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**The application of the Consumer Rights  
Directive to digital content**

**IMCO**





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **The application of the Consumer Rights Directive to digital content**

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## Questions by the IMCO Committee

The topic of digital content in relation to the Consumer Rights Directive is highly controversial among stakeholders. The European Commission has commissioned two studies expected to be published by mid 2011 to examine the economic and legal impact. The IMCO-Committee has asked me to answer the following questions:

1. Should the topic of digital content be dealt with by the legislator in the ongoing legislative process on the Consumer Rights Directive or preferably in the context of the Common Frame of Reference?
2. Is it recommended to include the issue of digital content in the Consumer Rights Directive? What are the advantages and disadvantages?
3. If digital content is to be included in the Consumer Rights Directive:
  - a) How should it be defined (e.g. good or service)?
  - b) In which Chapter(s) of the Directive should it be included?

## Executive summary

1. The topic of digital content should be dealt with in both the Consumer Rights Directive and the Draft Common Frame of Reference (DCFR)/the Optional Instrument.
2. The crucial policy issue in the field of rules on digital content is the right of withdrawal in the case of a transfer of digital content for permanent use. The decision on this policy issue is equivalent to the decision on whether or not the Legislator relies on the traders and producers of digital content to provide for copyright protection measures, which would avoid a large part of abusive behaviour by the consumer.
3. Digital content as part of a definition on services is extremely poor drafting. The typology of contracts in the Commission's Proposal and the preliminary position of the Council needs to be revised.
4. The application of the future Directive to digital content should differentiate on how the digital content becomes the object of the contract. The policy issues must be decided differently depending on whether digital content is transferred to the consumer for permanent use or only used for some time or not used by the consumer at all but by a service provider in rendering his service (transfer of digital products, use of digital products and digital service).
5. For most policy issues (apart from the right of withdrawal) the application of sales law to contracts for the transfer and permanent use of digital content seems to be reasonable. Implied terms on the quality could be easily applied and likewise would the application of sales law remedies for defective goods, passing of the risk and late delivery suit for digital content.
6. One should be very careful in adding an express clause to Annex III on restrictions to use or copying. Many court decisions in that respect will depend on the kind of use (permanent or temporary) agreed upon by the parties.
7. The simplest way to add rules for digital content would be to elude the reference to tangibility in the definition of goods in combination with adding exceptions for some specific assets (cf. article 2 CISG). This would make a clarification necessary that rules on goods are only applied where the consumer obtains the possibility of use on a permanent basis or in a way permanently similar to the physical possession of a good.
8. A possible definition could be expressed as follows: "digital content' means an intangible item in the form of digital data stored on a data storage medium, irrespective of whether or not it is transferred together with that medium."



## Part I: Basic questions<sup>1</sup>

### I. Cases at stake: digital content as object of the trader's obligation

Whether digital content (or digital products) should be incorporated in the imminent Consumer Rights Directive is the issue raised by and before the IMCO Committee of the European Parliament. The notion of digital content thereby represents a large variety of objects of the contractual obligations (i.e. different kinds of digital content) on the one hand and several ways in which such an object is subject matter of a performance owed to the creditor<sup>2</sup> on the other.

#### 1. Kinds of digital content

The decisive fact in digital content is that it is usually not transferred in the stricter sense of the word. Instead, a copy of the original data is made, which is however of a quality that is equal to the quality of the original. In court practice – and likely also in everyday life – the most important case of digital content in consumer contracts is software. Software is not always seen as a uniform object of the debtor's obligation. One traditional line of differentiation is drawn here between standard software and individually proposed software.<sup>3</sup> However, this differentiation, which is nevertheless on the decline, would not play a significant role in consumer contracts, as consumers usually obtain standard software. Software is protected by EU-law under the Directive 2009/24/EC on the legal protection of computer programs,<sup>4</sup> which contains specific rules on exhaustion in article 4.

A second major digital content, which forms part of consumer contracts, are music, films and pictures. This kind of content is traditionally regulated under general copyright protection laws in the member states, which are harmonised in part by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.<sup>5</sup>

Databases also belong to the category of digital content and even if their importance for consumer contracts may not form the crux, databases are widely used by consumers, an example being press databases. The European Union has established its own intellectual property right for databases under Directive 96/9/EC on the legal protection of databases<sup>6</sup>.

This list is by no means exhaustive. Other examples of digital content covered by this briefing note would be e-books or e-newspapers, which are increasingly common for consumers. Furthermore RSS-feeds could be analysed as digital content, which they are (small items of software/scripts); however, the core object of the contract is not the script but the service rendered by referring to sources of information.

#### 2. Kind of use by the creditor

When considering the regulation of digital content in consumer contracts one must keep in mind that practice acknowledges several methods as to how digital content may be the object of a performance promised to a creditor:

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<sup>1</sup> I am very grateful to Linda Young, Sonja Benninghoff, Carmen Langhanke and Grzegorz Russek for their help, their comments and our discussions on several drafts of this paper. All remaining errors are mine.

<sup>2</sup> The terms of creditor (instead of consumer) and debtor (replacing the trader) are used here to emphasise that questions of general contract law are at stake. The European Legislator here bears a great responsibility for the Member States' systems of contract law, which should not be interfered with, devoid of political reasons which could not technically be transposed otherwise.

