

Deviation from Objective Requirements for Conformity With a Contract of Digital Content or Digital Service: The Assessment of Its Use

by Vadim Mantrov, Jānis Kārklīšs, Irēna Barkāne, Zanda Dāvida, Salvis Kārklis and Kristaps Silionovs*

Abstract: Currently the European Union (EU) is taking major steps in different legal areas including consumer protection law to implement the Digital Single Market Strategy in order to ensure effective and smooth functioning of the internal market in the modern economy. The new EU policy concerning the Consumer Digital Content Directive (Directive 2019/770) lays down common rules on requirements concerning contracts between traders and consumers for the supply of digital content or digital service. At the same time, the Directive allows deviation from the objective requirements for conformity with a contract of a digital content or digital service on the basis of certain preconditions explicitly envisaged by Article 8(5) of the Directive itself. The present article aims to discuss the possibility for use of such a deviation by critically assessing the preconditions for deviation

to take place in conjunction with typical examples likely to appear in practice. The article begins by discussing the applicable regulation, providing a possibility for deviation from objective requirements for conformity with the contract. The article then proceeds to critical assessment of each precondition for use of a deviation in the light of examples that might either be permitted or not permitted under the applicable regulation. Furthermore, frequently used forms for supply of digital content or digital service are discussed considering the previous discussion of these preconditions, as deviation from objective requirements for conformity of digital content or digital service are most often found in online contracts. The article finishes by summarizing the discussion in the article.

Keywords: Directive 2019/770; Deviation; Conformity with the contract; Objective requirements; Digital content; Digital service

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A. Introduction

1 The European Commission (EC) has declared its Digital Single Market Strategy¹ which influences different areas regulated within European Union (EU) law, including consumer protection law, commercial law² and author law (i.e., copyright).³ In the case of consumer protection law, the European legislator implemented a major revision of consumer sale with the aim of improving existing regulation, starting in 1999 when the Proposal for the Consumer Sales Directive (CSD) 1999⁴ was adopted. Simultaneously, the EC legislator considered a new regulation on supply of digital content and digital service. This reform resulted in adoption of two new directives in 2019 aimed to protect the rights of consumers in specific matters, i.e., the CSD 2019⁵ and the Consumer Digi-

tal Content Directive 2019 (DCD).⁶ Both these directives aim for higher protection of consumers in the modern economy and e-commerce concerning conclusion and fulfilment of either a contract of sale or a contract for supply of digital content or digital service. As the EC explicitly admitted, “[t]he general objective of the proposals [for adoption of these directives – authors’ remark] is to contribute to faster growth of opportunities offered by creating a true Digital Single Market, to the benefit of both consumers and businesses”.⁷ Furthermore, it has become necessary to reorient consumer law, still focused on protection the final purchaser of consumer goods, into a system that protects the user, usually a long-term user, of various types of goods and services, especially it appears in relation to digital content.⁸

2 The DCD introduces a list of objective and subjective requirements for conformity of digital content or digital service with the contract.⁹ Simultaneously, the DCD allows for a trader to deviate from fulfilling the duty to ensure conformity with the contract. However, the EU policy in the DCD allowing such a deviation from objective conformity requires fulfilment of certain preconditions. By declaring the necessity “to ensure sufficient flexibility”¹⁰, the EU legislator expressly allowed such a deviation included in Article 8(5) DCD by formulating these preconditions as discussed in the next Section of this article.

3 Interestingly, the EC did not initially include the above provision in the Proposal for a directive itself. It was introduced to the text of the Proposal after the EC transmitted it to the Council. Lack of such a provision was viewed as a shortcoming of the Proposal in its initial wording, so a suggestion was expressed to supplement the Proposal with a provision allowing the possibility for the contracting

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1 European Commission, ‘A Digital Single Market Strategy for Europe’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2015) 192 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>> accessed 11 November 2021.

2 European Parliament and Council Directive (EU) 2019/1151 of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law [2019] OJ L186/80.

3 European Parliament and Council Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

4 European Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (CSD 1999).

5 European Parliament and Council Directive (EU) 2019/771 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 (CSD 2019).

6 European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (DCD).

7 European Parliament and Council, ‘Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods’ COM (2015) 635 final, Chapter 1.

8 Monika Jagielska, Monika Namysłowska, Aneta Wiewiórowska-Domagalska, ‘The Changing Nature of the Consumer in the Digital Reality’ in Dariusz Szostek and Mariusz Załucki (eds), *Internet and New Technologies Law* (Nomos 2021) 46-47.

9 DCD, art 7-8. Similarly also for consumer sale (CSD 2019, art 6-7).

10 DCD, Recital 49. Similarly also for consumer sale (CSD 2019, Recital 36).

parties to agree on the supply of digital content or a digital service that does not meet the standards normally required.¹¹ In the result, Article 8(5) DCD was adopted, allowing a deviation from objective requirements. Its wording was inspired by proposals for the other two directives, namely Article 4(3) of the Proposal for the Online Sales Directive and Article 99(3) of the Proposal for the Directive on Common European Sales Law.¹² Likewise, the wording of Article 8(5) DCD resembles the regulation of the previous CSD 1999 (though the CSD 1999 was not familiar with and thus did not regulate digital content or digital service as such); it also allowed the possibility that lack of conformity cannot be imputed to the seller if the consumer was aware of that non-conformity.¹³ The CSD 1999 was based on the assumption that it was not possible to easily depart from the duty to ensure conformity. In this regard, the CSD 1999 itself provided that restricting or waiving the rights granted to consumers “should apply also to clauses which imply that the consumer was aware of any lack of conformity of the consumer goods existing at the time the contract was concluded”¹⁴. Therefore, Article 2(3) CSD 1999 in comparable manner as Article (8)5 of DCD provides:

- 4 There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
- 5 Thus, a comparison of the CSD 1999 with the DCD demonstrates that the European legislator’s policy since 1999 has already allowed a deviation from the objective requirements for conformity of a purchase object with the contract. This does not mean that the aim of the DCD is to provide lesser consumer protection. The different approach of the DCD is explained by the fact that DCD regulates digital content and digital service, which by their nature are different from tangible goods.
- 6 As such, this article aims to provide a comprehensive

11 European Law Institute, ‘Statement of the European Law Institute on the European Commission’s Proposed Directive on the Supply of Digital Content to Consumers’ (2016) 19. <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf> accessed 19 November 2021.

12 Reiner Schulze, Dirk Staudenmayer, *EU Digital Law: Article-by-Article Commentary* (Hart Publishing, Beck, Nomos 2020) 164.

13 CSD 1999, art 2(3).

14 *ibid*, Recital 22 of the preamble.

analysis on preconditions of deviation from objective requirements for conformity, as well as to provide analysis on online purchase agreements (as deviation from objective requirements of conformity of digital content or digital services are most often found in online forms). Finally, it draws conclusions on whether the possibilities of application of Article 8(5) of DCD does reduce the protection of rights of consumers. In order to answer the above questions and to provide the above analysis, the article compares the views expressed by various authors in legal literature, while also providing the authors’ own views on the issue under analysis.

B. Overview of Preconditions Allowing Deviation from Objective Requirements for Conformity

- 7 The DCD itself provides for certain preconditions that allow deviation (or a waiver as indicated in legal literature)¹⁵ from objective conformity requirements. Indeed, as was noted before, Article 8(5) DCD (read together with the DCD’s preamble, Recital 49) provides for the possibility of such a deviation:

[t]here shall be no lack of conformity within the meaning of paragraph 1 or 2 if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity laid down in paragraph 1 or 2 and the consumer expressly and separately accepted that deviation when concluding the contract.

