and I am reached not via my phone number but rather as a Skype or WhatsApp user<sup>35</sup> then the service is a number-independent interpersonal communications service and subject to the DCD.

- 15 For example, while Gmail was not considered an electronic communications service under the Framework Directive<sup>36</sup>, it clearly falls under the notion of the interpersonal communications service of the EECC as recital 17 EECC cites all types of emails, messaging services, or group chats as typical examples of interpersonal communications services. This includes services like Facebook Messenger, Zoom or Microsoft Teams. Under the new rules, Gmail, including its chat-function or Google Hangouts feature, as well as other listed examples are to be considered number-independent interpersonal communications services within the meaning of the EECC.<sup>37</sup>
- 16 As number-independent interpersonal communications services such as Facebook Messenger, Zoom or WhatsApp also constitute digital services within the meaning of the digital content directive they also fall within the scope of the DCD.<sup>38</sup> Consequently, number-independent interpersonal communications services are within the scope of the DCD as well as within the scope of the EECC. Number-dependent interpersonal communications services such as Skype-Out, by contrast, are only subject to the rules of the EECC so that the potential overlap between the DCD and EECC does not occur.

## II. Legal consequences of falling within the scope of the DCD or EECC

- 17 After clarifying the scopes of application of both directives to the interpersonal communication services, it is now important to explore and compare the legal consequences of their application. Although both number-dependent as well as number-independent interpersonal communications services fall within the scope of the EECC, not all of its provisions are applicable to the number-independent interpersonal communications services. To start with, only number-dependent interpersonal communications services may be subject to the general authorization requirement set forth by Member States.<sup>39</sup> They are also part of the emergency communications, the single European emergency number, and public warning system.<sup>40</sup> These rules are not applicable to the number-independent interpersonal communications services as they do not benefit from the use of public numbering resources and they do not participate in a publicly assured interoperable ecosystem.<sup>41</sup>
- 18 Many end-user rights provisions also apply only to (publicly available) number-based interpersonal communications services.<sup>42</sup> For example, provisions regulating contract duration as well as to the obligation to give yearly tariff advice (art 105 EECC), transparency (art 103(1) EECC), the obligation to provide access free of charge to at least one independent comparison tool (art 103(2) EECC), contract termination (art 105), number portability (art 106(3) EECC), or bundles (art 107 EECC<sup>43</sup>), are explicitly not applicable to number-independent interpersonal communications services.<sup>44</sup> This solution was partly justified by the need to ensure consistency between the two directives: as the legislative procedure for DCD and EECC ran partly

34 EECC, recital 18.

35 Which also requires installation of such software to my computer or phone.

36 *Gmail* (n 14), para 42. This approach was questioned as being too simplistic by Axel Spies, see Axel Spies, 'Gmail ist kein TK-Dienst' (2019) 8 *Multimedia und Recht* 514.

37 Similarly for Gmail Gera P. Van Duijvenvoorde, 'Towards implementation of the European Union Telecom Code: ex ante reflections' (2020) 26(7) *CTLR* 205, 207.

38 See DCD, art 3(5)(b).

39 EECC, art 12(2). This means that in the end the outcomes of the *Gmail* and *SkypeOut* cases would be the same under the EECC as they were under the Framework Directive. Ludwigs and Huller (n 23) 1101.

40 EECC, arts 109–110.

41 EECC, recital 18.

42 Duijvenvoorde (n 37) 207.

43 Giparski finds this exclusion problematic from the consumer protection perspective. See Giparski (n 19) 186.

44 Such a distinction is criticized by Scherer, Heckmann, Heinicke, Kiparski, Ufer (n 30) 201.

in parallel, the legislator decided to exclude number-independent interpersonal communications services from art 105 EECC in order to avoid an overlap.<sup>45</sup>