<sup>3</sup> E.g. for the **CISG** see *Schlechtriem/Hachem* in: *Schlechtriem/Schwenzer* (Ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3<sup>rd</sup> Edition, Oxford 2010, Art. 1 No. 18; for **Austria**: *Staudegger*, JBI 1998, 604. For **Switzerland** see *Honsell*, *Standardssoftware- und Sachmängelhaftung*, Festschrift zum 65. Geb. von Mario M. Pedrazzini, Bern, 1990, p. 314.

<sup>4</sup> Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5. 5. 2009, p. 16.

<sup>5</sup> Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22. 6. 2001, p. 10.

<sup>6</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27. 3. 1996, p. 20.

Software, at least standard software, is usually transferred to a consumer on a permanent basis for permanent use.<sup>7</sup> And this is also the case with several other kinds of digital content. Nevertheless, the permanence of the transfer is not in all cases and not in every aspect equivalent to a transfer of property in tangible goods: The object transferred is the data of the digital content.<sup>8</sup> The other elements of the relationship between the parties are determined by questions of the use by the creditor and its restrictions. For example, the onward transfer is not allowed in every case, as usually number and purposes of copies are limited. Most of these questions of and restrictions to use permanently transferred digital content are rooted in the fragile nature of digital content, which allows the possibility of the creditor to abuse his factual position by copying and distributing the digital content.

Other digital content is only let to the creditor for a limited period of time.<sup>9</sup> One important example is the download of music data which may be used only once or for a fixed period of time. Similar situations may occur, when software is let for a monetary consideration, such as use for test purposes. Here, the debtor will usually protect himself by technical measures, which for instance block further use beyond the end of the use period. Although such measures seem to raise problems (e.g. of conformity with quality requirements) with the contract in the case of an envisaged permanent transfer of digital content, in the case of a mere use such restrictive instruments appear to be self-evident.

Finally, digital content may form part of a service (in the narrow sense). The use of databases may serve as one example for such a service. Further examples are RSS-feeds, Application Service Providing (ASP)<sup>10</sup> or Streaming. Debtors of such services face similar problems as those who offer a permanent transfer of data in digital content only in so far as the result of the service – usually the information – or a tool which helps rendering the service is copied and circulated.

### 3. Involvement of data storage medium – exhaustion

For the legal assessment of contracts on digital content, the factual issue as to whether the digital content is delivered on a storage medium or not is of decisive importance in EU-Law and the legal orders of the member states. The reason for that lies in the concept of exhaustion, which is an important mechanism to restrict the legal position of a copyright holder: The first sale by him or with his consent of the original of a work or copies thereof exhausts the right to control resale of that object. It is common ground that, where the intellectual property is incorporated in a material medium, namely a good like a CD or a DVD, the rules on exhaustion apply.

On the other hand, exhaustion in the case of digital content, which has not materialised in a tangible form, is widely debated. The majority view holds the concept inapplicable in this case<sup>11</sup>, unless the digital content is stored in a storage medium (like CD or DVD) and transferred by transfer of the medium.<sup>12</sup> This is supported by several rules and recitals in European Union law.<sup>13</sup> There is, however, a growing number of authors demanding the development of similar rules for digital content.<sup>14</sup>

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<sup>7</sup> Cf. *Apathy* in KBB, § 1054 ABGB, No. 2

<sup>8</sup> As to the possible transfer of a storage medium (CD, DVD etc.) see infra sub I.3.

<sup>9</sup> Cf. *Heusler/Mathys*, IT-Vertragsrecht, Zürich, 2004, p. 43.

<sup>10</sup> Cf. *Hantschel*, Softwarekauf und -weiterverkauf, Diss. Bayreuth 2010 (forthcoming).

<sup>11</sup> See for **Germany**: OLG Munich, CR 2008, 551; OLG Frankfurt, CR 2009, 423.

<sup>12</sup> See for **Germany**: BGHZ 145, 7

<sup>13</sup> See recital 29 to the Directive 2001/29/EC.

<sup>14</sup> E.g. *Hoeren*, CR 2006, 573; *Hantschel*, Softwarekauf und -weiterverkauf, Diss. Bayreuth 2010 (forthcoming).

## II. A matter of system: Types of contract under EU-Law or “goods and services”?<sup>15</sup>

Typology of contracts is one of the weakest points in European Union Private Law. The rather simple reasons for that weakness are, first, the thinking of European Union Law in the categories of the fundamental freedoms, which are geared towards administrative impediments to free trade and, second, the establishment of service as the general subsidiary category<sup>16</sup>, which makes the binom “goods and services” a formula covering nearly the complete range of business activities in the internal market.<sup>17</sup> The dichotomy of goods and services thereby forms a good and important part of the *acquis communautaire*.

However, the simple categories of goods and services are not tailored to the needs of contractual risk distribution, nor do they meet the technical needs of a coherent system of contract law. For instance, a separate category of use (as in contracts for the lease of goods) does not exist in European Union law, though it is of utmost importance. To illustrate the consequences of this shortcoming under the Distance Selling Directive, reference can be made to the ECJ decision in *easyCar v. Office of Fair Trading*<sup>18</sup>, where the Court held car hire to be a transport service under the Distance selling Directive 97/7/EC<sup>19</sup>, referring to the consequences of the directive but not to other aspects of contractual risk distribution.