- 8 Article 8(5) DCD contains six preconditions that could be deduced from the provision itself. These would form the basis for use of deviation from objective requirements. This provision makes clear that these preconditions should take place cumulatively. However, the provision in question is rather poor in terms of the contents of the preconditions. As a result, much of their interpretation should be carried out on the basis of the interrelation with other provisions of the Directive and, more importantly, with the Directive’s preamble. The burden of proof that these preconditions have been fulfilled will generally be on the trader.¹⁶ As it is rightly noted in European consumer law literature, these preconditions should be considered

15 Schulze, Staudenmayer (n 12) 162-168.

16 Schulze, Staudenmayer (n 12) 164. See further discussion in Section 2.2. of this article below.

separately, one by one.¹⁷ Therefore, the authors of the article consider these preconditions critically, while also discussing the practical implications of these preconditions by referring to typical examples that could arise in practice.

I. Deviation May Solely Concern the Objective Requirements

9 A possible deviation may only concern the objective requirements for conformity of a digital content or digital service with the contract. Such a distinction between subjective and objective criteria is made for the first time in European contract law.¹⁸ Though justification of this distinction goes beyond the scope of this article, it is sufficient to note that it is already subject to criticism in European legal literature.¹⁹ The DCD itself expressly envisages this condition by permitting deviation from the objective conformity requirements only. Indeed, Article 8(5) DCD contains the phrase that “[t]here shall be no lack of conformity within the meaning of paragraph 1 or 2 if [...]”. The reasoning for imposing such a condition is clear. Objective requirements of conformity with the contract are based on the understanding of what the consumer could reasonably expect from a particular type of digital content or digital service (including taking into account the statutory understanding of the features that a digital content or digital service must possess). For example, it is argued in legal literature that a consumer who has purchased a digital content or digital service that he can share with their family (for example, the access to the *Netflix* streaming platform) can reasonably expect to also be able to share it with friends.²⁰ A prohibition put forward by the trader on sharing the digital content or digital service with friends should be seen as a deviation from objective conformity (as such a prohibition cannot be reasonably justified).²¹ This means that a digital content or digital service must be of the expected quality and performance, 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 consumer (and, presumably, that the consumer actually examined before the contract was concluded).²² As can be seen, objective requirements for conformity with the contract under the DCD are specified using varying degrees of generality with verifying success. This has led some authors to question how simple it is to determine the objective requirements.²³

10 Nevertheless, it is for the contractual parties to have a possibility to deviate from the statutory standard (i.e., objective conformity requirements) if either a digital content or digital service has a lack of conformity which is known to the consumer. As it is rightly noted, such a possibility is based on the good faith principle, which would prevent the liability of the trader if the consumer knew about the lack of conformity with the contract at the moment of conclusion of the contract.²⁴

11 For instance, one of the objective requirements covers the situation that the digital content or digital service must be of the quantity—and possess the qualities and performance features including in relation to functionality, compatibility, accessibility, continuity and security—normal for digital content or digital service of the same type and which the consumer may reasonably expect.²⁵ Suppose a consumer contracts for an phone video game that is available on consumers phone market, but when downloading the game the consumer finds that it is only compatible with certain phone models, excluding the phone model of consumer. Such a deviation would mean that it corresponds to compatibility of the digital content being one of its “qualities and performance features”.

12 However, as it arises from the phrase “[t]here shall be no lack of conformity within the meaning of paragraph 1 or 2 if [...]”, a potential deviation cannot concern provisions of the Directive other than objective requirements of conformity with the contract (Article 8(1) and (2) DCD). For example, a deviation cannot be applied in respect of failure to install an update in every situation outside those specifically

17 *ibid*, 164-167.

18 Daniëlle Op Heij ‘The Digital Content Contract in a B2C Legal Relationship from a European Consumer Protection Perspective’ (2022) 11(2) *EuCML* 53, 57.

19 Reiner Schulze and Fryderyk Zoll, *European Contract Law* (3rd edn, Nomos Verlagsgesellschaft 2021) 49.

20 Karin Sein, Liliia Oprysk, ‘Limitations in end-user licensing agreements: is there a lack of conformity under the new Digital Content Directive?’ (2020) 51(5) *IIC* 594, 615

21 *ibid*, 606.

22 Hugh Beale, ‘Digital Content Directive and Rules for Contracts on Continuous Supply’ (2021) 12(2) *JIPITEC* 96, 97-98 <https://www.jipitec.eu/issues/jipitec-12-2-2021/at_download/CompleteIssue> accessed 1 December 2021.

23 Paula Giliker ‘Legislating on contracts for the supply of digital content and services: an EU/UK/Irish divide?’ (2021) 2021(2) *Journal of Business Law* 143, 146.

24 Schulze, Staudenmayer (n 12) 162.

25 Article 8(1)(b) DCD.

mentioned (Article 8(3) DCD), namely liability of the trader (Article 9 DCD²⁶); burden of proof (Article 10 DCD); or remedies (Articles 13-14 DCD).

- 13 Likewise, a deviation is not permitted from data protection requirements either. Where personal data are provided by the consumer to the trader, the trader should comply with its duties under the General Data Protection Regulation (GDPR).²⁷ Such duties should be complied with in cases where the consumer pays a price and provides personal data.²⁸ EU data protection law should fully apply to the processing of personal data in connection with any contract falling within the scope of the DCD.²⁹ According to Article 3 (8) CSDD, in the event of conflict between the provisions of that Directive and EU law on protection of personal data, then EU law prevails.
- 14 Lack of conformity of digital content or a digital service with subjective or objective requirements for conformity may, depending on the circumstances of the case, also lead to lack of compliance with requirements provided for by the GDPR, including core principles such as the requirements for data minimization, data protection by design, and data protection by default.³⁰ Article 3(1) DCD entitles consumers to invoke rights and remedies provided for in the CSDD even when they do not pay a fee but instead provide personal data to the trader. It is expressly recognized that the consumer will be able to proceed with the remedies provided in the event of failure to supply or lack of conformity of the service or digital content.³¹
- 15 It should be added that the precondition under discussion means that deviation should not cover

subjective requirements because subjective requirements depend on the contract itself. Therefore, it is not necessary to deviate from the contract provisions based on an agreement between the contractual parties. It is, therefore, rightly opined that any deviation from a subjective conformity criterion can be foreseen in the contract itself.³²

II. Consumer Must Be “Specifically Informed” about the Deviation

- 16 The DCD also provides the precondition that a trader is allowed to deviate from objective conformity requirements only if “the consumer was specifically informed” of the deviation in question (Article 8(5) DCD).
- 17 Comparing the wording of this condition with previous draft directives (i.e., Article 4(3) Commission Proposal for an Online Sales Directive and Article 99 (3) Common European Sales Law), it may be concluded that this condition is not new to EU law. A minor difference, however, was introduced, as it can be seen by comparing the wording of the above directives’ proposals: The knowledge criterion—“the consumer knew the specific condition”—was replaced with the condition “the consumer was specifically informed”. Therefore, the criterion that “the consumer was specifically informed” needs to be interpreted to mean that the trader must actively bring the information sufficiently clearly and transparently to the consumer’s attention. A common example would be the situation when the contract contains a clause stating the deviation (though it should be subject to separate acceptance as discussed further).
- 18 This criterion, therefore, would not be fulfilled in cases where the consumer needs to actively search for information, for instance if the information is in a hyperlink incorporating other hyperlinks or the consumer needs to scroll and search the hyperlink on the website³³ or when consent is included in a framework agreement for purchase of digital content or a digital service as a term of the contract (discussed later in the article).
- 19 The authors support the opinion that Article 8 (5) DCD can only be fulfilled if information regarding specific deviations was actively and directly brought to the consumer’s attention, so that a mere hyperlink would not suffice. Similarly, a mere reference to the end-user licence agreement of the right-holder in the standard terms and conditions of the trader

26 Schulze, Staudenmayer (n 12) 162.

27 European Parliament and Council Regulation (EU) 2016/679 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 [2016], OJ L119/1 (General Data Protection Regulation).