- 19 As shown above, number-independent interpersonal communications services fall within the scope of the DCD. Under the DCD, digital service providers including those providing number-independent interpersonal communications services are obliged to comply with the mandatory objective conformity criteria (art 8 DCD)<sup>46</sup> and are exposed to liability and consumers' remedies if they are in breach of them (art 11 et seq DCD). The end-users of number-dependent interpersonal communications services falling within the scope of the EECC do not have the possibility to use such mandatory contractual remedies and they are subject to the national contract law rules. Still, art 105(4) EECC gives them a right to terminate the service without an additional charge should such a service fail to reach the performance stated in the contract. Here it is hard to see an objective justification for such different treatment of a consumer's contractual rights; connection to public numbering plans and resources can hardly explain differences in the rules for price reduction, for example.
- 20 On the other hand, number-independent interpersonal communications services benefit from a more generous modifications regime – they are entitled to modify their services under the conditions of art 19(1) DCD and consumers may terminate their contracts only if such modifications have a considerable negative impact on them.<sup>47</sup> By contrast, other public electronic communications services, including number-dependent interpersonal communications services face the possibility of termination in all cases where they change their contractual conditions, unless these changes are exclusively to the benefit of the end-user, are of a purely administrative nature, and have no negative effect on the end-user, or are directly imposed by Union or national law.<sup>48</sup> To put it simply: Skype users must tolerate slightly negative modifications, SkypeOut users not. Again, it is hard to see a justification for such different treatment.

- 21 In order to avoid lock-in effects and enable a change of communications service provider, art 105(1) EECC allows fixed-term contracts only up to 24 months with the possibility for the Member States to foresee even shorter maximum contractual commitment periods. Moreover, there are also limitations as to the automatic prolongation of the contract.<sup>49</sup> The digital content directive applicable to the number-independent interpersonal communications services, by contrast, does not contain such limits as art 16 of the Commission's proposal of DCD was dropped during the legislative process.<sup>50</sup> Hence, number-independent interpersonal communications service providers may use longer fixed-term contracts<sup>51</sup> or foresee their automatic prolongation unless this is precluded under national law.
- 22 As to the security standards, digital communications services subject to EECC such as SkypeOut have no updating obligation,<sup>52</sup> but must of course follow the stricter safety rules under art 40 EECC obliging publicly available electronic communications services to take appropriate and proportionate technical and organizational measures to appropriately manage the risks posed to the security of networks and services. Here the applicability of stricter security standards does not depend upon whether an interpersonal communication service is number-dependent or number-independent but rather whether it is a publicly available electronic communications service. Therefore also number-independent interpersonal communications services, such as WhatsApp, qualifying as a publicly available electronic communications service can be subject to security rules of art 40 EECC.<sup>53</sup> By contrast, number-independent interpersonal communications services which do not qualify as publicly available electronic communications services must exercise only lighter security

45 Staudenmayer (n 7) art 3 para 98.

46 Compliance with objective criteria is mandatory for the trader under art 22 DCD and deviation from them is possible only by express and separate agreement (art 8(5) DCD). On the standards of such express and separate agreement, see Staudenmayer (n 7) art 8 paras 161-177.

47 DCD, art 19(2).

48 EECC, art 105(4).

49 EECC, art 105(3).

50 Originally, art 16(1) DCD-COM also aimed at avoiding lock-in effects and allowed consumers to terminate the contract after a 12-month period. Staudenmayer (n 7) art 3 para 98. See more on this issue in Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15(4) *European Review of Contract Law* 365, 389–390; European Law Institute, 'Statement of the European Law Institute on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers COM (2015) 634 final' (2016) 60–62.

51 In this sense, see also Giparski (n 19) 185.

52 C.f. DCD, art 8(2).

53 At the same time, WhatsApp is also subject to the updating obligation of the DCD.

measures as these service providers normally do not exercise actual control over the transmission of signals over networks and therefore the degree of risk for such services can be considered lower than for traditional electronic communications services.<sup>54</sup>

- 23 Subjecting all publicly available interpersonal communications services to the security standard of art 40 EECC was justified by public policy reasons,<sup>55</sup> that is the need to manage the risks posed to the security of networks and services.<sup>56</sup> As security is also one of the objective conformity criteria explicitly mentioned in art 8(1)b DCD<sup>57</sup> including the fit-for-purpose rule under art 8(1)(a) DCD which builds, inter alia, upon Union law rules and technical standards, one can assume that the objective security standard of DCD for number-independent interpersonal communication services as digital services coincides with the one of art 40 EECC. Hence, although number-independent interpersonal communications services are subject both to the security standards of art 40 EECC and art 8 DCD, the standard should be the same under both rules unless the service provider has promised higher security standards in the contract.
- 24 As a side remark: there is also no difference concerning the data protection standards. Both number-dependent as well as number-independent interpersonal communication services must comply with the data protection requirements of the e-privacy directive, including the principle of confidentiality of communications as *lex specialis* to those of the General Data Protection Regulation (GDPR).<sup>58</sup>