A further example is the handling of contracts involving continuous or periodic performance of a contractual obligation.<sup>20</sup> In such contracts, information duties would have significantly diverging effects from contracts for a simple exchange of performances like sales contracts. Moreover, termination of the contractual relationship will usually not have a retroactive effect and this rule would – perhaps – apply also to the consumer’s right to withdraw.<sup>21</sup>

In addition to that, a contract provides in many cases for an obligation to restore goods or other assets let for the contractual purpose at the conclusion of the period for use. In such cases the consumer’s right to withdraw does not add this restitution of the assets to the usual content of the contract and therefore concentrates on restitution of the value of the use or other benefits the consumer obtained under the contract.

Furthermore, the difficulties in transposition and application are to be named. The legal orders of many member states provide well-established systems of types of contracts, which are not at all compatible to the broad notion of service sometimes found in European Union law. Contracts, which in many member states are analysed as contracts of the sale of goods, should not for policy reasons be analysed differently under EU law,<sup>22</sup> if the same policy decision could be implemented by other means.

## III. Peculiarities of contracts on digital content

Following the peculiarities of digital content, certain peculiarities are typical for contracts on digital content. First, contracts on digital content usually involve questions of copyright law. In most cases, a licence element is included in the relationship between debtor (trader) and creditor (consumer), either analysed as a part of the contractual rights and duties or otherwise seen as a separate proprietary source of obligations and justification to interfere with the rightholder’s copyright position.

<sup>15</sup> See the work done by *Kümmerle*, “Güter und Dienstleistungen” – Vertragstypenbildung durch den EuGH, in *Andrés Santos/Baldus/ Dedek*, *Vertragstypen in Europa*, Munich, 2011 (forthcoming).

<sup>16</sup> See the wording of article 57 TFEU.

<sup>17</sup> Typical exceptions are contracts involving immovable property.

<sup>18</sup> ECJ 10. 3. 2005, C-336/03.

<sup>19</sup> Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4. 6. 1997, p. 19.

<sup>20</sup> Cf. III.-1:110 DCFR.

<sup>21</sup> See ECJ 15. 4. 2010, C-215/08 – *E. Friz GmbH v. Carsten von der Heyden*.

<sup>22</sup> See the confusion in **Germany** on § 312d paragraph (3) No. 2 BGB, which transposes article 6(3) of the Distance selling Directive 97/7/EC, and the different positions on that point in BGH NJW 2006, 1974 (digital content covered by “services”); *Bunz*, ZGS 2009, 112 (not covered because sales contract); *Lorenz*, JuS 2000, 840 (not covered); *Wendehorst* in: *MünchKommBGB*, § 312b No. 31.

The main issues in this respect are the restriction on the part of the creditor of onward transfers of the digital content and restraints to copying. While the latter issue exists for technical reasons and the contract only reacts to the technical possibilities, the former relates to the rules on exhaustion: In cases of tangible goods, the onward transfer is usually not barred by intellectual property rights, because the first sale of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of the tangible goods.<sup>23</sup> In contrast, the principle of exhaustion is usually not applied in the case of digital content.<sup>24</sup> The licence element in at least most contracts on digital content has its origin in this state of copyright law.

On the other hand, contracts on digital content in most cases involve necessary acts of (temporary) reproduction. Hence, a minimum of entitlement to copy or reproduce is frequently fundamental to have digital content in an acceptable quality. The crucial question usually is, therefore, how far reproduction rights of the creditor extend. This is to be answered by the licence element of the contract but is also of significant influence on the whole bargain.

Digital content is of intangible nature<sup>25</sup> and is usually not transferred to the creditor in a strict sense: The creditor usually obtains a copy identical to the original data kept by the debtor. Thus the transfer of digital content normally lacks the element of abandonment, which is necessary in the case of tangible goods and the same is true in the case of a re-transfer, for instance, after termination. Restitution of digital content in the event of failure of the contract is usually neither (completely) possible<sup>26</sup> nor necessary. Understood in a wider sense of the word, an obligation to "refund" digital content would, therefore, usually be fulfilled by deleting the data on the side of the creditor, for instance by uninstalling the software delivered or alternatively making it useless by inhibiting its use through technical means. There is no general conflict with copyright law in such cases of "restitutionary" obligations, because the creditor would no longer be allowed to make use of the digital content by copyright rules.

In this context, a considerable practical problem appears to be the so-called fraudulent creditor. It seems to be a significant temptation for creditors in the case of a failed contract not to delete the data, as it appears to be a far reaching practice to copy digital content in breach of the licence element of the original contract. It is not a legal matter to estimate how widespread the phenomenon of the fraudulent creditor really is, but it undoubtedly exists. Thus, the problem of the fraudulent creditor (or consumer) is therefore not a legal one but a practical issue.

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<sup>23</sup> See recital 28 to the Directive 2001/29/EC.

<sup>24</sup> See supra sub I. 3.

<sup>25</sup> It is argued among **German** lawyers that digital content is tangible as it has to be stored in a storage medium (like a pc), which is tangible, see *Lorenz* in *Münchener Kommentar zum BGB* § 474, No. 10. However, this remains a minority view.

<sup>26</sup> Which as such under actual **Austrian** law would exclude withdrawal in application of § 5f No. 3 KSchG: *Wiebe/Prändl*, *ÖJZ* 2004, 634.