28 *ibid*, Recital 69 of the preamble.

29 Dominik Lubasz, Zanda Davida, ‘Consumer Personal Data as a Payment – Implementation of Digital Content Directive in Poland and Latvia’ (New Legal Reality: Challenges and Perspectives II, the 8th International Scientific Conference of the Faculty of Law of the University of Latvia, University of Latvia Press 2022) 521, 528 <<https://www.apgads.lu.lv/konferencu-krajumi/new-legal-reality-challenges-and-perspectives-ii>> accessed 11 May 2022.

30 General Data Protection Regulation, Recital 48 of the preamble.

31 *ibid*, Recital 24.

32 Schulze, Staudenmayer (n 12) 163.

33 Schulze, Staudenmayer (n 12) 164.

would not be sufficient either.³⁴ It is well known that consumers are unlikely even to look at lengthy terms and conditions, let alone read them with any care before they conclude a contract. Consumers should not be expected to read the small print of the contract to see if the express terms qualify or restrict the traders' "objective" obligations,³⁵ but should instead be informed sufficiently clearly and transparently regarding each deviation.

- 20 In this regard we can draw parallels with Article 5(1) Directive 97/7 as it regulates when the information is considered to be delivered to the consumer under EU law in regards to distance contracts.³⁶ In interpreting this provision, the Court of Justice of the European Union in *Content Services Ltd v Bundesarbeitskammer* (Case C-49/11) noted that, where information found on the seller's website is made accessible *only via a link sent to the consumer*, that information is neither "given" to nor "received by" that consumer within the meaning of Article 5(1) of Directive 97/7.³⁷
- 21 It should be noted however, that Article 8(5) DCD does not specifically state that a duty to inform the consumer lies upon the trader itself. Given the nature of digital content and the nature of its distribution, it seems that there would be no violation of this provision if information about the deviation were to be provided by a third party, as rightly ar-

gued in legal literature.³⁸ For example, digital content may be accessed in a second hand market on the digital application distribution webpage, which became known to a consumer by visiting the webpage of the main provider of the digital content (for example, a photo correction application), if the latter webpage, before revealing second market retail web pages, specifically informs the consumer about lack of objective requirements. In this situation, it would be appropriate to conclude that the consumer was "specifically informed" about lack of conformity. However, in similar cases, where consumers would be informed by third parties about lack of conformity of the object, one could predict that it would be quite difficult for the trader to prove that such information was given. At the same time, information about lack of conformity from third parties should not come into contradiction with the next criterion to be discussed further.

- 22 It should be also mentioned that, according to the provision under discussion (in the light of Recital 49 and the last sentence of Recital 53 of the preamble to the DCD), it may not apply if the consumer has acquired knowledge of a particular deviation either based on their own initiative or otherwise (for instance, through information circulating in social media or the internet community). For example, the author of a popular and widely cited blog explains that a particular software program is not compatible with a certain operating system. This would mean that the consumer may be aware of that deviation concerning the compatibility of that digital content. Even if the trader can prove that the consumer knew or should have known about the blog entry, this is not enough to fulfil the "specifically informed" criterion, as positive knowledge in this regard (from information provided by the trader) is necessary—less strict variations of knowledge, as in the CSD 1999,³⁹ will not be considered sufficient.⁴⁰
- 23 Unlike some directives which contain a specific form for providing information to the consumer,⁴¹ the

34 Gerald Spindler, 'Digital Content Directive And Copyright-related Aspects' (2021) 12(2) JIPITEC 111, 129 <https://www.jipitec.eu/issues/jipitec-12-2-2021/at_download/CompleteIssue> accessed 1 December 2021.

35 Hugh Beale, 'Scope of application and general approach of the new rules for contracts in the digital environment. In-depth analysis' (2015) Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Study commissioned at the request of the European Parliament's Committee on Legal Affairs (JURI) <http://www.epgencms.europarl.europa.eu/cmsdata/upload/4a1651c4-0db0-4142-9580-89b47010ae9f/pe_536.493_print.pdf> accessed 25 December 2021.

36 Article 5(1) of Directive 97/7 states: "[t]he consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him. In any event the following must be provided: [...]".

37 Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* [2012] ECLI:EU:C:2012:419, para 37.

38 Schulze, Staudenmayer (n 12) 164.

39 Article 2 (3) of Directive 1999/44/EC envisages that there shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

40 Schulze, Staudenmayer (n 12) 164.

41 For example, Annex II of the Consumer Credit Directive 2008 (Directive 2008/48/EC) contains a form which must be followed regarding provision of specific pre-contractual information. See European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements

DCD does not provide a specific form to be used when informing the consumer, and it is therefore left to the trader's choice as long as the preconditions contained in Article 8(5) are met.

III. Information about Deviation Must Be Provided Not Later Than at the Time of Concluding the Contract

24 Another precondition deals with the time when the consumer should be informed about the deviation. The DCD requires that the consumer is informed about the deviation “at the time of the conclusion of the [...] contract” (Article 8(5) DCD). As one may observe from this provision, a trader must inform the consumer right at the moment when the contract is concluded. The usual way of fulfilling this condition would be a separate statement by the trader, delivered to the consumer, explaining the deviation. The wording “at the time of the conclusion of the [...] contract” indicates that the consumer must be informed about the specific deviation at the moment when expressing acceptance of conclusion of the contract.

25 However, the question arises whether it is permitted to inform the consumer before conclusion of the contract. It is argued in legal literature that this question should be answered in the negative because pre-contractual information will not be a basis for information about the deviation because the consumer must be informed “at the time of the conclusion of the contract, not beforehand”.⁴² This opinion could hardly be considered as valid. The DCD itself allows the trader to inform the consumer about the deviation “before the conclusion of the contract”. Arguments in favour of the conclusion that the consumer may be informed before conclusion of the contract is twofold. Firstly, the last sentence of Recital 53 of the preamble to the DCD expressly allows for information about the deviation to be given to the consumer before conclusion of the contract. The wording of this provision does not seem to be a mere typing error as the same wording persists in the different language versions (e.g., English, Latvian, Polish, German).⁴³ Secondly, the wording of Article

8(5) DCD itself does not seem to prohibit informing the consumer before conclusion of the contract, as it states that “*at the time of the conclusion of the contract, the consumer was specifically informed.*” In other words, Article 8(5) DCD states only that the consumer needs to be specifically informed not later than at the time of conclusion of the contract.

26 In addition, the precondition allowing receipt of information from third parties, as previously discussed, expressly demonstrates the possibility also to inform the consumer about the deviation before conclusion of the contract. Likewise, information about a deviation may be included in the pre-contractual information submitted to the consumer as this information forms part of the contract. The obligation of information could be said to be fulfilled if the trader sends an e-mail to consumer specifically informing the consumer about deviation before the consumer has entered into the contract (for example, before a consumer has given their credit card data or pressed “buy” to complete the conclusion of an agreement). Therefore, the authors argue that Article 8(5) DCD must be read widely, not limited to the requirement to provide information at the time of conclusion of the contract.