54 EECC, recital 95.

55 Explanatory memorandum (n 14) 4.

56 Art 40(1) EECC.

57 On security as objective conformity criteria under the DCD see Sein and Spindler (n 50) 369.

58 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, 1–88. As noted above, this was one of the main reasons for widening the definition of electronic communication services under the EECC. See Rojszczak (n 6) 10–11. He also raises an interesting question of whether the communication with voice assistants should be subjected to the same legal regime. *Ibid.*, 14.

### III. Consumer's remedies in case of a bundle contract

25 In the telecom world, digital services are often offered in a bundle for a fixed price comprising, for example, internet access, digital TV, and mobile phone subscription. Sometimes such a bundle may also involve sale of tangible goods, be it a TV box, mobile phone or a smart TV where the fixed monthly fee also includes payments for the consumer good. Bundling allows telecom providers to offer additional goods or services to the customer in addition to the main product or service, thereby possibly opening up additional markets, creating efficiency gains through synergy effects with the result of lower prices and enhancing customer loyalty.<sup>59</sup> On the consumer's side, however, it also creates lock-in effects and legal uncertainty as to whether and how problems concerning one bundle component affect the whole contract. The issue becomes even more complicated if components of a bundle contract are subject not only to national contract law but also to one or more EU sector-specific instruments.

26 For example, if we have a telecom bundle involving internet access, digital TV and mobile phone subscription, the digital TV part clearly falls within the scope of the DCD<sup>60</sup> while the other parts do not. For bundle contracts the general rule under art 3(6) DCD is that in such cases the DCD only applies to the elements of the contract concerning the digital content or digital service and the other elements are governed by the rules applicable to those contracts under national law or, as applicable, other Union law governing a specific sector or subject matter.<sup>61</sup> Thus, in case of a bundle contract consisting of internet access, digital TV and mobile phone subscription, internet access and mobile phone subscription are subject to the national rules implementing the EECC. This does not pose problems concerning contractual remedies such as price reduction or damages; for example, should one defective part of the bundle entitle the consumer to reduce the price, the reduced price will only apply to that part of the bundle.

27 The question becomes more complicated when we look at the possibility and consequences of terminating the whole bundle. In many cases the telecom company would not be breaching every part of the bundle but just one of them: let us assume that there is a defect in the rented TV box. In such cases

59 Peter Rott, 'Bündelverträge aus verbraucherrechtlicher Perspektive' (2018) 11 *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 1010, 1011.

60 DCD, recital 31.

61 DCD, recital 33.



we wonder about the impact of termination of one part of the bundle on the other parts of the bundle. Can you terminate the internet access and digital television subscription in case of a defective TV box? Or, if you terminate the digital TV part of the bundle due to the constant quality problems, what will then happen to the internet access or mobile phone subscription, and finally, to the rental of a TV box?

- 28 As a starting point, art 3(6) DCD avoids a clear answer and leaves it to the applicable national law. However, it makes a reservation for cases which are governed by art 107(2) EECC in order to avoid conflicting rules.<sup>62</sup> This reservation is applicable if the bundle comprises at least an internet access service or a publicly available number-based interpersonal communications service.<sup>63</sup> In case of such bundles, art 107(2) EECC entitles the consumer to terminate the contract with respect to all elements of the bundle if he has a right to terminate any element of the bundle because of a lack of conformity with the contract or failure to supply. In other words: when one element of the bundle consists in digital content/digital service, art 3(6) DCD gives precedence to art 107(2) EECC. Consequently, if the consumer may terminate the digital TV contract part due to the lack of conformity under art 14 DCD<sup>64</sup> then he can also terminate the whole bundle, including the rental of the TV box.<sup>65</sup> Similarly, if the consumer may terminate the rental of a defective TV box<sup>66</sup>, he may also end his contract concerning other services. This

62 Art 3(6) third sub-paragraph DCD provides: “Without prejudice to Article 107(2) of Directive (EU) 2018/1972, the effects that the termination of one element of a bundle contract may have on the other elements of the bundle contract shall be governed by national law.”