## Part II: Digital content in EU-Law, Member States' legal orders and in the Proposal

### IV. State of EU-Law

At present, EU-Law follows a mixed approach to digital content. On the one hand, the rules on copyright and related rights in the information society<sup>27</sup> provide for a common basis in the field of intellectual property. These rules also privilege "effective technical measures" designed to prevent copyright infringement and oblige member states to establish adequate legal protection against the circumvention of these measures, pursuant to article 6 of Directive 2001/29/EC.

In contrast, the consumer acquis only in part applies to digital content. First, digital content is excluded from the scope of application of the Consumer Sales Directive 1999/44/EC<sup>28</sup> by defining consumer goods as tangible movable items. The Distance Selling Directive 97/7/EC<sup>29</sup> applies to contracts on digital content, but excludes the application of the right of withdrawal in the case of a "supply of audio or video recordings or computer software which were unsealed by the consumer"<sup>30</sup> and for contracts "for the provision of services if performance has begun" (article 6(3) of the Directive 97/7/EC). The latter formula laid much pressure on the notion of a service which remained undefined in the Directive. The *easyCar* judgment<sup>31</sup> demonstrates the ambiguity of the article. The first rule is sometimes applied by way of analogy to all cases of software downloaded from the internet.<sup>32</sup> Whether the second rule applies to digital content remains nonetheless an open question. On the other hand the Doorstep Selling Directive 85/577/EEC<sup>33</sup> and the Unfair Terms Directive 93/13/EC<sup>34</sup> apply to contracts on digital content without any restriction.

As regards terminology, digital content is not necessarily considered a "service" in EU-Law: It is seen as a service in the sense of the fundamental freedom to provide services under articles 56 and subsequent TFEU. However, neither EU copyright rules nor the consumer acquis have taken a general decision on that point, nor has the Services Directive 2006/123/EC. As the notion of service has always been rather ambiguous and much less structured than under the contract laws of the Member States, the public law oriented goods-services-divide of the fundamental freedoms should not prescribe the typology of contracts under a more developed acquis. This is particularly true in the case of fully harmonised rules.

### V. Contracts on digital content in the Member States

Legal orders of the Member States have not settled on a common way to analyse contracts on digital content. The focal point of debate is the contract on the permanent transfer of the digital content to the creditor, whereas the analysis concerning contracts for the temporary use or for services rendered by using digital content as tools seems to be quite clear. Contracts for the temporary use of digital content are classified licence contracts; several sets of terms may lead to sub-classifications like a so-called exclusive licence. In the wide field of services (in the narrower sense of the word) involving digital content the established but usually rather vague rules on services apply.

<sup>27</sup> First and foremost the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (see *supra* sub I.1.).

<sup>28</sup> Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7. 7. 1999, p. 12.

<sup>29</sup> Richtlinie 97/7/EG vom 20. Mai 1997 über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, JO L 144, 4. 6. 1997, p. 19.

<sup>30</sup> Which presupposes a sealed storage medium: *Föhlisch*, *Das Widerrufsrecht im Onlinehandel*, Munich, 2009, p. 170.

<sup>31</sup> ECJ 10. 3. 2005, C-336/03.

<sup>32</sup> *Schwimann*, *Kommentar zum ABGB*, 3<sup>rd</sup> ed. Vienna, 2006, Vol. 5, § 5f KSchG No. 5.

<sup>33</sup> Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31. 12. 1985, p. 31.

<sup>34</sup> Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, p. 29.

The circumstance most discussed is the transfer of digital content for the permanent use by the creditor. The three (possible) elements of such a permanent transfer, the transfer of the data itself, the eventual transfer of a data storage medium and the concession of a right to use the data<sup>35</sup> in most Member States led to a vast number of proposals as to how to analyse such contracts.<sup>36</sup> Not all of the proposals at stake are based on policy considerations, but all of them show that the possible harsh consequences of the classification are a consequence of the mixture of the contractual elements mentioned above.<sup>37</sup> The situation is further complicated by the fact, that a licence is not a classical contract for the Continental legal orders and their system of types of contract. Therefore, the classification of licence agreements is generally discussed as much as the classification of the contracts at stake.

As the transfer of the data is intended to be a permanent one and is (or was at least in the past) often combined with the transfer of a storage medium, such a contract comes at least close to a classical contract for the sale of (tangible) goods. The majority view in some Member States, therefore, classifies the permanent transfer of digital content as a sales contract.<sup>38</sup> Particularly, sales rules on defective goods are often applied.<sup>39</sup> The transfer of digital content by transfer of the storage medium was the original basis of this opinion<sup>40</sup> and it was also adopted for the online transfer in many Member States.<sup>41</sup>

The most important concurring approach is to classify the permanent transfer of digital content as a permanent licence.<sup>42</sup> This approach has its origin in the use element, which is inherent in the concession to make use of something protected by copyright rules. It does not focus on defective digital content but on the creditor's restrictions to use, to copy and to forward. Therewith, the focal points are the use of elements restricting the permanence and absoluteness in sales contracts. As many legal orders are discussing the "nature" of licence agreements on the basis of classical continental ideas, authors and courts try to solve the classification problem by applying rules for types of contracts on use like lease contracts.<sup>43</sup>

<sup>35</sup> See the profound work done on these three elements by *Hantschel*, Softwarekauf und -weiterverkauf, Diss. Bayreuth 2010 (forthcoming).

<sup>36</sup> See for the very flexible solution under **Swiss** law: *Hepp/Müller/Herrmann* in: Ullrich/Lejeune (Ed.), Der internationale Softwarevertrag, 2<sup>nd</sup> ed., Frankfurt a.M., 2006, p. 1175, No. 1612.