27 At the same time, the mere possibility to inform the consumer before conclusion of a contract cannot be used as a tool to manipulate consumer choice or understanding, as other preconditions for a

if the trader specifically informs the consumer before the conclusion of the contract that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity [...]. The same sentence in the Latvian version states “*Tirgotājam vajadzētu būt iespējai no šādas atbildības izvairīties, tikai izpildot nosacījumus atkāpei no šajā direktīvā noteiktajām objektīvajām atbilstības prasībām, proti, tikai tad, ja tirgotājs pirms līguma noslēgšanas konkrēti informē patērētāju, ka digitālā satura vai digitālā pakalpojuma kāda konkrēta īpašība atkāpjas no objektīvajām atbilstības prasībām [...]*”; in Polish “*Przedsiębiorca powinien móc uniknąć pociągnięcia do odpowiedzialności wyłącznie wtedy, gdy spełni warunki umożliwiające odstępstwo od obiektywnych wymogów zgodności z umowa określonych w niniejszej dyrektywie, a mianowicie jedynie wtedy, gdy wyraźnie poinformuje konsumenta przed zawarciem umowy o tym, że określona cecha treści cyfrowych lub usługi cyfrowej odbiega od obiektywnych wymogów zgodności [...]*”; in German “*Der Unternehmer sollte einer dementsprechenden Haftung nur entgehen können, wenn er die Bedingungen für Abweichungen von den in dieser Richtlinie festgelegten objektiven Anforderungen an die Vertragsmäßigkeit erfüllt, was konkret bedeutet, dass der Unternehmer den Verbraucher vor Abschluss des Vertrags ausdrücklich darüber informiert, dass eine bestimmte Eigenschaft der digitalen Inhalte oder digitalen Dienstleistungen von den objektiven Anforderungen an die Vertragsmäßigkeit abweicht [...]*”.

for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

42 Schulze, Staudenmayer (n 12) 165.

43 For example, the English version of the last sentence of Recital 53 of the preamble to the DCD states that: “The trader should only be able to avoid such liability by fulfilling the conditions for derogating from the objective requirements for conformity as laid down in this Directive, namely only

permitted deviation from objective requirements still apply. It is doubtful that a trader could, for example, validly allege having properly informed the consumer about a deviation if the consumer was familiar with the deviation from the objective requirements years ago and the trader can prove it, for instance, via webpage server printouts.

IV.A “Particular Characteristic” Must Be Indicated

28 The DCD pursues the specific information approach, rejecting the general information approach concerning a characteristic of digital content or a digital service that is affected by a deviation. Thus, the Directive requires that “the consumer was specifically informed that a *particular* [emphasis added – authors’ remark] characteristic of the goods was deviating from the objective requirements for conformity laid down in” (Article 8(5) DCD). The rationale of the condition “a particular characteristic” prevents a trader from introducing a deviation or a set of deviations in general. For instance, such a situation could be where the contract states that the trader is not responsible for any lack of conformity, or the trader is not responsible for any non-compatibility with any existing operating system or device. These and similar clauses would therefore contradict the notion of “a particular characteristic” and would be contrary to the Directive. Therefore, it would not be sufficient, as is asserted in legal literature, if the trader expressly mentions a deviation from the objective requirements while not specifically identifying the pertinent characteristics.⁴⁴

29 Likewise, it is not sufficient if a trader simply describes the relevant feature of the digital content or digital service. According to Article 8(5) DCD (as well as Recitals 49 and 53 of the preamble to the DCD), the consumer needs to be able to comprehend the implications of this feature and to be enabled with this information to take a reasonable and deliberate decision to enter into a contractual relationship. Therefore, the information provided by the trader should indicate that a specific feature of digital content or a digital service deviates from the objective conformity requirements. It must be clear to the consumer that the reason this characteristic is mentioned is that the digital content or digital service does not meet the standard that could otherwise be expected.⁴⁵

30 Therefore, the contract clause must list the specific characteristic of a digital content or digital service

44 Schulze, Staudenmayer (n 12) 165.

45 Schulze, Staudenmayer (n 12) 164.

that is deviated from. For instance, the contract clause states that a particular video game or a software program is meant to be used in a tablet only or in another device. In addition, there are applications which operate only in a particular operating system, for instance, in computers using the *macOS* operational system, and, therefore, cannot operate so easily on a computer using *Windows*. For example, the video editing application *Final Cut Pro* is specified to run only on the *macOS* operating system, with *macOS* 11.5.1 as the minimum required operating system version (“*macOS* 11.5.1 or later”). In this case, the trader must fully indicate that this application is compatible with a particular computer operating system. Simultaneously, this example highlights the specific situation. Namely, if a digital content or digital service deviates from the objective requirements only partly, then the remaining part of the digital content or service must meet the objective requirements. For example, a trader informs the consumer that a software program operates only in a particular operating system, for instance, in smartphones using *Android*. This situation would mean that the software program supplied must comply with the objective (as well as subjective) requirements for conformity with the contract if it is used in smartphones based on *Android* but if the consumer uses a smartphone with a different operating program or uses the software program in another device, such use is subject to deviation from the objective requirements for conformity with the contract.

V. The Consumer Must Expressly Accept the Deviation

31 The last two preconditions are the consumer’s express (1) and separate (2) acceptance to the deviation. These preconditions arise from the phrase “the consumer expressly and separately accepted that deviation” contained in the Article 8(5) DCD, and in essence incorporate the principle that any deviation from the objective conformity requirements requires an agreement between the trader and the consumer (rather than just requiring the trader to unilaterally inform the consumer of such deviation). Moreover, as it will be described further below, the prerequisites of separate and express acceptance practically entail that this agreement is subject to a qualified form of consent, which excludes the possibility of obtaining it through the current widespread forms of agreement (such as so-called shrink-wrap, box-wrap, browse-wrap and sign-in-wrap agreements).

32 The precondition of “express acceptance” is to be interpreted in conjunction with Recital 49 of the preamble to the DCD, according to which consumer has to accept the deviation by way of active and

unequivocal (in other words express) conduct. The necessity for active and unequivocal conduct means that the consumer's acceptance cannot be tacit or implied, such as by statements often found in websites of traders which provide that the act of browsing the website constitutes acceptance to their general terms, or that the act of registering or signing into an account constitutes an acceptance to the terms of service described on the same webpage or available via a hyperlink. For example, a notice on a social media platform's registration form, which states that "By signing up, You agree to our Terms (hyperlink provided) and Privacy Policy (hyperlink provided)" would not meet the requirement of express acceptance even if instead of Terms and Privacy Policy, this notice would specifically describe the deviations from the objective conformity requirements.