63 EECC, art 107(1).

64 This is normally possible only if the trader has first got a possibility to cure and if the lack of conformity is not minor. See DCD, art 14(4) and (6). For more on termination and its consequences under the DCD see, Sein, Spindler (n 50) 377-383; Axel Metzger, Zohar Efroni, Lena Mischau, Jakob Metzger (n 25) 102-105.

65 Here art 105(6) EECC forbids the trader to demand any compensation from the end-user other than for retained subsidised terminal equipment.

66 Again, this is only possible if the seller has had a possibility to cure the defect or replace the defective product and if the lack of conformity is not minor. See art 13(4) and (5) of the new Consumer Sales Directive. 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 [2019] OJ L136/28.

is clearly a major development for consumer rights as compared to the previous legal regime.

- 29 Apart from termination, there may also be overlap or conflict between the DCD and EECC concerning the rules on modifications. In order to ensure consistency with the sector-specific provisions of the EECC, art 3(6) DCD declares art 19 DCD, i.e., the rules on modifications of digital content or digital services, not applicable if a bundle includes elements of an internet access or a number-based interpersonal communications service. Instead, the relevant provisions of EECC should apply to all elements of the bundle, including the digital content or digital service.<sup>67</sup> The main rule on contract modifications for electronic communications providers is found in art 105(4) EECC which, first, lays down notification obligation and its modalities<sup>68</sup> and, second, entitles consumers to terminate the contract without any costs when the trader notifies him of changes in the contractual conditions, unless the proposed changes that are exclusively to the benefit of the consumer, are of a purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law.<sup>69</sup>
- 30 Thus, if a digital service such as digital TV forms part of a telecom bundle, the consumer benefits from the easier termination possibility in case of modifications in the contract. It also shows that in such bundle cases the European legislator considers sector-specific telecom contract rules to be more appropriate than the consumer contract law rules based on the “digital object” of the contract.
- 31 Finally, when establishing the liability of the telecom provider in case of a bundle contract, one can also argue that if the consumer’s internet access and rented TV box all stem from the same telecom provider then the consumer’s cooperation obligation under art 12(5) DCD in order to determine whether his problem with the digital TV quality lies in his digital environment should in practice be reduced to a minimum. Article 12(5) DCD obliges the consumer to cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the

67 See DCD, recital 33.

68 The trader must notify at least one month in advance in a clear and comprehensible manner on a durable medium, see art 105(4) EECC. The right to terminate the contract must be exercised within one month after notification.

69 This is considerably different from the principle found in art 19(2) DCD, which entitles the consumer to terminate only if the modification negatively impacts the consumer’s access to or use of the digital content or digital service, unless such negative impact is only minor.

digital content or digital service at the relevant time lay in the consumer's digital environment. Breach of the cooperation obligation – provided that the trader informed the consumer of such obligation in a clear and comprehensible manner before the conclusion of the contract – leads to a shift of the burden of proof with regard to whether the lack of conformity existed at the relevant time<sup>70</sup> and places it on the consumer.<sup>71</sup> As art 12(5) DCD limits the cooperation obligation to the technically available means which are least intrusive for the consumer and if both the internet access as well as the TV box are provided by the same telecom operator then in most cases the telecom operator should be able to detect the cause of the problem of the digital TV quality without requiring much cooperation from the consumer.

## D. Co-application of the DCD and audio-visual media rules in digital communication sector

32 The question of co-application of the DCD and the revised Audiovisual Media Directive rises in cases where a digital services provider is at the same time acting as a content provider and not only as a communication service provider. This may occur, first, in cases where a telecom company is not only offering internet access and digital TV services, but also produces its own content or even its “own channel”.<sup>72</sup> When offering their own content, telecom companies are acting as audiovisual media service providers within the meaning of art 1(1)(a)(i) AVMD as they are providing programs under their editorial responsibility.<sup>73</sup> Consequently, they become

subject to the audio-visual media rules. At the same time such digital TV services are also subject to the DCD as clarified by recital 31 DCD.