<sup>37</sup> See the **Scottish** case of *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* [1996] S.L.T. 604, 609: contract *sui generis*, containing elements of nominate contracts such as sale and the grant of a licence.

<sup>38</sup> **Austria**: OGH 5 Ob 504, 505/96, JBI 1998, 577; *Staudegger*, JBI 1998, 604; **Germany**: § 453 BGB (see the parliamentary materials BT-Drucks 15/4060 p. 242); *Völmann-Stickelbrock* in: Pütting/Wegen/Weinreich, BGB Kommentar, Cologne, Wolters Kluwer, 5<sup>th</sup> ed, 2010, § 90 No. 5; cf. BGHZ 109, 97 (download). **Austrian** (OGH, IHR 2005, 195) and **German** (OLG Koblenz, RIW 1993, 934, 936) courts also classify software a good under the **CISG**. There is considerable uncertainty as to the applicability of the Sale of Goods Act in the **United Kingdom**: cf. the **Scottish** case of *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd* [1996] S.L.T. 604, 609 (cf. previous footnote) and from **England** *St Albans City and District Council v International Computers Ltd*, [1996] 4 All E.R. 481 (obiter: no goods, necessary to rely upon the pre-existing common law, fitness for purpose) and see the statement by *Adams*, (2009) J.B.L. 396, 397. Other Common law jurisdictions apply sales law: see for the **United States** e.g. *RRX Industries Inc. v. Lab-Con Inc.* 772 F 2d 543, 546 (9<sup>th</sup> Cir. 1985) ("the sales aspect of the transaction predominates"); *Micor Base Systems v. Dharma Systems Inc.* 148 F 3d 649, 655 (C.A. 7 Ind. 1998) ("Here it is the sale of the goods that predominates."). **Australian** courts decide equally on the basis of sales law in cases of "mass production" of software, see *Toby Constructions Products Ltd. v. Computer Bar Sales Pty Ltd* [1983] 2 N.S.W.L.R. 48.

<sup>39</sup> **Austria**: OGH 5 Ob 504, 505/96, JBI 1998, 577; **France** (for standard software only): Cass. com., 9 mai 1995, N° de pourvoi: 93-16539, legifrance.com; Cass. com., 4 jan 2005, N° de pourvoi: 03-17119, legifrance.com; *Cahen*, legipme.com; cf. *Huet*, „De la «vente» de logiciel“, in: Le droit privé français à la fin du XXe siècle – Études offertes à Pierre Catala, ed. by Carillac, Rémy/Lequette, Yves/Maistre du Chambon, Patrick/Simler, Philippe, Paris, 2001, p. 799, 806 f.; **Germany**: BGHZ 102, 144; *Marly*, Softwareüberlassungsverträge, Munich, C.H.Beck, 4<sup>th</sup> ed. 2004, No. 68 and following; *Hoeren*, Softwareüberlassung als Sachkauf, Munich, 1989, No. 75 and following. The same is true for the **Swiss** court practice BGE 124 III 459.

<sup>40</sup> But see for **Poland**: System prawa prywatnego. Prawo cywilne – część ogólna. Tom I, Rozdz. XVII, str. 7; red. Prof. Dr hab. M. Safjan, Warszawa 2007 (software on CD/DVD classified as „hidden” intangible).

<sup>41</sup> See for **Germany** BGH, NJW 2007, 2394.

<sup>42</sup> See COM(2006) 744, p. 24 (Commission's Green Paper on the Review of the Consumer Acquis): "digital content is usually licensed rather than sold to the consumer". For **Switzerland** see Honsell/Vogt/Wiegand, Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Vol. I, 3<sup>rd</sup> ed., Basel, 2003, Introduction to article 184 and following No. 292.

<sup>43</sup> Cf. *Heusler/Mathys*, IT-Vertragsrecht, Zürich, 2004, p. 43.

The permanent transfer of digital content is, however, usually not seen as a service unless a service element forms an essential part of the contractual arrangements. The most important service element thereby is the production of the digital content by the debtor. Other elements could be installation work or the maintenance of software installed.

## VI. State of the legislative process

The original Proposal for a Consumer Rights Directive by the European Commission defined goods as tangible movable items and, therefore, excluded the permanent transfer of digital content from the notion of the sales contract (article 2(3) and (4) of the Proposal). Therefore, the only construction, which came under the notion of a sales contract, remained the case of digital content sold on a data storage medium. The preliminary position of the Council<sup>44</sup> does not change these rules in substance, but proposes to add a new recital (10d) clarifying that digital content is not tangible unless stored in a storage medium. On the other hand, the Proposal established service contracts as a pure subsidiary category naming a service contract "any contract other than a sales contract" (article 2(5)) and this position has been taken also by the Council. Therefore, contracts for the supply of digital content are seen as service contracts independently if the digital content is to be transferred permanently.

Therefore the whole Chapter IV of the Proposal for a Consumer Rights Directive, on "Other rights specific to sales contracts", did not apply to most contracts on digital content. At least in the case of article 22 on "Delivery", which was assumed from the Distance Selling Directive 97/7/EC, the proposal would have changed the *acquis* significantly. The Council, when proposing the deletion of most parts of Chapter IV failed to re-broaden the scope of applicability of the remaining articles on delivery and passing of the risk; thus, they would not apply to digital content. However, Member States would have been free to deviate by applying the rules of Chapter IV to other contracts, as the basic rule on full harmonisation would not have prohibited such legislation.