- 33 As noted in legal literature, the precondition of "express" acceptance was already laid down in the EC's Proposal for an Online Sales Directive in order to prevent that acceptance could be made subject to standard terms and conditions,⁴⁶ and the phrase "expressly accepted" requires an individually negotiated contract clause.⁴⁷ In our view, however, the inclusion of deviations in the general terms of the contract, does not preclude the possibility of "express acceptance", and the necessity for "individually negotiated contractual clause" instead results from the requirement of "separate acceptance", which will be described in more detail in the next subsection.
- 34 Article 8(5) DCD requires that the "consumer expressly and separately accepted that [emphasis added] deviation when concluding the contract", therefore there needs to be a clear link between the consumer's acceptance and the deviation—acceptance needs to refer to, and only cover, the specific deviation from the objective conformity requirements as regards the particular characteristic of the digital content or digital service.⁴⁸ Therefore this criterion will not be fulfilled in the widespread "as is"⁴⁹ or similar clauses in the trader's terms

and conditions. This aspect was already argued for Article 99(3) Common European Sales Law which provided for a similar yet lower deviation standard.⁵⁰ The authors agree with the view expressed in legal literature, namely that in order to protect the reasonable expectations of the consumer, the courts should set high standards for "express agreement" to exclude the liability of traders, especially in cases where such exclusion would come as a surprise to a reasonable consumer,⁵¹ while "as is" clauses do not provide for a clear link between consumer's acceptance and the deviation, nor can it be concluded from them that the consumer has unequivocally agreed to accept these deviations.

- 35 In addition, the "express acceptance" criterion will also not be met if the trader has inferred it by using default options which the consumer is required to reject in order for deviation not to apply (for example pre-ticked boxes). A similar conclusion has already been reached by the EC Directorate-General for Justice and Consumers (JUST) regarding the phrase "if the performance has begun with the consumer's prior express consent and his acknowledgment [...]" contained in Article 16(m) of the Consumer Rights Directive (Directive 2011/83/EU).⁵² Namely, it was stated that "express" consent and acknowledgement for the purposes of Article 16(m) should be interpreted as requiring the consumer to take positive action, such as ticking a box on the trader's website. A pre-ticked box or accepting the gen-

to exclude seller's liability for defects (see Robin Paul Malloy, James Charles Smith, *Emanuel law outlines. Real estate* (3rd edn, The Emanuel Law Outlines Series, Wolters Kluwer 2015) 50). For example, regarding real estate, the *caveat emptor* doctrine is recognized as a legal rule in England, but is also indirectly applied in different EU Member States (see Christoph Ulrich Schmid and others, 'Real property law and procedure. General Report. Final Version' (European University Institute Florence/European Private Law Forum Deutsches Notarinstitut 2005) 59 <<https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/Research-Themes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>> accessed 28 November 2021).

46 Schulze, Staudenmayer (n 12) 165.

47 Karin Sein, 'The applicability of the digital content directive and sales of goods directive to goods with digital elements' (2021) (30) *Juridica International* 23, 27.

48 Schulze, Staudenmayer (n 12) 166.

49 Under an "as is" clause, the buyer agrees that the product quality is acceptable in its present condition, when the contract is signed. An "as is" clause places all the risk on the buyer, so it would be desirable to combine it with providing the buyer an opportunity to inspect. This clause is often recognized as an argument for applying the *caveat emptor* doctrine,

50 Karin Sein, 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, 374.

51 Sein (n 46) 27.

52 European Parliament and Council Directive 2011/83/EU of 25 October 2011 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 [2011] OJ L304/64.

eral terms is not likely to satisfy the requirements of Article 16(m).⁵³

- 36 Although at the outset the above-described preconditions for deviation from the objective conformity requirements and the precondition of “separate acceptance” described in the following subsection gives consumers significant protection in the digital content and services market where deviations are justified on the basis of private autonomy, the EU legislator may have indirectly encouraged Article 8(5) DCD being perceived as a simple formality by traders. Namely Recital 49 of the preamble to the DCD provides a set of examples of how the preconditions of express and separate acceptance could be fulfilled, i.e., “by ticking a box, pressing a button or activating a similar function”.
- 37 In this regard, the authors agree with the view that: firstly, it would not be reasonable to consider Recital 49 of the preamble to the DCD detached from the conditions set out in Article 8 (5) DCD, and the examples mentioned in this Recital of the preamble such as “ticking a box, pressing a button or activating a similar function” are simply examples and their use (such as ticking a box according to which consumer accepts general terms and conditions) does not in itself give grounds for believing that the trader is exempted from ensuring compliance with objective conformity requirements⁵⁴; and secondly, traders should follow the provision contained in Article 5 of the Unfair Contract Terms Directive,⁵⁵ according

to which written contractual terms must always be drafted in plain, intelligible language.⁵⁶

- 38 As noted by Professor Hugh Beale, the term “expressly” should be interpreted as requiring that the actual facts be made clear to the consumer and that application of the Unfair Contract Terms Directive is possible as well. Application of the Unfair Contract Terms Directive may provide consumers useful additional protection from the requirement that traders use plain and intelligible language. Namely, “expressly” in Article 8(5) DCD should equally be interpreted as requiring transparency.⁵⁷ Such interpretation would be desirable as non-transparent (difficult to understand) deviations would call into question whether consent was indeed given “expressly” (which requires unequivocal conduct according to Recital 49 of the preamble to the DCD).
- 39 In addition, the necessity to formulate agreements regarding deviations in plain, intelligible language arises indirectly from the obligation contained in Article 8(5) DCD that consumer must be “specifically informed” about each particular deviation. As explained above, this criterion requires positive knowledge from the consumer, which naturally implies the need for consumer to actually be able understand the deviation. Furthermore, it would be difficult to see how Article 8(5) DCD would be in line with the purpose of the DCD (stated in Article 1 DCD) to “contribute to the proper functioning of the internal market while providing for a high level of consumer protection” if the trader would be allowed to include deviations in a way that is not understandable to the average consumer, thereby preventing the consumer from making an informed choice as regards to acceptance to deviations.
- 40 The necessity to provide for deviations in plain, intelligible language perfectly fits with the aim of the EU legislator. That is, while providing for the possibility of deviating from objective conformity requirements, the EU legislator has striven to ensure that the consumer is completely and clearly aware of what and to what extent they agree to and take an active and deliberate conscious decision.⁵⁸ whenever the digital object provided deviates from the consumer’s reasonable expectations. Furthermore, the whole purpose of Article 8 (5) DCD is that deviations from the objective requirements of Article 8(1) and (2) are possible only under strict conditions.
- 41 Article 5 of the Unfair Contract Terms Directive con-

53 European Union Commission’s Directorate-General for Justice and Consumers (JUST), ‘Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the 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’ (2014) 66 <https://ec.europa.eu/info/sites/default/files/crd_guidance_en_0.pdf> accessed 20 November 2021. Essentially the same conclusion has been stated in: European Union Commission Notice ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ (2021) point 5.7. <[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(04)&from=EN)> accessed 1 May 2022.

54 Salvis Kārklis, ‘Jauns digitālā tirgus regulējums: Nākamgad gaidāmās izmaiņas un to piemērošanas problēmas’ [A New Digital Market Framework: Changes Expected Next Year and Their Application Problems] (2021) 47 (18) *Jurista Vārdi* 18, 25.

55 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive).