33 Second, the question of the interrelationship of both of the directives also arises in case of the so-called new media players. Recital 1 of the revised AVMD acknowledges that “new types of content, such as video clips or user-generated content, have gained an increasing importance and new players, including providers of video-on-demand services and video-sharing platforms, are now well-established.” True, AVMD remains applicable only to those services the principal purpose of which is the provision of programs in order to inform, entertain or educate.<sup>74</sup> However, if the provision of programs and user-generated videos constitutes an essential functionality of social media services and video-sharing platforms, they are also included in the scope of AVMD, because they compete for the same audiences and revenues as audiovisual media services.<sup>75</sup> This includes service providers such as Netflix, YouTube and Facebook. This type of digital service, if offered on contractual basis for a counter-performance, clearly also falls within the scope of the DCD<sup>76</sup> and therefore the co-application of both directives is also of relevance for these big communication market players.

34 In these cases, communication providers must comply with all rules, be it the DCD or AVMD<sup>77</sup> whereby art 3(7) DCD declares the AVMD as a sector-specific regulation to be *lex specialis*, there is, in my view, also a specific link between these directives as the revised AVMD lays down certain public law requirements for TV programs or other

70 See DCD, art 11(2) and (3). C.f. Sein and Spindler (n 50) 387-388.

71 See, on that, Zoll (n 7) art 12 paras 28-30. C.f. also on the Commission's proposal of the DCD Simon Geigerat and Reinhard Steenot, 'Proposal for a directive on digital content – Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia Cambridge 2017) 156-159.

72 At least in Estonia, most telecoms are also offering specific content that they have produced themselves (“own TV channels”). See e.g. Elisa channel, <https://www.elisa.ee/et/uudised/elisa-tuli-valja-oma-ajaviitekanaliga> and Telia Inspira channel, <https://www.telia.ee/uudised/telia-hakkab-eesit-edastama-oma-telekanalit>.

73 Audiovisual media service is defined as a service where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the

general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.

74 AVMD, recital 3.

75 AVMD, recitals 4 and 5. On these see Lorna Woods, 'Video-sharing platforms in the revised Audiovisual Media Services Directive' (2018) 23(3) *Communications Law* 127 – 140 and Commission's Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive. [2020] OJ C 223, 3–9.

76 See DCD, art 3(1).

77 Similarly, for previous regulatory framework see Jan Oster, *European and International Media Law* (Cambridge University Press 2019) 272, 273.

content, including provisions aimed at avoiding hate speech or terrorist information, content not suitable to minors, as well as certain information and accessibility obligations.<sup>78</sup> These requirements could be considered as objective conformity criteria within the meaning of art 8(1)(a) DCD. According to this provision, in order to be in conformity with the contract, digital content and digital services must be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account any existing Union law.<sup>79</sup> The provisions of the AVMD can be in my view considered such Union law, thereby setting the standards for conformity and leading to the contractual remedies if they are not complied with.<sup>80</sup> Another case of non-conformity in practice relevant for digital content-providing services is addressed in recital 51 of DCD stating that short-term interruptions of the supply of a digital service should be treated as instances of lack of conformity if those interruptions are more than negligible or recur. Consequently, consumers are entitled to use contractual remedies, e.g., reduce the price for the time of such interrupted use of content service.

- 35 As indicated above, telecom companies also often offer bundle contracts where the complementary application of the EECC may come into play as it applies to the internet access provision, whereas the content-provision or video-sharing platform services part of the bundle are subject to the rules of the DCD and AVMD.<sup>81</sup> In case of such mixed services, the scope of applicable rules must be determined separately for each functionally definable service component.<sup>82</sup> Should the lack of conformity – be it interruptions of the service or breaches against the

standards set for the content by AVMD – entitle the consumer to termination under art 14 DCD, then art 107(2) EECC allows termination of the whole bundle contract, including e.g. the rental of a TV box or installment sales of a smart TV.