Additionally, in Annex III to Chapter V on "Consumer rights concerning contract terms" – now proposed to be deleted by the Council – the narrow meaning of goods would have excluded the applicability of the prohibition of a clause "restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader" (limb (j)). And in Chapter II on "Consumer information" there would not have been an information duty concerning "the existence and the conditions of after-sales services and commercial guarantees" (article 5(1)(f)). The integration of the article in Chapter III does not change the situation significantly, as article 9(1)(j) of the Council's version contains a similar formula, which is also restricted to sales contracts.

Defining the supply of digital content as a service is not without consequence for the consumer's right to withdraw from the concluded contract. The Commission's Proposal adopted the restrictions of the right to withdraw from the Distance Selling Directive 97/7/EC and, therefore, excluded the right to withdraw in case of "services where performance has begun, with the consumer's prior express consent, before the end of the [withdrawal] period" (article 19(1)(a)). The Commission thus proposed to clarify the scope of this exclusion<sup>45</sup> by opting for a broad meaning of "service". Withdrawal is also excluded in the case of unsealed recordings or software (article 19(1)(e)). Although the latter exception remains unchanged by the Council, its position provides for deletion of article 19(1)(a) of the Commission's Proposal and replacement by the much narrower formula in a new article 19(1)(j), which refers to "services contracts concluded by electronic means and performed immediately and fully through the same means of distance communication such as downloading from the Internet, where the performance has begun with the consumer's prior express consent". However, the Commission's Proposal only excluded the right to withdraw if performance had begun before the end of the withdrawal period under article 12. This could have been understood as applying only to the ordinary withdrawal period and not in the case of its prolongation for breach of the information duty under article 13.

<sup>44</sup> See Council document 16933/10 (CONSOM 112, JUSTCIV 212, CODEC 1379) of 10 December 2010.

<sup>45</sup> See *supra* sub IV.

This would have been a very hard sanction for the trader bearing in mind that article 16 of the Commission's proposal did not provide for a restitution of services (including digital content).

In addition to that, both the Commission's Proposal and the Council's position provide the withdrawal period to start the day following the day of the conclusion of the contract in the case of digital content as opposed to the day of delivery in the case of tangible goods.



## Part III: Policy questions

### VII. Consumer Rights Directive or Common Frame of Reference / Optional Instrument

The question as to whether the topic of digital content should be dealt with by the legislator in the ongoing legislative process on the Consumer Rights Directive or preferably in the context of the Common Frame of Reference or – perhaps more likely – in an Optional Instrument must be reformulated for the purposes of the ongoing legislative process: Taking the draft as it stands, a decision in favour of the second alternative would be equivalent to excluding digital content from the scope of application of the directive.

Such a decision would deviate significantly from the existing *acquis* described above. Member States would be free to decide on the standard of consumer protection in that field. Under Article 6 of the Rome I Regulation<sup>46</sup> this would usually lead to the result that every consumer is protected under the law of his home country (“country where the consumer has his habitual residence”). It is quite obvious that such a solution would result in weakening the internal market for digital content. The Directive should therefore contain rules on digital content, which could also be adopted (and/or amended) in a future Common Frame of Reference or Optional Instrument.

### VIII. Digital content in the Consumer Rights Directive in general?

If digital content is to be dealt with in the Consumer Rights Directive, this could be done by a kind of *summa divisio* between goods and services, as proposed by the Commission or Council or alternatively it could be achieved by a step-by-step approach deciding one specific policy issue after another and deciding on the systematical organisation at the very end of the political process. The latter approach is distinctly preferable, as it would unburden the technical terms of the directive.

Moreover, the Commission and Council have implicitly proposed a system, which functionally divides the rules of the Directive in a special part (on goods and sales contracts) and a general part formed by the residuary rules on services and services contracts, the rules of the general part to be applied to digital content. If this is the functional structure of the texts being discussed, their drafting is disastrous from a technical point of view. The difficulties in formulating policy decisions on digital content in a coherent way find their origin in this bad drafting.

### IX. Several specific policy issues

#### 1. Information duties

The information duties for tangible goods and digital content should be identical in substance. The Commission and Council propose to make a distinction in so far as “the existence and the conditions of after sale customer assistance [and] after-sales services” are at stake.<sup>47</sup> There is – not only in the case of full harmonisation – no political reason not to apply this information duty to digital products and digital content transferred for permanent use.

One could think of introducing an additional pre-contractual information duty on protection measures and interoperability, but I am sceptical on that point. The more important part of the information would in any case belong to the “main characteristics of the goods or services”. The details of the mechanisms are of no interest for the consumer.

<sup>46</sup> Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4. 7. 2008, p. 6.

<sup>47</sup> See article 9(1)(j) Council’s position and similar article 5(1)(f) Commission’s Proposal.

## 2. Right of withdrawal

### a) Exclusion?

The consumer's right of withdrawal is the crucial political issue for the whole debate on digital content in the Consumer Rights Directive. Digital content delivered on a permanent basis does not share in most cases the characteristic difficulty in the restitution of services that either the consumer has to pay the value of the service or the trader has rendered the service for free.<sup>48</sup> In contrast, a kind of "restitution" seems to be possible for digital content, at least basically.