56 Schulze, Stadenmayer (n 12); Kārklis (n 54) 25.

57 Beale (n 21) 98.

58 Schulze, Stadenmayer (n 12) 163.

tains a “transparency requirement”. Schulze and Zoll note that the principle of transparency may be viewed as a further expression of the consumer’s reasonable expectations being among the central features of EU contract law. The content of the contract may only be influenced by factors that the consumer can expect. Such factors must be sufficiently clear in order to be acknowledged by the consumer. A transparency requirement is expressly included in several EU directives, for example, Articles 5(1) and 6(1) of the Consumer Rights Directive and Article 5 of the Unfair Contract Terms Directive. This principle is not merely a feature of EU consumer law, as it can also be seen in Article 3(1)(a) of the recent Platform Regulation, which states that providers of an online intermediation service shall [i.e., must] ensure that their terms and conditions are drafted in plain and intelligible language.⁵⁹ A transparency requirement is also contained in other provisions of the DCD, such as Article 19(1)(3), which requires that the consumer must be informed in a *clear and comprehensible manner* of any modification of the digital content or digital service, especially in situations where those modifications impact negatively the consumer where the obligation to inform is strengthened.⁶⁰

- 42 The concept of the transparency requirement contained in Article 5 of the Unfair Contract Terms Directive has been extensively discussed in the case law of the Court of Justice of the EU. As confirmed in *Jean-Claude Van Hove v CNP Assurances SA*,⁶¹ in order for a provision to be worded “in plain and intelligible language”, it must be comprehensible not only literally (formally and grammatically) but also in substance so that the consumer can easily foresee the consequences of such a provision. A similar conclusion can also be inferred from several other European Court of Justice judgments (*Kásler*,⁶² *RWE Vertrieb AG*,⁶³ and *RWE Bogdan Matei*⁶⁴). In order to evaluate whether a waiver is expressed in “plain and intelligible language” we have to take into account, for example, the level of attention expected from

the average consumer, who is reasonably well informed and reasonably observant and circumspect.⁶⁵ Another important aspect noted in *RWE Vertrieb AG* is that “it is clear that obligation to make the consumer aware [...] is not satisfied by the mere reference, in the general terms and conditions, to a legislative or regulatory act determining the rights and obligations of the parties. It is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned”.⁶⁶ This applies even if that the trader mentions mandatory statutory or regulatory provisions⁶⁷: if there are circumstances which would allow the consumer to rely on objective conformity requirements, it would apply as well. When applying this transparency requirement to a waiver (ie, a deviation), it is insufficient to refer simply to the respective objective conformity requirement, but rather it is necessary to demonstrate how a deviation from the objective conformity requirements takes place.⁶⁸

- 43 However, as noted by Oprysk, while providing clear information to consumers could theoretically help them decide on a provider, the impact is limited in practice if the supply is not diverse or a consumer is locked into using a particular platform anyway.⁶⁹ Transparency would be of greater importance if viable alternatives were available and if a consumer could choose and easily switch between them. In practice, contracts and end-user licence agreements could remain on a take-it-or-leave-it basis with no satisfactory alternatives.⁷⁰ Accordingly, the level of consumer protection in practice will most likely depend on the preferences of traders with the greatest network effects and bargaining power in the market.⁷¹ It is therefore to be hoped that in future the EU legislator will set out more restrictions for the possibility to deviate from the objective conformity requirements, to limit the opportunity for traders to deviate from such objective conformity requirements

59 Schulze, Zoll, 9) 51.

60 Martim Farinha, ‘Modifications on the digital content or digital service by the trader in the Directive (EU) 2019/770’ (2021) 25 (2) *Red-Revista Electronica De Direito* 84, 92.

61 Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* [2015] ECLI:EU:C:2015:262.

62 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282.

63 Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V* [2013] ECLI:EU:C:2013:180.

64 Case C-143/13 *RWE Bogdan Matei, Ioana Ofelia Matei v SC Volksbank România SA* [2015] ECLI:EU:C:2015:127.

65 Geraint Howells and others, *Rethinking EU Consumer Law* (Routledge 2018) 27-31.

66 Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V* [2013] ECLI:EU:C:2013:180.

67 *ibid.*

68 Schulze, Staudenmayer (n 12) 168.

69 Liliia Oprysk, ‘Digital Consumer Contract Law Without Prejudice to Copyright: EU Digital Content Directive, Reasonable Consumer Expectations and Competition’ (2021) 70(10) *GRUR International* 951.

70 *ibid* 952.

71 *ibid* 954.

that are derived from EU law.⁷² Similarly, according to Article 3(8) DCD, deviations currently from the objective conformity requirements do not affect the provisions of EU law on protection of personal data.

- 44 Alternatively, the EU legislator could at the very least provide that the scope of the Product Liability Directive⁷³ will be extended explicitly to digital content and digital service, while reducing the current limitation contained in Article 9(1)(b) of the Product Liability Directive, which provides that damage amounting to at least 500 euros must be caused for application of that Directive. According to Article 12 of the Product Liability Directive (and as confirmed in its preamble), no contractual derogation is permitted as regards the liability in relation to the injured person. Applying this directive irrespective of the deviations made within the meaning of Article 8(5) DCD could ensure at least partially effective remedies if a digital content or digital service does not provide the safety which a person is entitled to expect. As mentioned by the EC, “[d]igital content, software and data play a crucial role in the safe functioning of many products but it is not clear to what extent such intangible elements can be classified as products under the Directive. It is therefore unclear whether injured parties can always be compensated for damage caused by software, including software updates, and who will be liable for such damage”.⁷⁴
- 45 The situation “leave or confirm deviation” should be seen together with practical analysis: For example, whether the trader offers the same non-diversion digital content or digital service to other consumers, whether offering the deviating digital content or service to the consumer would cause disproportionate difficulties or significant economic loss, or whether the deviation has an objective justification for its necessity.
- 46 Likewise, the precondition under discussion cannot be applied in isolation from the rest of EU law, particularly other legal acts falling within EU

72 See. Article 8(1)(a) DCD

73 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 [1985] OJ L210/29 (Product Liability Directive).

74 European Commission. Inception Impact Assessment. Initiative ‘Civil liability – adapting liability rules to the digital age and artificial intelligence’ (Ref. Ares(2021)4266516 - 30/06/2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence_en> accessed 11 December 2021.

consumer protection law. In this way, EU law may not only affect the interpretation and application of the above preconditions that allow deviation but may be also applied in parallel to those preconditions by banning a trader from circumventing consumer protection guarantees under EU law.

- 47 As it is justly indicated in legal literature, a deviation from objective requirements is not likely to be individually negotiated (Article 3(2) Unfair Contract Terms Directive). Likewise, they do not fall within exceptions from application of regulations on standard contract terms: 1) they are not mandatory or otherwise prescribed; 2) they normally do not relate to the definition of the main subject matter of the contract; and 3) they do not relate to the “adequacy of the price and remuneration” (Article 1(2) or Article 4(2) Unfair Contract Terms Directive).⁷⁵ From the point of view of the possibility to use standard terms for drafting the deviation, it is possible to speak about “accusation” against the EC suggested in legal literature concerning drafting of the DCD⁷⁶ which relates to deviation because it also leaves the contract content to the parties, i.e., the trader in practice, so that the consumer is vulnerable to disadvantageous provisions in standard term contracts.⁷⁷ However, further discussion of these issues concerning the impact of the Unfair Contract Terms Directive on the drafting of the deviation from the objective requirements goes beyond the scope of this article and, therefore, should be left for further studies.

VI. The Consumer Must “Separately” Accept the Deviation

- 48 Finally, the DCD follows the separateness approach by requiring that a contract for a particular digital content or digital service itself be separated from the consumer’s acceptance of the deviation. Indeed, Article 8(5) DCD requires that the “consumer [...] *separately* [emphasis added] accepted that deviation when concluding the contract”.
- 49 As it can be seen from Recital 49 of the preamble to the DCD, the requirement for a “separate” acceptance of the deviation is not fulfilled if a statement containing such acceptance is contained

75 Schulze, Staudenmayer (n 12) 167.

76 Paula 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 Tatiana Synodinou and others (eds), *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer 2019) 311.