## E. Conclusions

- 36 In the near future, communication services will be subject to several new legal acts such as the new Digital Content Directive, the European Electronic Communications Code, as well as the revised Directive on Audiovisual Media Services. These directives are partly mutually exclusive but partly also cumulatively applicable. Number-dependent interpersonal communications services as a subtype of electronic communications services are excluded from the scope of the DCD and subject to the EECC. Number-independent interpersonal communications are subject to the DCD and partly also to the EECC.

- 37 Whereas the classification of an electronic communications service under the old Framework Directive depended on the technical design of the service, qualification under the new EECC is based on the end-user perspective, i.e., on a functional approach. Even though this functional approach is in principle easier to understand for the consumers, the delineation between the scopes of the EECC and the DCD is still complicated and leaves consumers in considerable uncertainty as to which legal regime is applicable to their communication services contracts. Yet, the legal consequences of falling within the scope of one or the other legal act are significant: only number-independent interpersonal communications services such as e-mail and messaging services are subject to the updating obligations and mandatory consumer contract rules of the DCD. On the other side, only number-dependent interpersonal communications services may be subjected to the general authorization requirement and the public warning system rules of the EECC: this is justified by the fact that only number-dependent services benefit from the publicly assigned numbering resources. Number-independent interpersonal communications service providers may use longer fixed-term contracts or foresee their automatic prolongation (unless precluded under national law) and they also benefit from a more generous modifications regime of the DCD compared with that of the EECC.

- 38 The contractual remedies of the consumers are different as well: whereas in case of number-independent interpersonal communications services consumers can resort to contractual remedies maximum harmonized in the DCD, consumer's

78 See AVMD, arts 6–6a.

79 For an in-depth analysis of objective conformity criteria, see Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (2020) 2 ERPL 235-237; Christian Twigg-Flesner 'Conformity of goods and digital content/digital services' [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3526228](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526228) 24-27; Jorge Morais Carvalho 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directive 2019/770 and 2019/771' (2019) 8 EuCML 198-199.

80 Similarly, Hugh Beale, 'Digital content Directive and rules for contracts on continuous supply' (to be published in this issue).

81 See Martini (n 9) TMG § 1 paras 11-13 for the legal situation before the new directives were adopted.

82 Martini (n 9) TMG § 1 para 11.

remedies for breach of number-dependent interpersonal communications services are subject to national law plus art 105 EEC on termination. It is hard to see an objective justification for such different treatment of a consumer's contractual rights; connection to publicly assigned numbering plans and resources can hardly explain differences in the rules for price reduction, for example.

- 39** In cases where a digital communications provider acts also as a content provider, the digital content directive is applicable cumulatively with the revised AVMD. The provisions of AVMD concerning the standards of the content are to be considered part of the objective conformity criteria under art 8(1) (a) DCD entitling consumers to use contractual remedies if they are not complied with. Moreover, should the lack of conformity – be it interruptions of the digital TV service or violations against the standards set for the content by the AVMD – entitle the consumer to termination under art 14 DCD, then art 107(2) EEC allows termination of the whole telecom bundle contract, including e.g., the rental of TV box or installment sales of a smart TV. Entitling consumers to terminate the whole bundle contract in cases where only one part of the bundle is affected is a considerable improvement in the consumer's contractual rights compared to the previous rules.
- 40** All in all, the new directives bring about a considerable extent of contract law harmonization within the field of communications services as both the contractual rules of the DCD as well as the contractual end-user rights of the EEC are mostly maximum harmonizing.<sup>83</sup> Under the former legal regime the end-user rights were formulated on the minimum harmonization principle and there were no European contract law rules applicable to the digital content contracts. At the same time, one must admit that the new rules also make it more difficult to orient oneself in the maze of their scattered and intertwined rules and it is hard to see a convincing policy reason behind the different treatment of a consumer's contractual remedies.

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<sup>83</sup> This is, however, not always seen as a positive development. For example, BEREC has criticized the maximum harmonization approach because it does not allow flexible reaction to market changes and specific needs of consumers on national markets. Joachim Scherer, Caroline Heinickel, 'Ein Kodex für den digitalen Binnenmarkt', (2017) *Multimedia und Recht* 76.