As mentioned above, the trader retaining the original copy of the data does not have a legitimate interest to claim back the data delivered to the consumer. His legitimate interest is restricted to the prevention of any further use of the data by the consumer after withdrawal. The practical problems in enforcing such a kind of "restitution" do not prevent altogether the possibility to enforce it and to forbid the consumer any further use of the digital content. Council and Parliament will have to decide if they rely on the trader to provide for the respective technical means (in the sense of article 6 of Directive 2001/29/EC) to prevent the consumer from the "temptation" to further use the digital content obtained.

If Parliament and Council decide not to exclude the right to withdrawal in cases of digital content, the relationship between protective measures in the sense of article 6 of Directive 2001/29/EC and the rules governing quality of performance has to be made clear: Digital content should not be deemed as defective because it contains legitimate protective measures in that sense.<sup>49</sup>

A further consequence of conferring the right to withdraw on the consumer for digital content in general would be the deletion of the exception for unsealed software in article 19(1)(e) of the Commission's Proposal/Council's Position, because it would be contradictory to keep that exception while dropping the general exclusion for digital content once delivered to the consumer.

### b) Payment of value of benefit / Adequate payment

A middle course could be not to exclude the right of withdrawal in entirety but only to restrict its restitutionary effects. Establishing an obligation on the consumer to pay for the value of benefit obtained up to the agreed price could at least reduce the effects of the withdrawal by shifting the risk of not having contracted for a fair price.

Under the actual German solution in § 312d BGB, paragraph (6) demonstrates another middle course by even excluding the obligation of the consumer to pay a sum of money for the value of a service rendered, where the trader has breached his duty to inform the consumer of this consequence of a withdrawal. However, it is undoubtedly ambiguous whether this rule applies to the transfer of digital content for permanent use, as the notion of *Dienstleistung* under German law is much narrower than under the Commission's Proposal and the Position of the Council.<sup>50</sup>

### c) Beginning of withdrawal period

The weak policy reason to instigate the withdrawal period with the conclusion of the contract in a case of promised service generally lies in the impossibility to find a different point in time comparable to the delivery. In the Commission's proposal, this policy reason is flanked by a reason of coherence: Where performance has begun in the case of a service (with the consumer's prior express consent) the right to withdraw is excluded anyway.

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<sup>48</sup> The position of the Council now opts for the latter solution by proposing to delete article 19(1)(a) apart from digital content, which goes perhaps too far to the detriment of the trader.

<sup>49</sup> Cf. for a case of an illegitimate protection measure TGI Nanterre, 24 June 2003, unpublished, (Association Consommation Logement Cadre de Vie "CLCV" c/ SA Emi Music France): Music files not usable on radios in cars.

<sup>50</sup> As the question is hardly discussed in German general literature on the BGB, a lawyer not familiar with questions on digital content would be very surprised, if that paragraph applied. Cf. BGH, NJW 2006, 1974 (for the former § 312d paragraph (3) No. 2 BGB, which originally transposed article 6(3) of the Distance Selling Directive 97/7/EC. Cf. supra footnote 22.

In the case of digital content, only the latter argument is of value, but only if the Proposal remains as it is. The first argument does not count, because the delivery of the data would be a starting point for a withdrawal period precise enough for the purposes of the directive.

### 3. Quality of digital content

As far as quality of the digital content is concerned, many Member States have broad experience in applying the implied terms under article 2 of the Consumer Sales Directive 1999/44/EC or the general rules for defective goods in sales law to the permanent transfer of digital content also.<sup>51</sup> The typical criterion of fitness for purpose adapts well for the duties to reach a specific result as to quality. Article 24 of the Commission's proposal, therefore, could easily be applied to digital content, as it is applied in cases of digital content sold on a CD or a DVD. The applicable rules on copyright do not impede the application; the defect in those cases is in the digital data transferred to the consumer, which do not conform to the contract and the terms implied therein. Such a defect is independent from any copyright, which protects the producer of the digital content.

The sometimes discussed conflict between the objective fitness for the purposes, for which goods of the same type are usually used, with the description by the seller is not a specific phenomenon of digital content but a general problem under the Consumer Sales Directive 1999/44/EC and the Proposal. The crucial point here is the temptation to restrict liability by description of the trader's obligations in an abusive way.<sup>52</sup> However, the problem of abuse does not as such exclude a standard of quality by description, which does not fulfil the objective standard of the normal purpose.

Broadening the quality standard of the Proposal to other kinds of contracts like the temporary use or the online service in its narrower sense (like streaming) would leave the parallel to the sales contracts on tangible items covered by Chapter IV. The rules of Chapter IV should, therefore, not apply to such kinds of contracts.

### 4. Peculiarities in remedies for defects

In so far as sales law is applied by the Member States in cases of defective digital content, the usual rules on remedies also apply. Again, the only significant difficulties arise in cases where a remedy would lead to a restitution of the digital content. This emerges where the buyer claims replacement of the digital content and where the buyer would terminate the contract. The legislator, once again, will be required to decide which party should bear the risk for the malfunctioning of protection mechanisms. The burden on the trader should not, however, be overestimated in such circumstances: Replacement will in many cases cause a disproportionate effort compared to repair by sending a bugfix or patch, at least in cases of software. Defective digital content, the use of which remains nevertheless desirable, will often lead to a minor lack of conformity, for which termination is excluded.