77 *ibid* 312.

in other statements or agreements, such as: 1) an agreement to standard terms and conditions; 2) an explicit acknowledgement by the consumer that the order implies an obligation to pay⁷⁸; or 3) consent to processing data. Accordingly, the word “separate” in the above provision should be interpreted restrictively as meaning that the consumer’s consent must be given separately from any other terms of the contract. However, this does not mean that consent must be included in a separate document. Thus, it is argued in legal literature that it will not be sufficient to obtain the consumer’s consent to the general terms and conditions of the contract in order to fulfil this condition.⁷⁹

- 50 The DCD does not provide a specific form to be used for acceptance, nor does it exclude that the consumer may give the statement of acceptance to another party than the trader.⁸⁰ Nevertheless, it can be concluded from the text of Article 8(5) DCD that for each digital content or digital service characteristic which deviates from the objective conformity requirements a separate acceptance is required. This conclusion is supported by the wording of Article 8(5) DCD according to which consumer must be “specifically informed that that a particular characteristic [emphasis added] of the digital content or digital service was deviating from the objective requirements for conformity and the consumer [...] separately accepted that deviation [emphasis added] when concluding the contract”.
- 51 A trader who wishes to deviate from any objective conformity requirement should do so with a short, easy-to-understand list of boxes or bullets setting out precisely, unambiguously, and separately those characteristics that do not meet the objective conformity requirements, requiring separate acceptance for each of them.⁸¹ Such an approach would indeed be preferable to listing all deviations in a single document and requesting acceptance for them as a whole. In this regard, the classical situation of conclusion of a contract depicts two parties of relatively equal bargaining power who negotiate the details of a transaction that each fully comprehends, and who then expressly agree to the resulting terms. However, in a typical consumer contract, the trader drafts a set of standard contract terms, without a consumer’s input and then submits these standard

terms to consumers, on a take-it-or-leave-it basis. The consumer pays attention not to the standard contract terms, but to a few primary terms, such as the product’s description and its price. The consumer, who is focused on primary contract terms, almost never reads or comprehends the standard contract terms, but indicates assent to them, e.g., by signing at the bottom of a long document or clicking a button labelled “I agree”.⁸² If traders were to summarize all the characteristics they might consider as deviations from the objective conformity requirements in a separate document (e.g., entitled “deviation terms” or “additional terms”) and ask for a consumer’s acceptance at the end of that document, there is a risk that consumers might perceive these terms similarly to standard contract terms and click the “I agree” button without actually reading them. Whereas if the consumer had to give separate acceptance for each characteristic that does not meet the objective conformity requirements, this would likely lead to greater consideration of these terms and contribute to informed decision-making.

C. Assessment of the Typical Forms for Limitation of Liability Used in Practice

- 52 Taking into account the above discussion and conclusions regarding the preconditions for deviation from the objective conformity requirements with the contract, it is now possible to evaluate whether frequently used forms of agreements, i.e., shrink-wrap, box-wrap, click-wrap, browse-wrap, and sign-in-wrap, would fulfil these preconditions. The authors will first describe the essence of each of these forms, and then explain which of them could fulfil the preconditions contained in Article 8(5) DCD.
- 53 *Shrink-wrap agreements* derive their name from the clear plastic wrapping that encloses goods (such as software packages), typically including a notice saying that by opening the wrapping, the purchaser agrees to the terms and conditions enclosed.⁸³ Shrink-wrap agreements are most common in the market of goods (including goods with digital elements) but may also occur when purchasing digital content

78 This acknowledgement is required in the context of Article 8(2) of the Consumer Rights Directive as one of the formal requirements for distance contracts.

79 Schulze, Staudenmayer (n 12) 163; Spindler, ‘Digital Content Directive and Copyright-Related Aspects’ (n 33) 129.

80 Schulze, Staudenmayer (n 12) 166.

81 Kärklis (n 54) 25.

82 Gregory Klass, ‘Empiricism and Privacy Policies in the Restatement of Consumer Contract Law’ (2019) 36(1) Yale Journal on Regulation 45, 52 <<https://openyls.law.yale.edu/handle/20.500.13051/8282?show=full>> accessed 11 December 2021.

83 Lynden Griggs and others, *Commercial and Economic Law in Australia* (3rd edn, Wolters Kluwer 2018) para 662; Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press 2019) 67.

if the tangible medium supplied to the consumer serves exclusively as a carrier of digital content (Article 3(3) DCD). For example, this situation would apply where a USB or a CD (covered in a wrapping) contains an installable computer operating system or video game. Similar to shrink-wrap agreements are *box-wrap* agreements, which involve opening a box as a sign of assent to the terms of the contract. In both cases, the contract is packaged with the product,⁸⁴ and, accordingly, they would be subject to the same conclusions.

54 *Click-wrap agreements* are a method of including terms and conditions in an online contract, i.e., formed on the internet. This type of agreement differs from a shrink-wrap agreement, as in the case of a click-wrap agreement, the user assents to a list of terms by clicking an onscreen button marked, for example “Agree”, “I accept”, “I consent” or similar. A click-wrap agreement has the advantage of allowing the user to read the specified term(s) before consenting.⁸⁵

55 *Browse-wrap agreements* are used by many websites and consider that the act of browsing the website constitutes acceptance of their terms.⁸⁶ These terms and conditions, placed somewhere on the website, are accessible through a hyperlink and will regulate the relationship between the parties despite consumers likely never having seen them.⁸⁷ Browse-wrap agreement is by nature a questionable form of agreement⁸⁸ and has been critically viewed by the courts, including those established in third countries. As noted by Momberg, in *Specht v. Netscape Communications Corp.* an arbitration clause included in a browse-wrap contract was declared unenforceable. In that case, the browse-wrap link stated “Please review and agree to the terms of the Netscape SmartDownload software licence agreement before downloading and using software”, but users were not required to click on that link as a condition of downloading Netscape’s software. The Court decided that users were not bound by Netscape’s

licence because they had not viewed the licence agreement and, therefore, they had not assented to the contract. In other words, downloading a software does not mean that the user agrees to terms that they are not reasonably aware of.⁸⁹

56 *Sign-in-wrap agreements* are similar to browse-wrap agreements. In a sign-in-wrap agreement, the user is presented with a button or link to view the terms of use. Unlike click-wrap agreements, these agreements do not have an “I accept” or similar box/button (i.e., they do not require positive action by the user). Instead, they usually contain language to the effect that, by registering for an account, or signing into an account, the user agrees to the terms of service which they can navigate from the sign-in screen.⁹⁰ Compared to browse-wrap agreements, sign-in-wrap agreements actually give consumers a chance to read the terms offered by the trader before the consumer is considered to have consented to them.

57 Out of all these forms of agreements, only *click-wrap agreements* could meet the requirements contained in Article 8(5) DCD. Firstly, the problem with *shrink-wrap agreements* (and *box-wrap agreements*) is that the terms contained in them are meant to be binding on the consumer even though they are unknown at the time the contract is entered into, thereby not fulfilling the precondition that information must be provided not later than at the time of conclusion of contract. Similarly, a separate acceptance cannot be established since the act of opening a wrapping is understood as simultaneous acceptance of all terms and conditions. Furthermore, since these terms are unknown to the consumer, it cannot be established that consumer unequivocally intended to agree to the specific deviations. Secondly, a *browse-wrap agreement* would manifestly not meet a number of preconditions envisaged by Article 8(5) DCD, including “specifically informed” (information is not sufficiently clearly and transparently brought to the consumer’s attention), as well as “separate” and “express acceptance” since it requires acceptance separately from other statements or agreements and by way of active and unequivocal conduct (express acceptance under Article 8(5) DCD cannot be implied). Thirdly, a *sign-in-wrap agreement* does not meet the precondition of “express acceptance” since such acceptance cannot be implied, and consumer might already have signed in before even considering purchasing a specific digital content/service. In addition, this agreement does provide for “separate acceptance” from other

84 Rodrigo Momberg, ‘Standard Terms and Transparency in Online Contracts’ in Alberto De Franceschi, *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution* (Intersentia 2016) 192.