Some authors discuss difficulties with replacement in the event of outdated versions of software, emphasising that in some cases one version could have been replaced by a newer one.<sup>53</sup> However, these difficulties could be solved simply by applying the Directive's yardsticks of disproportionality and inconvenience.

Irrespective, if the Legislator opts for the application of the rules on quality and remedies for defects in digital content, the responsible person should remain the seller. He should not be replaced by any other person "responsible for the lack of conformity", which would introduce an element of direct liability of the producer. Rather, the Legislator should consider maintaining devices to protect the final seller like article 4 of the Consumer Sales Directive.<sup>54</sup>

<sup>51</sup> See for **Austria, France and Germany** supra footnotes 38 and 39.

<sup>52</sup> Cf. *Leible* in Gebauer/Wiedmann, 2<sup>nd</sup> ed., Stuttgart 2010, Kaufvertrag (§§ 433 bis 480 BGB), No. 150 and following. See the still fundamental work on this topic by *Schwenzer*, Die Freizeichnung des Verkäufers von der Sachmängelhaftung im amerikanischen und deutschen Recht, Frankfurt a.M. 1979.

<sup>53</sup> Cf. See for German law *Goldmann/Redecke*, MMR 2002, 4 and following.

<sup>54</sup> Cf. for criticisms of the proposal to drop the article see *Schmidt-Kessel*, in *Jud/Wendehorst*, Neuordnung des Verbraucherprivatrechts in Europa?, Vienna 2009, 39 and *Jud*, in op.cit. 138 and following.

## 5. Passing of the risk

Deterioration or loss of digital content by virus attacks or electricity problems seem to be prevalent occurrences. The sphere of control of the consumer could be used as criterion of risk distribution as material possession does for tangible items. However, the decision on applying the proposed rules on passing of the risk to digital content largely depends on the decision concerning the applicability of the rules on defective goods sold.

## 6. Late delivery

The rules on late delivery in article 7 of the Distance Selling Directive 1999/44/EC apply to digital content as they apply to services. The restriction of the scope of application to goods by article 22 of the Commission's Proposal and the Council's position are neither explained nor politically explainable.

## 7. Restrictions to the permitted use as unfair terms

Departing from all aspects of defects or late delivery, the main policy issue in the unfair terms Chapter V is the extent to which the trader may restrict the consumer's rights of use, copy and forward of digital content by contractual terms and how far he is permitted to protect his copyright by such restrictive practices. To my mind, this cannot be decided by the Legislator, but should be left to the Courts applying the general clause of the Unfair Terms Directive 93/13/EC or article 32 of the Commission's Proposal.

One should be extremely cautious in adding an express clause to Annex III on restrictions to use or copying. Many court decisions in that respect will depend on the kind of use (permanent or temporary) agreed upon by the parties. Exceptions might be reasonable in the field of transfer of digital content for permanent use. On the other hand, it goes without saying that not every term of use of digital content belongs to the subject matter of the contract and therefore falls outside the scope of the content control. Additionally, the yardstick for the control of terms will differ, depending on what element of a contract on digital content is under review.

## X. How should digital content be defined?

As explicit policy decisions are always preferable compared to policy decisions hidden in definitions, I am reluctant to propose any definition of digital content that would determine the scope of the Directive or indeed, parts of it. Moreover, such a definition may conflict with the principle of media neutrality of EU Law, under which legal rules should be formulated in such a way that they are applicable independently of the state of technical development.

The Proposal by the Commission does not require any definition of digital content, because the rules on services have been established as a kind of general part of the directive from which the rules on goods deviate.<sup>55</sup> Although this internal structure follows from the definitions in article 2 of the Proposal, it does not conform to the external structure in the wording of the Proposal. If the policy decisions proposed by the Commission remain, many parts of the text should be widely redrafted. This is similarly the case in respect of the Council's position.

The simplest way to add rules for digital content would be to elude the reference to tangibility in the definition of goods. This would necessitate the establishment of several exclusions comparable to article 2 point (d) of the CISG.<sup>56</sup>

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<sup>55</sup> For the idea to apply general rules of contract law to licence contracts instead of classifying them see, *McGuire, Die Lizenz – eine Einordnung in die Systemzusammenhänge des BGB und des Zivilprozessrechts*, Tübingen, Mohr Siebeck, 2011 (forthcoming).

<sup>56</sup> "This Convention does not apply to sales:

[...]

(d) of stocks, shares, investment securities, negotiable instruments or money;

[...]

(f) of electricity."

However, depending on the political decision on the right to withdraw with regard to digital content, it might still be necessary to have a definition to enable the formulation of an exception to the right of withdrawal. Additionally, including intangible items in the definition would evoke the need that rules on goods are only applied, where the consumer obtains the possibility of use on a permanent basis or in a way similar to the physical possession of a good. However, such an addendum bears the risk of weakening the consistency of the definition of goods.

An express definition of digital content is difficult. The directives on copyright protection in the information society and software protection abstained from formulating a definition, as does the Draft Common Frame of Reference. Such a definition should contain a reference to the intangibility of digital content and to its form as digital data. As such data do not exist without storage,<sup>57</sup> the storage medium must form part of the definition. However, the notion of digital content does not rely upon the transfer medium of data. A possible definition could be expressed as follows:

“digital content’ means an intangible item in the form of digital data stored on a data storage medium, irrespective of whether or not it is transferred together with that medium.”

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<sup>57</sup> *App*, *Medien & Recht* 2010, 213.



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