85 Davidson (n 81) 68.

86 Griggs (n 81) para 662.

87 Marco Loos, Joasia Luzak, ‘Update the Unfair Contract Terms Directive for Digital Services’ (Study requested by the European Parliament’s Committee on Legal Affairs (JURI) European Union 2021) 17 <[www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU\(2021\)676006_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf)> accessed 11 November 2021.

88 Momberg (n 82) 195.

89 *ibid.*

90 Gordon Hughes, ‘Enforceability of Contract Terms Displayed on Social Media’ in Marita Shelly, Margaret Jackson (eds), *Legal Regulations, Implications, and Issues Surrounding Digital Data* (1st edn, IGI Global 2020) 9.

statements contained in the sign-in-form (such as standard terms, privacy policy, cookies policy, etc.). Additionally, the criterion “information about the deviation must be provided not later than at the time of conclusion of the contract” is to be understood so that the consumer needs to be informed before concluding a contract. This criterion would not be fulfilled by arguments that the consumer signed into the trader’s website two years ago and therefore has been properly informed about deviations regarding each of the trader’s products/services and the consumer has accepted these deviations by signing into the website.

58 As regards to *click-wrap agreements*, they are similar to the possible forms of deviation mentioned in Recital 49 of the preamble to the DCD “ticking a box, pressing a button or activating a similar function”. It is noted in legal literature that the formerly used ways to incorporate restrictions of intellectual property law in contracts such as “click-wrap” or “shrink-wrap” contracts can no longer be used because an explicit and separate agreement is necessary.⁹¹ In a practical sense this statement would usually be correct since end-user licence agreements are normally drafted similar to general terms and conditions—without requiring separate and express consent to author-imposed limitations/restrictions regarding the specific digital content/service. But in a theoretical sense “click-wrap” agreements could certainly be used to fulfil the conditions of Article 8(5) DCD.

59 For example, a trader may include the text below together with the following checkboxes:

“Limited liability company ‘ABC’ has included in the computer program ‘ABC’ a system of copyright protection (technical protection measures), which prevent any reproduction or transfer of the computer program ‘ABC’ to a third party. By clicking on the following boxes and purchasing the computer program, the I accept that I waive my right to:

make private copies;

make back-up copies;

transfer (including selling or lending) the program to third parties.

60 This purely illustrative example generally satisfies the “specifically informed”, “particular characteristic”, and “separately accepted” preconditions. To ensure that the “express acceptance” condition is complied with, these boxes are not previously “checked” or activated automatically by agreeing to the general

terms and conditions. Pursuant to Article 8(5) DCD, the above text with checkboxes would be included not during installation phase of the computer program but before the purchase of the program is finished.

61 This way, if the consumer wants to make a private copy, back-up copy or sell the computer program to a third party (in accordance with the conditions laid down in *UsedSoft GmbH v Oracle International Corp*⁹²) but is unable to do so in practice because of the technical protection measures used, no lack of conformity can be established within the meaning of Article 8(1) and (2) DCD, and the consumer is not entitled to the remedies provided for in that Directive (which would be transposed into national law). If, however, the same text was included in the trader’s general terms and conditions which would need to be scrolled through with an “I accept” checkbox at the end, consumer would be entitled to remedies, as the “separate acceptance” (from other statements or agreements) precondition would not be fulfilled. Whereas if general terms (inter-alia containing deviations) were included in a hyperlink with an “I agree” checkbox next to it, the precondition “specifically informed” would also not be met.

62 Thus, although the legal literature sources do not contain a detailed assessment as to which forms of obtaining consent are in conformity with Article 8(5) DCD, the authors of this article support the view expressed by *Staudenmayer* that “clickwrap agreements could fulfil the conditions of this provision, while browse-wrap or shrink-wrap agreements would not”.⁹³ However, it should be clarified that click-wrap agreements only allow for the possibility to fulfil the preconditions contained in Article 8(5) DCD, but *in itself* neither fulfil nor violate them (it still needs to be examined whether all the preconditions of Article 8(5) DCD are met).

63 Finally, to answer the question as to how a trader in a physical shop could provide for deviations according to Article 8(5) DCD, the essence would likely be similar to click-wrap agreements—there could be an additional agreement or a marked paragraph in the text of the contract for each deviation, which would need to be either signed or otherwise separately accepted (e.g., by checking a box, putting a “+” or “x” sign into it by hand) before the contract is concluded⁹⁴. However, even a trader that uses such a

91 Sein, Spindler (n 49) 365, 374.

92 Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] ECLI:EU:C:2012:407.

93 Schulze, *Staudenmayer* (n 12) 166.

94 Haslinger/Nagele Rechtsanwalte GmbH, ‘The New Warranty Law – Everything Clear?’ (Haslinger/Nagele Rechtsan-

form must comply with the requirements of Article 8 (5) DCD (described in more detail in Section 2 above) regarding the *content* of the deviation.

D. Conclusion

64 The present article deals with the understanding of the EU policy concerning a deviation from objective requirements for conformity with a contract of digital content or digital service. This EU policy is encapsulated in Article 8(5) DCD and is considered as an exception from the general regulation for ensuring conformity with the contract of digital content and digital service. The permitted use of the discussed deviation is based on six preconditions from Article 8(5) DCD that should be established cumulatively and interpreted narrowly and strictly. These preconditions are as follows: a deviation may solely concern the objective requirement; the consumer must be specifically informed about the deviation; information about the deviation must be provided not later than at the time of conclusion of the contract; the particular characteristic of the deviation must be indicated; the consumer must expressly accept the deviation; and the consumer must separately accept the deviation. The article demonstrates that traders could easily use a permitted deviation from objective requirements in their proposed and concluded transactions as fulfilment of these preconditions in general is relatively easy. At the same time, the article argues that traders could not use the deviation in all possible instances. For instance, it would not be permitted to deviate from any other trader's duty under the DCD as well as EU data protection legal acts. There, the consumer would be able to seek remedies when lack of compliance with the requirements of Regulation (EU) 2016/679 constitutes lack of conformity with requirements of digital content or digital service. At the same time, the article raises serious concerns about possible abuse of a deviation permitted under Article 8(5) DCD by traders. In this regard, the article analyses five frequently used forms of agreements (shrink-wrap, box-wrap, click-wrap, browse-wrap, and sign-in-wrap) to evaluate whether they fulfil above preconditions, arguing that only click-wrap agreements could meet the requirements contained in Article 8(5) DCD, although not automatically. This conclusion is discussed together with a hypothetical example of a statement in the form of a click-wrap agreement that could possibly be used to satisfy the preconditions envisaged by Article 8(5) DCD. However, the potential abuse issue requires further studies analysing existing practices in respect of each

precondition separately. Likewise, further studies are necessary to investigate deeper interrelation with other EU legal instruments such as regulation of unfair contract terms or e-commerce which is characterised in the present article as far as it is possible considering the theme of the article.

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wälte GmbH 2021) <www.haslinger-nagele.com/en/news/the-new-warranty-law-everything-clear/> accessed 18 November 2021.